Nos. 06-1195 & 06-1196

IN THE
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al*.,
Petitioners,
v.
GEORGE W. BUSH, *et al*.,
Respondents.

KHALED A.F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al*.,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al*.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* SPECIALISTS IN ISRAELI MILITARY LAW AND CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Contents

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

ISRAELI CASES

Cited Authorities

Page

Page

ISRAELI STATUTES

Cited Authorities

Page

ISRAELI MILITARY REGULATIONS AND ORDERS

Page

EUROPEAN CASES

Page

MISCELLANEOUS

Cited Authorities

Cited Authorities

Page

INTERESTS OF AMICI[1]

In an interdependent world threatened by transnational terrorism and linked by converging rule-of-law norms, all peoples are affected by the process the United States affords to foreign nationals who fall under its control. As much as any other nation, Israel has a vital stake in assuring that the United States pursues its struggle against terrorism successfully within the bounds of the law. Israel also has decades of experience that bears directly on the issues posed in these cases: Israel guarantees detainees—including suspected unlawful combatants—unimpeded, fully independent judicial review within fourteen days, access to counsel within thirty-four days, and periodic review of the basis for their detention, in a fully adversarial proceeding, at least once every six months.

As specialists in Israeli military law and constitutional law, *amici* draw on Israel's experience with this system in urging this Court to ensure that all detainees, regardless of nationality, be afforded prompt, independent judicial review of the basis for their detention. *Amici* are:

Ariel L. Bendor, Professor of Law and former Dean of the Faculty of Law at the University of Haifa; lieutenant colonel (reserve duty), military judge since 1994;

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

Asher Maoz, Professor of Law at the University of Tel Aviv, Fellow of the Whitney R. Harris Institute for Global Legal Studies, Washington University Law School, St. Louis;

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SUMMARY OF ARGUMENT

Judicial review of executive and military detention, the indispensable core of habeas corpus, need not be sacrificed to protect public safety and national security, even in the face of an unremitting terrorist threat. Israel has demonstrated that security detainees and prisoners of war, including alleged unlawful combatants, can and should be afforded the opportunity for prompt, independent judicial review of the factual basis for their confinement. Israeli experience demonstrates unambiguously that providing such review to Guantánamo detainees would not be "impracticable and anomalous." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

For more than fifty years, Israel has faced mortal threats to its national survival and countless acts of terrorism against its civilian population, with devastating losses of life. Yet even as terrorist attacks have intensified, Israel has strengthened its commitment to unimpeded judicial review of detention, recognizing that "human rights are constantly

threatened by the war-like situation." Asher Moaz, *Defending Civil Liberties Without a Constitution—The Israeli Experience*, 16 Melb. U. L. Rev. 815, 829 (1988). Prompt access to the courts extends not only to criminal suspects but also to security detainees and unlawful combatants, regardless of nationality, including those seized in territories under military occupation and those captured in battle on foreign soil. All such detainees have access to counsel within a matter of days or, at most, weeks, and all have the right to have their detention reviewed promptly by an independent judicial authority empowered to order release when the facts warrant.

Over the course of many decades, Israel has been able to address its security concerns and meet its pressing need for timely intelligence while preserving independent judicial review and access to counsel. Consequently, Israeli experience makes clear that these safeguards are by no means impracticable. With Guantánamo currently holding over 300 detainees, however, the United States Government has raised the specter of an administrative nightmare, contending in these cases that detainee litigation is "consuming enormous resources and disrupting the day-to-day operation of the Guantánamo Bay Naval Base." (Cert. Opp., p. 4.) Yet in operations on the West Bank in May of 2002, the Israel Defense Forces ("IDF") seized nearly 7000 suspected enemy combatants, quickly processed and released over 5000, and gave the remaining 1600 suspects access to defense counsel and to independent courts within a matter of weeks.[2] The contention that the United States military, with vastly greater resources, cannot provide comparable process to far fewer detainees, even years after their seizure, does not comport with Israeli experience. *Cf. Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring in the judgment) ("Perhaps,

2. HCJ 3239/02 *Marab v. IDF Commander in the West Bank* [2003] IsrSC 57(2) 349, ¶ 1.

where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.").

The safeguards provided under Israeli law, though denied to Guantánamo detainees, are not only workable but also are essential components of the rule of law. No process that lacks these core features can be considered an adequate substitute for time-honored forms of judicial review, such as the traditional writ of habeas corpus. Israeli authorities, executive as well as judicial, support these rights as necessary elements of the response to terrorism in a resilient democratic society governed by law.

ARGUMENT

A. For decades, Israel has faced an unremitting, mortal threat to its survival.

Though well known, Israel's security problems bear emphasis. From its founding in 1948 to the present day, the State has been formally at war with one or more nations on its immediate borders. In addition, it has confronted active insurgencies against its occupation forces in the West Bank and Gaza, and it has been the frequent target of lethal suicide bombings in the civilian population centers of Israel itself.[3] Such attacks have caused enormous casualties and widespread disruption and fear in civilian life.

For a small country, the scale of these losses remains staggering, even against the background of the attacks of September 11, 2001. Since January 2001, Israelis have been the target of 148 suicide terror attacks, claiming the lives of 545 Israelis; during the same time period, 1067 Israelis have perished in terror attacks overall, while another 6333 have been

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3. *See generally* Asher Moaz, *War and Peace—An Israeli Perspective*, 14(2) Const. F. 35 (2005).

wounded.[4] On a per capita basis,[5] those casualties and injuries would translate to approximately 49,000 American deaths and over 290,000 Americans wounded over a seven-year period.

Israelis believe that terrorist organizations responsible for these attacks "have set Israel's annihilation as their goal," literally the complete destruction of the State of Israel. HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817, ¶ 1.[6] Moreover, the threat is perceived

4. *See* State of Israel, Ministry of Foreign Affairs, Victims of Palestinian Violence and Terror since September 2000, http://www.mfa.gov.il/MFA (follow "Terrorism: Terror since 2000" hyperlink; then follow "Victims of Palestinian Violence and Terror since September 2000" hyperlink") (last visited Aug. 22, 2007) (providing bar graphs and a chronological summary of casualties); *see also* Israel Defense Forces Spokesman, Main Terrorist Attacks Against Israeli Civilians and IDF Soldiers since the Onset of Ebb and Flow, *available at* http://www.mfa.gov.il/MFA (follow "Terrorism: Terror since 2000" hyperlink; then follow "Victims of Palestinian Violence and Terror since September 2000" hyperlink; then follow "Main terrorist attacks against Israeli civilians and IDF soldiers since Sept 2000 (IDF Spokesman)" hyperlink) (chronicling over 120 terrorist attacks since 2000) (last visited Aug. 22, 2007).

5. Based on an Israeli population of 6.5 million and an American population of 300 million. *See* State of Israel, Ministry of Foreign Affairs, Israel in Brief, http://www.mfa.gov.il/MFA (follow "Facts About Israel: Israel in Brief" hyperlink) (last visited Aug. 22, 2007); U.S. Census Bureau, Population Estimates—National, *available at* http://www.census.gov/popest/states/NST-ann-est.html (follow "Excel" hyperlink) (last visited Aug. 22, 2007).

6. In this brief, citations to Israeli Supreme Court decisions identify the procedural role played by the Israeli Supreme Court; the case number; the case name; the year of the decision; the volume and part of the official reporter, Piskei Din; the first page of the case; and the page or paragraph cited. The Israeli Supreme Court functions as a Court of Appeals, hearing both civil appeals and criminal appeals from Israel's five district courts, and serves as a High Court of Justice, hearing constitutional and administrative cases in the first instance. Citations to decisions of the Israeli Supreme Court identify whether the Court was (Cont'd)

in highly personal terms. As a former Israeli Attorney General noted, "Israel is much more vulnerable [than other nations] . . . . In our case, the danger extends not only to national existence, but to our very survival as individuals. The Holocaust, which decimated the Jewish people a short time ago, lends an awesome reality to the danger." Itzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375, 376 (1989). For the Justices of the Supreme Court, that threat is very real. As Chief Justice Aharon Barak has put it, "Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror." HCJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Israel* [2004] IsrSC 58(5) 807, ¶ 86. From the Israeli perspective, both national and individual survival require the strongest antiterrorism responses compatible with law. The circumstances Israel faces leave little if any room for avoidable risks or mistakes.

B. Despite this unremitting terrorist threat, Israeli courts have discerned no practical obstacle to exercising jurisdiction and guaranteeing the rule of law, regardless of the petitioner's nationality or location.

Access to the Israeli courts is never refused simply because of the personal status or geographical location of the petitioner. Alleged unlawful combatants and enemy aliens, even when seized in combat on foreign soil, retain the right to be treated in accordance with the rule of law and are always entitled to access to Israeli courts. *See generally*, *e.g.*, HCJ 4219/02 *Gussin v. IDF Commander in the Gaza Strip* [2002] IsrSC 56(4) 608 (Heb.) (claims regarding the demolition of homes); HCJ 5591/02 *Yassin v. Commander of Kziot Military Camp* [2002] IsrSC 57(1) 403 (claims of suspected Palestinian terrorists challenging detention conditions at the Kziot detention facility). The Israeli Supreme Court applies this principle not only within the

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(Cont'd)

hearing a civil appeal ("CA"), a criminal appeal ("CrimA"), an administrative detention appeal ("ADA"), or was acting as the High Court of Justice ("HCJ").

occupied territories but also to IDF actions on enemy soil, in Lebanon for example. *See generally*, *e.g.*, CrimA 8780/06, 8984/06 *Srur v. State of Israel* [2006] IsrSC (unpublished) (Heb.) (claims of Hezbollah fighters captured during IDF 2006 combat operations in southern Lebanon considered and rejected on the merits); HCJ 4887/98 *Assaf v. State of Israel* [1998] IsrSC (unpublished) (Heb.) (claims of Lebanese citizens arrested by South Lebanon Army and held on Lebanese soil considered and rejected on the merits); HCJ 574/82 *Al Nawar v. Minister of Defense* [1985] IsrSC 39(3) 449 (Heb.) (civil suit by Lebanese national for injuries sustained during IDF combat operations in Lebanon considered and rejected on the merits).

For decades, the Israeli Supreme Court's guiding principle has been that even in combat "there is no more potent weapon than the rule of law. . . . This court will never accept the contention that while [exercising] power on behalf of the State anywhere in the world, a soldier or civil servant might repudiate these standards . . . ." HCJ 320/80 *Kawasme v. Minister of Defense* [1980] IsrSC 35(3) 113, 127, 132 (Heb.). The Court continues to endorse this approach, as epitomized by its recent holding that segments of the security fence constructed along Israeli-Palestinian borders are unlawful, despite the fact that the fence was designed to prevent terrorist penetration into Israeli territory in a context of armed conflict. *Beit Sourik*, 58(5) ¶¶ 60-62. The Court there ruled that all Israeli soldiers, even when acting outside the State's territory, are exercising State authority and thus must remain within the limits on that authority. *Id.* ¶ 24. As Chief Justice Barak expressed:

> [E]very Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law. . . . There is no security without law.

Id. ¶¶ 24, 86 (internal quotations and citation omitted).

C. Despite great danger and pressing needs for intelligence, Israel affords all detainees prompt, independent judicial review of their detention, protected by procedural safeguards and aided by access to counsel.

The Israeli experience demonstrates a democratic society's capacity to develop a practical, workable system of judicial review of detention orders, notwithstanding powerful countervailing interests of national security. Far from being anomalous, Israel's decision to extend substantive and procedural safeguards to detainees—including alleged enemy combatants—places Israel squarely within the customary practices of the democratic world.

Under Israeli law, all detainees, regardless of nationality or the circumstances of their seizure, have a right of access to counsel and to independent courts empowered to review the basis for their detention and, when warranted, to order their release. In the words of the Ministry of Justice, "[A] detainee always has access to a court empowered to rule without delay on the lawfulness of his detention." State of Israel, Ministry of Justice, Foreign Relations & Int'l Org. Dep't, The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism 4 (March 2003) [hereinafter Ministry of Justice, The Legal Framework]. If the Israeli court finds no basis for detention, or if it concludes that alternative means would suffice to meet the State's security needs, the Israeli court will order the detainee's immediate release.

Israeli law establishes several distinct regimes regarding the treatment of administrative detainees. The regimes that govern within the State of Israel proper are distinct from those which apply in the occupied territories, as these areas (portions of the West Bank and, until recently, Gaza) are under military administration and are juridically distinct from Israel itself. In both cases, the rules applicable to criminal prosecution can differ from those applicable to administrative detention. In 2002, Israel also enacted a distinct framework for detention of "unlawful combatants," regardless of their place of seizure.

As described below, each of these regimes—which govern detentions in the State of Israel, detentions in the occupied territories, and detentions of unlawful combatants—protects basic rights that the United States Government denies to Guantánamo detainees. Specifically, individuals detained by Israeli civilian or military authorities always have (1) the right to judicial review of the basis for their detention within no more than fourteen days of their seizure; (2) the right to have that review conducted by a judicial officer independent of the executive who is empowered, when the evidence warrants, to order their release; (3) the benefit of a standard that permits detention only when an individual poses a threat to State security and when no other means are available to neutralize that threat; (4) the right to have the government's evidence subjected to a searching examination by the court; (5) the right to judicial review without having coerced testimony used against them; (6) the right to have a judge independently evaluate any claim that classified information offered to support detention cannot be disclosed to them; (7) the right of access to counsel within no more than thirty-four days; and (8) the right to have the basis for their detention independently reviewed every six months at a fully adversarial hearing. Though the United States affords Guantánamo detainees none of these safeguards, Israel has proved through experience that each of them is workable and that each of them is essential to maintaining the rule of law. *See* Appendix II.[7]

1. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review of the basis for their detention within no more than 14 days of their seizure.

Providing access to a judicial forum, to afford an independent check on executive power to incarcerate the individual, is an obligation incumbent on a civilized society

7. In order to emphasize the significant features of the Israeli regime, we attach as Appendix II a chart contrasting Israeli law, on which *amici* are experts, with United States law.

and is one of the most long-standing and fundamental elements of the rule of law.[8] The Israeli Supreme Court, observing that, "[j]udicial intervention stands before arbitrariness; it is essential to the principle of rule of law," *Marab*, 57(2) ¶ 26,[9] has scrupulously and consistently enforced this right.

Criminal suspects in the State of Israel. When an individual is detained in connection with criminal proceedings within Israel proper, a judge ordinarily must approve any detention within

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8. *See*, *e.g.*, Int'l Covenant on Civil & Political Rights ("ICCPR"), art. 9, ¶ 4, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that "[a]nyone 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" (emphasis added)); Office of the United Nations High Commissioner for Human Rights, Int'l Covenant on Civil & Political Rights, Ratifications & Reservations, *available at* http://www.ohchr.org/english/countries/ratification/4.htm (last visited Aug. 22, 2007) (noting that the United States ratified the ICCPR on June 8, 1992); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 56 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), for the proposition that States must provide a determination of probable cause by a judicial officer either before or promptly after an arrest, and concluding that such determinations, when conducted within forty-eight hours of arrest, generally comply with the U.S. Constitution). This principle is consistent with those set forth by European nations. *See*, *e.g.*, European Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, arts. 5-3, 5-4, 213 U.N.T.S. 221 ("Everyone arrested or detained . . . shall be brought promptly before a judge [to have] the lawfulness of [their] detention . . . decided speedily by a court."); *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. Ct. H.R. 553, ¶¶ 70, 78, 81, 83, 84 (1996) (extra-judicial detention for periods exceeding fourteen days is impermissible even in responding to terrorist threats that constitute a "public emergency threatening the life of the nation"); *Brogan v. United Kingdom*, App. No. 11209/84, 11 Eur. Ct. H.R. 117, ¶ 58 (1988) ("Judicial control of interferences by the executive with the individual's right to liberty is . . . one of the fundamental principles of a democratic society.") (internal quotation marks omitted).

9. The official English translation of the Israeli Supreme Court's decision in *Marab* has been attached as Appendix I.

twenty-four hours of arrest.[10] Criminal Procedure (Enforcement Powers – Detention) Law, 5756–1996, (Isr.) § 29(a) [hereinafter "CPL"];[11] Eliahu Harnon & Alex Stein, *Israel*, *in* Criminal Procedure: A Worldwide Study 217, 221-22, 226 (Craig M. Bradley ed. 1999). The initial period of detention cannot exceed fifteen days,[12] and extensions are permissible only under limited circumstances. CPL § 17(a). An individual cannot be detained prior to indictment for more than seventy-five days except by order of a Justice of the Israeli Supreme Court. *Id.* §§ 17(a), 59, 62.

Administrative detainees in the State of Israel. Israeli law also permits administrative detention within Israel. Under the state of emergency in effect since 1948, Israel enacted the Emergency Powers (Detention) Law 1979, S.H. 76 [hereinafter "EPDL"]. The EPDL authorizes the Minister of Defense to issue an order of detention for reasons of State security. EPDL § 2(a); *see also* 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, 725-26 (Fall 2001) [hereinafter Gross, *Bargaining Chips*]. As in a criminal case, the detainee can be held only for forty-eight hours before the detention order must be submitted for judicial review. EPDL § 2(c).

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10. The period can be extended to forty-eight hours under certain conditions, CPL § 30, and for security offenses the law has recently been amended to permit a total delay of up to ninety-six hours. Criminal Procedure (Detainees Suspected of Committing Security Offences) (Provisional Decree) Law, 5766-2006, 2056 LSI 364 (Isr.) § 3(2) (Heb.).

11. Citations to Israeli statutes are to the Laws of the State of Israel ("LSI"), the authorized English translation of Israeli legislative enactments; if the LSI provides only a partial translation, citations are to Sefer HaChukkim ("S.H."), the legislative enactment of the Knesset (the Israeli legislature).

12. For security offenses, this period has recently been extended to twenty days. Criminal Procedure (Detainees Suspected of Committing Security Offences) (Provisional Decree) Law, *supra* note 10, § 4(1).

Criminal suspects and administrative detainees in the occupied territories. In the occupied territories, criminal prosecution and administrative detention are governed by military orders and are supervised by military courts. Under both frameworks, the initial appearance in court and judicial review can be deferred for up to eight days. *Marab*, 57(2) ¶¶ 5, 29, 36.

Both in Israel and in the occupied territories, detention orders upheld at the first judicial hearing are subject to appeal to a court of appeals,[13] and the detainee may petition for further review in the Israeli Supreme Court. Ministry of Justice, The Legal Framework, *supra*, at 4. At both appellate levels, review is *de novo*: the appellate judges examine the strength of the evidence and determine whether the need for continued detention on balance outweighs the liberty interest of the detainee. *Id.* at 4-5; *see also infra* Sections C.3. & C.4.

Unlawful combatants in the State of Israel or the occupied territories. Since 2002, unlawful combatants can be held under a more flexible regime, a regime that traces its history back to a 2000 Israeli Supreme Court decision spawned by the shooting down of an Israeli aviator over Lebanon in 1986, his seizure by a terrorist group, and the subsequent Israeli government attempt to gain his release in exchange for Lebanese detainees held in administrative detention.

The Lebanese citizens, who had been captured in southern Lebanon, were being held under EPDL administrative detention orders that were about to expire, and to make the offer to exchange these prisoners possible, the Israeli government first had to confirm its right to continue holding them. The government attempted to do so by arguing that "reasons of State security" (EPDL § 2(a))—namely, the possible negotiation of an exchange for the Israeli aviator—required that the Lebanese citizens be detained. The Israeli Supreme Court ruled, however,

13. In the occupied territories, the appellate court is a military court of appeals, staffed, as in the case of military trial courts, by judges independent of the executive. *See infra* Section C.2.

that no person (even a former enemy combatant) could be detained under the EPDL unless that person himself posed a security threat, even if his detention was otherwise useful to State security as a means of facilitating a prisoner exchange. CrimA 7048/97 *Anonymous v. Minister of Defense* [2000] IsrSC 54(1) 721, 743 (Heb.), *discussed in* Gross, *Bargaining Chips*, at 727 & n.25. Pursuant to the court's order, the government was required to release the Lebanese prisoners. *Id.*; Emanuel Gross, The Struggle of Democracy Against Terrorism 121 (2006) [hereinafter Gross, The Struggle of Democracy]; Gross, *Bargaining Chips*, *supra*, at 721-36 (summarizing, in English, the decision in *Anonymous v. Minister of Defense*).

In the wake of this decision, the Knesset (the Israeli Parliament) enacted the Incarceration of Unlawful Combatants Law, 5762-2002, (Isr.) [hereinafter "UCL"],[14] to provide a basis for detaining enemy combatants where the EPDL might not apply. Under the UCL, the Chief of General Staff of the Israel Defense Forces may designate as an unlawful combatant "a person [not entitled to prisoner-of-war status] who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel." UCL § 2. When the Chief of General Staff finds that such a person will harm State security, he is authorized to issue a detention order. *Id.* § 3(a). The detainee must be brought before a district court (civilian) judge no later than fourteen days after the order is issued, and the judge must order the person's release unless he finds "reasonable cause to believe that [the detainee] is an unlawful combatant and that his release will harm State security." *Id.* §§ 3(a), 5(a). Each order of detention can be appealed within thirty days to a Justice of the Israeli Supreme Court. *Id.* § 5(d).

As a result of the UCL, unlawful combatants can be denied judicial review for longer periods than other detainees, who are

14. Available at http://www.justice.gov.il/MOJHeb/HeskeminVeKishreiHutz/KishreiChutz/HukimEnglish (select document icon next to "Incarceration of Unlawful Combatants Law, 5762-2002") (last visited Aug. 22, 2007).

entitled to judicial review within two days (in Israel) or eight days (on the West Bank). The fourteen days of detention prior to judicial review permitted in the case of unlawful combatants is long by Israeli standards and has been controversial.[15] By comparison, the Petitioners (and others) have been held at Guantánamo for several years without a judicial hearing on the factual claims underlying their detention. *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus.").

2. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review in a tribunal independent from the executive.

It is not sufficient simply for the detainee to be brought before a judicial officer; rather, the rule of law demands that a judicial officer be independent from the executive and imbued with the power to order release. "Th[e] public officer must be independent of the investigators and prosecutors. He must be free of any bias. He must be authorized to order the release of the detainee." *Marab*, 57(2) ¶ 35. Again, Israel scrupulously respects this right.

Criminal suspects, *administrative detainees*, *and unlawful combatants within the State of Israel*. Within Israel proper, all detentions—whether they involve criminal defendants,

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15. Indeed, Israel's fourteen-day limit on the denial of judicial review, not yet tested in Israeli litigation, is lengthier than what is permitted by the European Court of Human Rights. That court has held that detentions of seven days under a state of emergency are only justifiable when other safeguards are in place, including the remedy of habeas corpus and the right to consult with an attorney after forty-eight hours. *Aksoy*, 23 Eur. Ct. H.R. 553, ¶¶ 82-83; *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89, 14554/89, 17 Eur. Ct. H.R. 539, ¶¶ 62-66 (1993).

administrative detainees, or alleged unlawful combatants—are reviewed in the ordinary civilian courts. *See*, *e.g.*, UCL § 5(a); EPDL § 4(c); *see generally* Zamir, *supra*, at 398 (discussing requirement that detention orders be reviewed in civilian courts).

Criminal suspects, *administrative detainees*, *and unlawful combatants in the occupied territories*. In the occupied territories, detentions are nominally different, as the territories are under military administration and the relevant courts, even for ordinary criminal cases, are military courts. *See generally* Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza (2005). Nonetheless, Israeli military judges are fully independent. Israeli military judges are appointed and promoted by a selection committee headed by the Military Advocate General ("MAG")—a senior officer roughly comparable in status to the Judge Advocate General of the United States Army—or by the Deputy MAG. *See* Hajjar, *supra*, at 254. The selection committee is composed primarily of senior military appeals judges, and it also includes a civilian elected by the Israel Bar Association. Only two of the seven members of the selection committee are Israel Defense Forces staff officers outside the ranks of the civilian or military bar. *See*, *e.g.*, Detention in Time of Warfare (Temporary Order) (Amend. No. 87) (Judea and Samaria) (Number 1500)-2003, art. 78E1 (Heb.). Reinforcing the independence of the trial and appellate judges in the occupied territories, many of them are reservists satisfying their active duty obligations before returning to private life as civilian lawyers or law professors; at any given time, roughly 80% of the sitting military judges are reservists. Hajjar, *supra*, at 254. As the Israeli Supreme Court has noted, military courts sitting in the occupied territories unquestionably qualify as judicial officers "independent of the investigators and prosecutors." *Marab*, 57(2) ¶ 35.[16]

16. Again, Israel's insistence on guaranteeing the independence of military judges comports with rule-of-law imperatives recognized throughout the democratic world. The European Court of Human Rights, (Cont'd)

Unlike Israeli military judges, members of the Combatant Status Review Tribunals ("CSRT") at Guantánamo appear to lack such independence. While the CSRT Order states that such members must be "neutral," *i.e.*, not involved in the investigation of the detainee in question, the Order does not provide that they must be *independent*, and it does not appear to provide the structural guarantees of independence applicable to courts martial under the Uniform Code of Military Justice. *Compare* Memo. from Dep. Sec'y of Def. Paul Wolfowitz regarding Order Establishing Combatant Status Review Tribunal (July 7, 2004), ¶ (e) [hereinafter CSRT Order], *with* 10 U.S.C. § 826(c) (2007). To the contrary, members of the CSRT are selected by a designee of the Secretary of the Navy, and two of the three tribunal members can be line officers rather than judge-advocate lawyers. CSRT Order, ¶¶ (e), (f); *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring in part) (noting, in reference to military commission members, that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," and further concluding that "any suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness").

(Cont'd)

for example, has held that the kind of tribunal required for review of detention must be "independent . . . of the executive" and must afford "the guarantees of judicial procedure." *De Wilde*, *Ooms & Versyp v. Belgium*, App Nos. 2832/66, 2835/66, 2899/66, 1 Eur. Ct. H.R. 373, ¶¶ 76, 77 (1971). That court has applied this requirement to military as well as civilian courts and has invalidated countries' courts-martial procedures where they permit trial of soldiers by judges serving within the military chain of command. *De Jong*, *Baljet & van den Brink v. The Netherlands*, App. Nos.8805/79, 8806/79, 9242/81, 8 Eur. Ct. H.R. 20, ¶ 47 (1984).

3. Unlike the United States, Israel limits detention to only those circumstances in which the suspected unlawful combatant poses a threat to State security and when no other means are available to neutralize the threat.

Each of the Israeli detention regimes requires a judicial determination that the detainee poses a threat to State security and that no other means are available to neutralize the threat. Within the State of Israel, the governing standard is the EPDL criterion that "reasons of State security or public security require that a particular person be detained." EPDL § 2(a). In the occupied territories, the applicable military order requires a "suspicion that [the detainee] endangers or may be a danger to the security of the area, the IDF, or the public." Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002, § 2(a) (Heb.), *quoted in Marab*, 57(2) ¶ 3 (English translation). For unlawful combatants, the UCL requires the judge to find "reasonable cause to believe that [the detainee's] . . . release will harm State security." UCL §§ 3(a), 5(a).[17]

Israeli courts have interpreted these standards to require that the detainee would "almost certainly" pose a danger and that the situation is "so grave as to leave no choice." *See* Gross, *Bargaining Chips*, *supra*, at 763 (emphasis omitted) (citing ADA 1-2/88 *Agbariyya v. State of Israel* [1988] IsrSC 42(1) 840, 844-45 (Heb.) and Eyal Nun, *Administrative Detention in Israel*, 3 Plilim (Israel Journal of Criminal Justice) 168, 178-79 (1992)

17. Similarly, the European Court of Human Rights also requires that a judge find reasonable suspicion. *Fox*, *Campbell*, *& Hartley v. United Kingdom*, App. Nos. 12244/86, 12245/86, 12383/86, 13 Eur. Ct. H.R. 157, ¶ 32 (1990) ("The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1(c) (art. 5-1-c) [of the Convention]. . . . [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1(c) (art. 5-1-c) is impaired . . . .").

(Heb.), respectively). Applying these criteria in the context of a military detention, a military judge explained that he would have to be satisfied that there existed "evidence, which shows as a near certainty, that failure to detain[] would lead to substantial harm to the security of the area or its inhabitants." *See* Ministry of Justice, The Legal Framework, *supra*, at 3 (quoting ADA 48/97).

The need to show strict necessity for detention also requires that there be no other way to meet the security threat. Thus, if criminal proceedings could be filed, administrative detention is no longer appropriate. *See* Ministry of Justice, The Legal Framework, *supra*, at 2-3; HCJ 7015/02 *Ajuri v. Commander of Israel Defense Force (IDF) in West Bank* [2002] IsrSC 56(6) 352, ¶¶ 26, 32 ; HCJ 5784/03, 6024/03, 6025/03 *Salama v. IDF Commander in Judea and Samaria* [2003] IsrSC ¶ 6, *available at* http://elyon1.court.gov.il/eng/verdict/search_eng/verdict_by_misc.html (last visited Aug. 22, 2007) ("Administrative detention is not meant to be a tool used to punish previous acts, or to be used in place of criminal proceedings."). In the same vein, the Court has stressed "[t]he necessity of finding the right balance between the security of the state and the protection of the detainee's human rights." *Salama*, *supra*, ¶ 8. Thus:

> [T]he decision on the detention [must] reflect[] in each concrete case the appropriate balance between a security necessity for which no other reasonable solution can be found, and the fundamental principle according to which a person's liberty must be respected.

Ministry of Justice, The Legal Framework, *supra*, at 5 (English translation) (quoting HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801 (Heb.)).

It was this requirement—that detention be justified by a threat from the detainee himself and not by other national security objectives—which led to the Israeli Supreme Court's decision mandating the release of the Lebanese detainees when the Israeli government sought to use them as bargaining chips.

See supra Section C.1. (discussing *Anonymous v. Minister of Defense*).

4. Unlike the United States, Israel subjects the evidence and judgments supporting the detention of suspected unlawful combatants to searching judicial review.

Judicial review of detention in Israel is not perfunctory. Rather, the Israeli Supreme Court has determined that the rule of law requires an independent judge to perform a sweeping review of the record to "balance security needs, on the one hand, and individual liberty, on the other." *Marab*, 57(2) ¶ 33.[18]

In Israel, each of the elements necessary to support detention must be the subject of a *judicial* finding. Security officials make the initial assessment, but when the case reaches a court for review, the crucial judgments—the weight of the evidence, the seriousness of the security threat, and the appropriate balance between security needs and liberty interests—are all matters for the judge to determine.

Accordingly, Israeli judges are required to undertake a searching examination of the record. The judge must "ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect either quality or the extent of the judicial examination." *Sajadia*, 42(3) at 820 (Heb.), *quoted in Marab*, 57(2) ¶ 33 (English translation). The evidence and information presented by the security forces must be "carefully and meticulously" examined. ADA 4/94 *Ben Horin v. State of Israel* [1994] IsrSC 48(5) 329, 335 (Heb.), *quoted in Salama*, *supra*, ¶ 7; *accord Salama*, *supra*, ¶ 7 ("The Military Court and the Military Appeals Court can question the reliability of the evidence, and not merely decide

18. In this respect again, the Israeli Supreme Court endorses the view, shared across all Western democracies, that where judicial review is required by the rule of law, that review must be sufficiently wide in scope to permit the judge to make an independent judgment on the weight of the evidence. *See*, *e.g.*, *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. 25, ¶ 200 (1978).

what a reasonable authority might be expected to decide, on the basis of the evidence presented.").

The searching review of the record demanded by Israeli law is a byproduct of the belief that administrative detention is an exception to the customary procedures for deprivation of liberty:

> The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention. . . . Judicial detention is the norm, while detention by one who is not a judge is the exception.

Marab, 57(2) ¶ 32. Even a detainee seized on a battlefield—whose detention, at the outset, is a military rather than a judicial act—must be brought within the judicial system's framework for evaluating the basis for detention as soon as possible. Referring to the detention of unlawful combatants seized during military operations on the West Bank, the Israeli Supreme Court has insisted that even when "the initial detention is done without a judicial order . . . . everything possible should be done to rapidly pass the investigation over to the regular track, placing the detention in the hands of a judge and not an investigator." *Marab*, 57(2) ¶ 32.

In practice, judicial oversight of administrative detentions in Israel has been neither disruptive nor toothless. The Ministry of Justice reports that "on many occasions the courts have either reduced the period of detention or cancelled the order where there was a question about the necessity for such a measure." Ministry of Justice, The Legal Framework, *supra*, at 5; *see also* Gross, *Bargaining Chips*, *supra*, at 758-61 (describing trends in judicial review of administrative detention in Israel). HaMoked, an advocacy organization representing administrative detainees, reported that in 2004 it appeared in 142 military court hearings and secured release for 11 detainees. HaMoked, Activity Report 2004, at 40, *available at* http://www.hamoked.org.il/items/12902_eng.pdf (last visited Aug. 22, 2007). In the

great majority of cases, courts have upheld the detention orders under review, to the disappointment of Israeli civil rights groups. *See*, *e.g.*, HaMoked, *supra*, at 39-40. For present purposes, however, the decisive point is that Israeli courts monitor the exercise of administrative detention powers by conducting a searching, independent judicial check on the factual justification for holding each and every detainee.

5. Unlike the United States, Israel prohibits all inhumane methods of interrogation and limits the use of coerced testimony against suspected unlawful combatants when assessing the basis for their detention.

Although at one time the Israeli security services argued that harsh techniques of interrogation should be permitted when necessary to elicit information to thwart a terrorist attack, the Israeli Supreme Court squarely rejected this position. HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817, ¶ 36. The Court held that Israel's Basic Law[19] prohibits not only outright torture but also other forms of inhumane treatment, and "any degrading conduct whatsoever," specifically including such techniques as sleep deprivation, stress positions, and "shaking." *Pub. Comm. Against Torture*, 53(4) ¶ 23. Moreover, evidence obtained by techniques that violate such fundamental rights is subject to exclusion in both criminal trials and administrative proceedings. Evidence Ordinance (New Version) 1971, 5731-1971, 2 LSI 198 (1968-72) (Isr.), § 12; CrimA 5121/98 *Isacharov v. State of Israel* (unpublished) (Heb.). As the Israeli Supreme Court has declared:

> This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies

19. Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8, *in* Israel's Written Constitution (3d ed. 1999). Although Israel has yet to adopt a complete formal constitution, on many matters of "constitutional significance" the Knesset has enacted "Basic Laws," which stand above regular parliamentary statutes. *See* Ariel L. Bendor, *Is It a Duck? On the Israeli Written Constitution*, 6 Yale Isr. J. 53, 53-59 (Spring 2005); Aryeh Greenfield, *Introduction*, *in* Israel's Written Constitution, *supra*, at 4.

> are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

Pub. Comm. Against Torture, 53(4) ¶ 39.

6. Unlike the United States, Israel requires judicial approval before limiting a suspected unlawful combatant's access to classified information offered in support of detention.

At several stages of a detention proceeding, Israel's need to protect classified information can conflict with the detainee's need to confront such information in order to challenge the State's evidence effectively. Classified information is protected whenever its disclosure could harm State security; but the decision to limit a detainee's access to such information must be made by the judge. UCL § 5(e); Zamir, *supra*, at 398. Thus, detainees have the right to know the reason for their detention unless a judge finds that the information would jeopardize security. Gross, *Bargaining Chips*, *supra*, at 757. Detainees have the right to be present in court for all legal proceedings unless a judge finds that State security requires otherwise. *Id.* Where security concerns warrant, judges can withhold evidence from a detainee and elect to review it *in camera* and *ex parte* instead. Zamir, *supra*, at 399 (describing the development of the practice permitting *ex parte* review).

In determining whether classified information should be withheld from a detainee, the Israeli Supreme Court has articulated the following test: "Does the material need to remain confidential because revealing it would harm state security? If not, then it should be revealed wholly or partially to the petitioner." Ministry of Justice, The Legal Framework, *supra*, at 5 (quoting HCJ 3514/97 *Anonymous v. State of Israel*).

When a court limits a detainee's opportunity to review certain evidence, it must assume a concomitant obligation to conduct an especially comprehensive and thorough examination of the record. *See generally*, *e.g.*, ADA 8788/03 *Federman v. Minister of Defense* [2003] IsrSC 58(1) 176 (Heb.); ADA 8607/04 *Fahima v. State of Israel* [2004] IsrSC 59(3) 258 (Heb.). On the other hand, if the court concludes that evidence was improperly classified, or that portions of it need not be withheld, the court will order the State to reveal such evidence. Evidence Ordinance (New Version) 1971, § 44; UCL § 5(a); *see also* Ministry of Justice, The Legal Framework, *supra*, at 5 (quoting *Anonymous v. State of Israel*). In such a case, the State still can refuse to disclose the evidence, but only if it is willing instead to free the detainee.

7. Unlike the United States, Israel provides access to counsel within no more than 34 days.

Honoring the rule of law, the Israeli Supreme Court recognizes that, as a general principle, detainees should be permitted to meet with an attorney within days of being detained. "This stems from every person's right to personal liberty." *Marab*, 57(2) ¶ 43.[20]

Criminal suspects and administrative detainees in the State of Israel. In criminal proceedings within Israel proper, a detainee ordinarily is entitled to meet with an attorney immediately. CPL § 34. For detainees suspected of security offenses, however, access to an attorney can be delayed, but only under specified circumstances and subject to a right of appeal to a Justice of the Supreme Court. CPL §§ 35(a), (d). And in any event, for criminal proceedings within Israel proper, the period of delay in affording access to counsel may not exceed a total of twenty-one days. CPL §§ 35(c), (d). The same time limits apply in the case of terrorism suspects facing administrative detention: an order denying access to counsel is subject to judicial review, and in any event access to counsel of the detainee's choice cannot be

20. Courts in other democracies throughout the world likewise recognize that prompt access to counsel is a vital safeguard for assuring the rule of law. *See*, *e.g.*, *Aksoy*, 23 Eur. Ct. H.R. 553, ¶¶ 81, 83.

delayed for more than twenty-one days. *See* Harnon & Stein, *supra*, at 234.

Criminal suspects and administrative detainees in the occupied territories. For criminal defendants in the occupied territories, access to counsel is ordinarily unimpeded. But for administrative detainees in the occupied territories (and criminal defendants suspected of violating security laws), certain military orders permit access to counsel of the detainee's choice to be denied for periods totaling thirty to thirty-four days, depending on the circumstances.[21] *See Marab*, 57(2) ¶¶ 37-39; Stephen J. Schulhofer, *Checks and Balances in Wartime: American*, *British and Israeli Experiences*, 102 Mich. L. Rev. 1906, 1930 (2004).

Unlawful combatants. Unlawful combatants held under the UCL are guaranteed more rapid access to counsel than those held in the West Bank pursuant to military orders, presumably because they will have been seized in Israel proper or are being held there after serving a criminal sentence. Under the UCL, an alleged unlawful combatant must be permitted to meet with a lawyer "no later than seven days prior to his being brought before a judge," in other words, given the fourteen-day limit on detention prior to judicial review, *see supra* Section C.1., no later than seven days after the beginning of detention. UCL § 6(a).

Thus, with respect to the right to counsel, the most restrictive regime applies to detainees in the occupied territories. Reflecting the importance of affording the security services an adequate opportunity for interrogation, *see Marab*, 57(2) ¶ 39, those detainees can be denied access to counsel for up to thirty-

21. Because of the potential for a delay of up to thirty-four days in affording access to counsel, a fully adversarial hearing may not occur at the first judicial hearing, which must be conducted within fourteen days of the detainee's seizure. *See supra* Section C.1. The first judicial hearing nonetheless affords an occasion for independent review, and a hearing with the assistance of counsel will occur, at the latest, at the first renewal hearing, which must occur within no more than three months for detentions within Israel and within no more than six months for detentions in the occupied territories. *See infra* Section C.8.

four days. By comparison, the United States Government argues that many years of complete isolation are a necessary tool for effectively combating modern terrorism. In Israel, thirty-four days is the maximum period permitted for detention without access to counsel, and even that period of delayed access is considered long by Israeli and international-law standards.[22]

8. Unlike the United States, Israel provides for periodic review of detention at least once every 6 months, permitting the continuation of detention only upon a fresh judicial finding of dangerousness following a fully adversarial hearing.

In the State of Israel, orders of detention must be reviewed after no more than three months (for administrative detentions, *see* Gross, The Struggle of Democracy, *supra*, at 124) or six months (for detentions of alleged unlawful combatants, UCL § 5(c)), and the detainee must be released if the Court "finds that his release will not harm State security." UCL § 5(c); *see also* Gross, The Struggle of Democracy, *supra*, at 123-24 (providing the comparable standard under the EPDL).

In the occupied territories, detention orders must be reviewed every six months and can be renewed only if the court finds continued detention necessary to protect the security of the area. *See* Ministry of Justice, The Legal Framework, *supra*, at 4; Administrative Detentions Order (Temporary Order) (Judea and Samaria) (Number 1226)-1988, *cited in Marab*, 57(2) ¶¶ 5, 21, 22, 29.

Under all of these regimes, the renewal hearing is held in the same independent courts where initial detention hearings occur and is a fully adversarial proceeding. The detainee has a right to representation by counsel of his choosing, can offer any evidence in his favor, and can confront all evidence against him, subject to any restrictions on access to classified information

22. *Compare Aksoy*, 23 Eur. Ct. H.R. 553, ¶¶ 81, 83, 84 (counter-terrorism measures that blocked access to courts or counsel for periods exceeding 14 days held impermissible even in responding to terrorist threats that constitute a "public emergency threatening the life of the nation").

that are approved by the judge. *See supra* Section C.6. Any order renewing the detention is subject to appeal in the same way as an initial order of detention: to military courts of appeal in the case of detention in the occupied territories and to ordinary civil courts in all other cases. *See supra* Section C.2. And all detainees—regardless of whether they are held in Israel proper, in the occupied territories, or on foreign soil, and regardless of whether they are the subjects of general administrative detention or are held as alleged unlawful combatants—can seek review of the renewal of their detention before the Israeli Supreme Court. Ministry of Justice, The Legal Framework, *supra*, at 4.[23]

In short, suspected unlawful combatants detained by Israeli authorities are entitled to judicial review of the basis for their detention within fourteen days (and thereafter periodically, at least every six months) by an independent judicial officer empowered to order their release, who must conduct a careful and meticulous review of the government's evidence to

23. Under the Administrative Review Board ("ARB") regulations applicable at Guantánamo, (1) detainees are not entitled to any prompt reconsideration of the initial classification; (2) the reconsideration—which occurs only once a year—is carried out by a board of officers who are appointed by the Deputy Secretary of Defense and who are not guaranteed independence; (3) the ARB cannot order the detainee to be released; (4) the ARB's review results only in a recommendation as to whether the detainee should continue to be detained, leaving the final decision regarding detention to the executive branch; (5) the ARB may base continued detention either on a finding that the detainee is still a threat or on other reasons; (6) the review proceeding is non-adversarial, with the detainee expressly denied the right to be represented by counsel; and (7) the ARB's decision is not subject to judicial review. The ARB's lack of independence and limited role as an advisory body within the executive branch mean that after the initial CSRT determination and limited review by the United States Court of Appeals for the District of Columbia Circuit, a detainee can be held indefinitely with no further right of access to counsel or to the courts. Memo. from Hon. Gordon R. England, Sec'y of the Navy, regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (September 14, 2004), Encl. (3).

determine whether they pose a threat to State security and whether other means are available to neutralize the threat. Throughout these adversarial judicial proceedings, the government can withhold from detainees classified information proffered in support of their detention only with the court's approval, and they are provided access to counsel within no more than thirty-four days of their seizure. Guantánamo detainees are denied each of these safeguards.

D. As Israel's experience during Operation Defensive Wall illustrates, providing prompt access to independent judicial review is practical even under the most demanding circumstances.

The regime of prompt independent judicial review has proved workable even in Israel's distinctively difficult and dangerous situation. As a result, judicial oversight is endorsed not only by Israel's courts, but also by its executive authorities as well. The Israeli Ministry of Justice emphatically supports the principle that "special standards of judicial supervision must apply to ensure that the power to use this measure [of administrative detention] is not abused." Ministry of Justice, The Legal Framework, *supra*, at 2.

The viability of Israel's regime was demonstrated most strikingly during recent large-scale military operations on the West Bank. In an effort (known as "Operation Defensive Wall") to sweep up suspected terrorists hiding amidst the civilian population, the IDF moved heavy armor and thousands of troops into the area beginning in March 2002. Within a few months, the IDF had detained nearly 7000 people. After initial screening, many were released, while others were moved to detention facilities for further investigation. By May 15, 2002, more than 5000 detainees had been released and 1600 remained in detention. *See generally Marab*, 57(2) ¶ 1.

As the IDF was finding it difficult to process all detainees within the then-applicable eight-day limit on detention prior to judicial review, a new regulation, Order 1500, was promulgated to regularize the situation. But the new regulation did not go so

far as suspending entirely the right to independent judicial review. Rather, the extraordinary influx of detainees prompted IDF commanders to extend the permissible period of extra-judicial detention only from eight days to eighteen. Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002, § 2(a) (Heb.), *quoted in Marab*, 57(2) ¶ 3 (English translation). Moreover, two months later, a new IDF Order reduced the maximum delay prior to a judicial hearing from eighteen days to twelve. Detention in Time of Warfare (Temporary Order) (Amend. No. 2) (Judea and Samaria) (Number 1505)-2002 (Heb.), *cited in Marab*, 57(2) ¶ 6.

Although these delays in affording access to courts—from eight days to eighteen and later back down to twelve—are insignificant by Guantánamo standards, they were intensely controversial in Israel. Ultimately, the Israeli Supreme Court held the added delays to be violations of the rule of law, unacceptable even under the unusual combat conditions confronting the IDF in 2002. *Marab*, 57(2) ¶ 36. The Court's central premise was that "judicial review of detention proceedings [is] essential for the protection of individual liberty." *Marab*, 57(2) ¶ 32. The Court found in international law a clear governing principle: "[d]elays must not exceed a few days," as even an alleged unlawful combatant "is to be brought promptly before a judge." *Marab*, 57(2) ¶ 27 (citation omitted).

The Israeli Supreme Court did not ignore the practical constraints of warfare. Noting that "police detention is not the same as detention carried out during warfare in the area," and that it cannot be "demanded that a judge accompany the fighting forces," the Court held that judicial intervention could be postponed, but only "until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly." *Marab*, 57(2) ¶ 30 (internal quotations omitted).

Nor did the Court overlook the obstacles of resources and manpower. The Court acknowledged that factual investigation cannot be performed during military operations, that some time

may be required to organize investigations of large numbers of detainees, and that qualified investigators may be in short supply. *Marab*, 57(2) ¶ 33. Nonetheless, the Court held that the military bears an obligation to take the steps necessary to permit investigations to begin promptly:

> Security needs, on the one hand, and the liberty of the individual on the other, all lead to the need to increase the number of investigators. . . . [a]nd even more so when it was expected that the number of detainees would rise due to Operation Defensive Wall. . . . "A society is measured, among other things, by the relative weight it attributes to personal liberty. This weight must express itself not only in pleasant remarks and legal literature, but also in the budget . . . . Society must be ready to pay a price to protect human rights."

Marab, 57(2) ¶ 48 (quoting HCJ 6055/95 *Tzemach v. Minister of Defense* [1999] IsrSC 53(5) 241, 261). In similar fashion, the Court rejected the suggestion that difficulty in arranging more judges could justify a delay in judicial review:

> The current emergency conditions undoubtedly demanded large-scale deployment of forces . . . . However, by the same standards, effort and resources must be invested into the protection of the detainees' rights, and the scope of judicial review should be broadened.

Marab, 57(2) ¶ 35 (quoting HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801, 821).

Without setting a specific deadline for judicial review, the Court in *Marab* suspended its ruling for six months to permit the military to implement a more expeditious system. *Marab*, 57(2) ¶ 36. In subsequent regulations, the IDF provided for a judicial hearing within eight days of detention, in effect reinstituting the eight-day period that had been in force before. Detention in Time of Warfare (Temporary Order) (Amend. No. 87) (Judea and Samaria) (Number 1500)-2003, art. 78E1 (Heb.).

Since then, the IDF has managed its detention and judicial review processes within this eight-day limit, without reported difficulty.

The 1600 detainees who required further processing during Operation Defensive Wall represent, for a nation of Israel's size, the equivalent of over 73,000 detainees held for processing by the United States. By comparison, the total number of detainees who have passed through Guantánamo over the past five years reportedly does not exceed several hundred. Against the background of Israel's experience during Operation Defensive Wall, compliance with universal understandings of the rule of law—by providing equivalent rights to several hundred Guantánamo detainees, long after their seizure, and at a location far removed from any area of active combat—can scarcely be deemed "impracticable and anomalous."

CONCLUSION

The judgments of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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APPENDIX I
MARAB v. IDF COMMANDER IN THE WEST BANK
OFFICAL ENGLISH TRANSLATION

Marab v. **IDF Commander in the West Bank**
Israel High Court of Justice
Decided 5.2.2003

HCJ # 3239/02
[official English translation 30.10.2003]

1. Iad Ashak Mahmud Marab

2. Ahsan Abed Al Ftah Id Dahdul

3. Weesam Abed Al Ftah Id Dahdul

4. Center for the Defense of the Individual founded by Dr. Lota Salzberger

5. B'tselem—The Israeli Information Center of Human Rights in the Occupied Territories

6. The Association for Civil Rights in Israel

7. Physicians for Human Rights

8. Adalah—The Legal Center for Arab Minority Rights in Israel

9. Kanon—The Palestinian Organization for the Protection of Human and Environmental Rights

10. Public Committee Against Torture

v.

1. IDF Commander in the West Bank

2. Judea and Samaria Brigade Headquarters

Appendix I

The Supreme Court Sitting as the High Court of Justice
[April 18 2002, July 28 2002]
Before President A. Barak, Justice D. Dorner
and Justice I. Englard

For the petitioners —Lila Margalit
For the respondents —Aner Helman

Judgment

President A. Barak

The Facts

1. Since September 2002, Palestinians have carried out many terrorist attacks against Israelis, both in Judea and Samaria as well as in Israel. The defense forces have been fighting this terrorism. To destroy the terrorist infrastructure, the Israeli government decided to carry out an extensive operation, Operation Defensive Wall. As part of this operation, which was initiated at the end of March 2002, the IDF forces entered various areas of Judea and Samaria. Their intention was to detain wanted persons as well as members of several terrorist organizations. As of May 5, 2002, about 7000 persons had been detained in the context of this operation. Among those detained were persons who were not associated with terrorism; some of these persons were released after a short period of time. Initial screening was done in temporary facilities which were set up at brigade headquarters. Those who were not released after this screening were moved to the detention facility in Ofer Camp. The investigation continued and many more were released.

A number of the detainees were then moved to the detention facility in Kziot. As of May 15, 2002, of the 7000 persons who had been detained since the start of Operation Defensive Wall, about 1600 remained in detention.

2. The detentions were initially carried out under the regular criminal detention laws of the area, under the Defense Regulations Order (Judea and Samaria) (Number 378)-1970 [hereinafter Order 378]. It soon became clear that Order 378 did not provide a suitable framework for screening thousands of persons detained within a number of days. Thus, on May 5, 2002, respondent no. 1 promulgated a special order: Detention in Time of Warfare (Temporary Order) (Judean and Samaria) (Number 1500)-2002 [hereinafter Order 1500].

3. Order 1500 established a special framework regarding detention during warfare. The order applied to a "detainee," which was defined as follows:

> Detainee —one who has been detained, since March 29, 2002, in the context of military operations in the area and the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF, or the public.

The principal innovation of Order 1500 may be found in section 2(a):

> Notwithstanding sections 78(a)-78(d) of the Defense Regulations Order (Judea and Samaria) (Number 378)-1970 [hereinafter the Defense

> Regulations Order], an officer will have the authority to order, in writing, that a detainee be held in detention, for up to 18 days [hereinafter the detention period].

Under this section, officers are authorized to order the detention of a detainee for a period of 18 days, and a judicial detention order is not required. In order to continue holding a detainee beyond 18 days, however, a judge must be approached. Section 2(d) of Order 1500 relates explicitly to this matter:

> Continuing to hold a detainee in detention for investigative purposes, beyond the detention period, will be done under the authority of a detention order issued by a judge, in accordance with section 78(f) of the Defense Regulations Order.

During the first 18 day period of detention, detainees have no option to be heard by a judge. This is due to the fact that under section 78(i) of Order 378, a judge's authority to order the release of detainees is limited to those detained who have been detainees in accordance with those specific sections. However, the detainees in question were not detained under these regulations, but rather under the terms of Order 1500, which explicitly grants authority to detain "[n]otwithstanding sections 78(a)-78(d)" of Order 378. In this specific regard, Order 1500 differs from Order 378 in two ways. First, an officer has the authority to order the detention of a detainee for a period of 18 days himself, and need not obtain a judicial order. Second, during that detention

period, there is no judicial review of the detention order. Of course, an officer has the authority to release the detainee before the detention period has passed. *See* Order 1500, § 2(c).

Order 1500 also differs from Order 378 is a second manner. Under Order 1500, "a detainee shall not meet a lawyer during the detention period." *See* Order 1500, § 3(a). However, "meeting between a detainee and his lawyer after the detention period may only be prevented by the authorities in accordance with section 78C(c)(2) of the Defense Regulations Order." *See* Order 1500, § 3(b). Thus, after the 18 day detention period has passed, meetings with lawyers shall be allowed, unless disallowed by the standard procedures of Order 378. Under this law, the relevant authority may, in a written decision, prevent a meeting between a detainee and his lawyer for an additional period of 15 days, if it has been convinced that such is necessary for the security of the area or for the benefit of the investigation.

Finally, Order 1500 adds that "a detainee shall be given the opportunity to raise claims opposing his detention within eight days." *See* Order 1500, § 2(b). As such, during the first eight days of his detention, a detainee may be held without being given the opportunity to be heard. Order 1500, which was issued on April 5, 2002, was to be valid for two months.

4. As we have seen, Order 1500 states that in order to hold a detainee for a period which exceeds the 18 day detention period, a judge must be approached. This judge proceeds under the provisions of the standard detention law.

See Order 1500, § 2(3) of Order 1500. It became clear, however, that there are many detainees who have been screened, yet have not been brought before a judge, despite the fact that their 18-day detention period has passed. To rectify this situation, an additional order was issued on May 1, 2002: Detention in Time of Warfare (Temporary Order) (Amendment) (Judea and Samaria) (Number 1502)-2002 (hereinafter Order 1502). This order provided that section 2(d) of Order 1500 shall be marked subsection (1), after which shall be inserted subsection (2), which would provide that:

> (2) Any person who has been detained under subsection (1) for a period which exceeds the detention period, whose detention is necessary for further investigation, and who has not been brought before a judge in accordance with subsection (d)(2), shall be brought before one as soon as possible, and, in any event, no later than May 10, 2002.
>
> A detainee who has not been brought before a judge within this period of time shall be released, unless there stands a cause for his detention under any other law.

Order 1502 also provided that its provisions would remain in effect until May 10, 2002.

5. Aside from Order 378, which is concerned with criminal detention, and Order 1500 (as amendment by Order 1502), which is concerned with detention during times of

warfare, and which was specially issued within the context of Operation Defensive Wall, there also exists defense regulations which apply to the area and deal with administrative detention. The main order in this regard is the Administrative Detentions Order (Temporary Order) (Judea and Samaria) (Number 1226)-1988 [hereinafter Order 1226]. This order has undergone numerous amendments. After the issue and amendment of Order 1500, Order 1226 was amended accordingly. Issues concerning these orders do not stand before us.

6. To conclude this review of the relevant defense regulations, it should be noted that Order 1500 was to remain in effect for a period of two months. *See* Order 1500, § 5. As this expiration date approached, the order was extended by Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 2) (Judean and Samaria) (Number 1505)-2002 [hereinafter Order 1505]. This subsequent order made a number of significant changes in Order 1500. First, the definition of "detainee" was modified. The new definition was set in section 2:

> Detainee—one who has been detained in the context of the war against terrorism in the area, while the circumstances of his detention raise the suspicion that he endangers or may endanger the security of the area, IDF security, or the public security.

Second, the period of detention without judicial review was shortened. The 18-day period set by Order 1500 was replaced with a 12-day detention period. Third, a detainee

could only be prevented from meeting with his lawyer for a period of "four days from his detention." *See* Order 1500 4(a). Furthermore, it provided that if the investigators wished to prevent such a meeting after the four-day detention period, they must act in accordance with section 78C(c) of Order 378. Thus, the "head of the investigation" may first be appealed to. The head of the investigation, if he is of the opinion that such is necessary for the security of the area or for the benefit of the investigation, he may, in a written decision, order that the detainee be prevented from meeting with his lawyer for a period of up to 15 days from the day of his detention. After these periods have elapsed, such a meeting may be prevented for an additional 15 days.

7. Order 1505 was to expire on April 9, 2002. Its validity was extended until January 4, 2003 in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 3) (Judea and Samaria) (Number 1512)-2002 [hereinafter Order 1512].

Petitioners' Arguments

8. Petitioners argued in their original petition that Order 1500 is illegal. It allows for mass detentions without the individual examination of each case, without clear grounds for detention, and without judicial review. It unlawfully prevents meetings between a detainee and a lawyer for a period of 18 days, without allowing for judicial review of this decision. It unlawfully permits detention for a period of 8 days without allowing the detainee's claims to be heard. Petitioners claim that arrangement is in conflict with the Basic Law: Human Dignity and Liberty. The petitioners apply these general claims to the specific cases of petitioners 1-3.

Appendix I

9. We received additional briefs from the petitioners after the issue of Order 1502. In these briefs, petitioners argued that Order 1500 and Order 1502 are unlawful, as they are in conflict with international humanitarian law and human rights law. In this regard, the petitioners rely upon the Covenant on Civil and Political Rights-1966 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949. The petitioners claim that international law recognizes only two types of detentions: regular "criminal" detention and preventive detention (internment). According to the petitioners, Order 1500 creates a third type of detention: prolonged mass detention for the purpose of screening the detainees. This third type is not recognized by international law and is unlawful. Lawful detention, whether "regular," "preventive," or "administrative," must be based on individual reasons related to a specific person. Order 1500 and Order 1502, petitioners argue, allow for collective detention. In summarizing their arguments, the petitioners note that "Order 1500 severely violates fundamental basic human rights. It allows for arbitrary detention, precludes judicial review over decisions regarding detention and isolates those detained under the order from the outside world for a prolonged period of time."

10. In additional oral arguments which were heard after the issue of Order 1505 on May 5, 2002, petitioners asserted that their claims apply to Order 1505 as well. They claim that the three orders unlawfully violate freedom, due process and the principle of proportionality.

Appendix I

The State's Response

11. In the state's original response to the petition, on May 5, 2002, it noted that the Palestinian terrorists had based themselves in population centers. In carrying out their activities, they did not hesitate to use women and children, sometimes dressed in civilian garb, and often carried concealed explosives on their bodies. Under these circumstances, it was often impossible to distinguish, in real-time and during combat situations, between members of terrorist organizations and innocent civilians. As such, persons who were found at sites of terrorist activity or combat, under circumstances which raised the suspicion of their involvement in these activities, were detained. About 7000 persons were so detained between the initiation of the operation and this suit. As a result, it was decided that the standard detention laws—which are concerned with policing activities, and not with combat situations—did not provide a suitable framework for the need to detain a large number of persons whose identities were often unknown. Respondents added that many of the detainees were released, and, as of May 5, 2002—the date the response was submitted—about 1,600 persons remained in detention.

12. Regarding Order 1500, the state asserted in its response that due to the large number of detainees and limited resources, the initial process of investigation and screening under Order 1500 could last up to 18 days. Occasionally, the process could last for over 18 days. Order 1502 was issued to provide a legal framework for this situation. Respondents further claimed that Order 1500, as well as Order 1502, accord with the international laws of warfare and detention,

specifically article 43 of the Hague Convention Regarding the Laws and Customs of War on Land-1907 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War-1949.

In addition, the state claimed that the temporary prevention of meetings with a lawyer is lawful. The state argues that while military activities continue—especially while IDF forces find themselves in hostile territory, in an attempt to uproot the terrorist infrastructure—it is unthinkable that their lives should be endangered due to the possibility that messages may be passed from the detention facilities to the outside world. This is especially true when the screening processes are unfinished and it is unclear which of the detainees will remain in detention, whether criminal or administrative, when the screening is concluded. Finally, the respondents assert that regardless of whether the Basic Law: Human Dignity and Liberty applies to the orders in question, Order 150, as well as Order 1502, are in accordance with the limitations clause of the Basic Law. *See* Basic Law: Human Dignity and Liberty, § 8.

13. On June 11, 2002, in additional briefs, the respondents drew attention to Order 1505, which was issued on April 6, 2002. This order limited the detention period from 18 to 12 days. The period during which meetings with a lawyer could be prevented was shortened from 18 days to 4 days. The respondents assert that these changes became possible due to the easing of military activities in the area. Nevertheless, the respondents are of the opinion that due to the current state of affairs in the area, such as the war against terrorism—which places an unprecedented and prolonged

burden on the security and investigatory authorities—and the large number of detainees being held, which is substantially higher than the amount of persons detained before Operation Defensive Wall, it is practically impossible to be satisfied with the standard detention framework of Order 378.

With regard to the prevention of meetings with a lawyer, the respondents assert that under the current circumstances and considering the amount of persons currently being detained, it is possible to restrict the prevention period to four days. Further, respondents claim that the amendment of Order 1500 does not change the fact that the original text of Order 1500 was also reasonable and proportionate under the circumstances. The amendment promulgated under Order 1505 only entered the realm of possibility as a result of the decreased number of detainees and changes in the nature of the military activities. Respondents add that Order 1500 does not to allow for mass detentions in the absence of any individual basis for detention. They assert that Order 1500 also requires individualized grounds, based on individual circumstances and suspicion. As such, Order 1500 should not be characterized as a third type of detention, aside from and in addition to criminal and administrative detention. Moreover, according to the respondents, Order 1500 is not administrative detention. It is a type of detention intended to allow for initial clarification and criminal investigation. The respondents analyze the laws of warfare and conclude that Orders 1500, 1502 and 1505 are legal under those laws.

14. In the additional oral pleadings which were conducted on July 28, 2002—during which Order 1505 was already effective—the respondents reiterated their claim that

Order 1500, as well as Order 1505, do not create a third type of detention. According to respondents, they provide for a regular form of criminal detention, in accordance with the special circumstances of warfare.

15. In approaching the task of writing our judgment, it became clear that no *order nisi* had been issued under this petition. We asked the parties whether they would be willing to continue as if such an order had been issued. Petitioners, of course, agreed; respondents objected. Under these circumstances, we issued an *order nisi* on December 15, 2002, ordering the respondents to submit their final response within 10 days. The petitioners were given ten additional days to respond to the respondents' response. We added that the judicial panel would decide whether additional oral pleadings would be necessary.

16. After a number of continuances, we received an affidavit in response from respondent no. 1 on January 13, 2002. In this affidavit, the respondent explained the reason behind the issuance of Order 1512, *see supra* par. 7. He informed us that terrorist activities persist and the IDF is responding with military operations. For example, between September and the end of December 2002, approximately 1,600 terrorist attacks were carried out. During this period, 84 citizens and residents were killed. Over 400 citizens and residents were wounded. About 2,050 persons suspected of terrorist activity were detained in Judea and Samaria. Consequently, respondent 1 decided to extend Order 1500—as it had been extended in Order 1505—for an additional period of time in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 4) (Judea and

Samaria) (Number 1518)-2003 [hereinafter Order 1518], after concluding that security reasons demanded such an extension. The extension is valid until April 5, 2003.

17. Aside from extending the validity of the amended Order 1500, Order 1518 also makes two significant modifications. First, it specifies that meetings between a detainee and his lawyer will be prevented for a period of "two days from the day of his detention." *See* Order 1518, § 3. As was mentioned, previously, such meetings could be prevented for a maximum of four days. Second, the detainee was given the opportunity to voice his claims "no later than within four days of his detention." *See* Order 1518, § 2. As noted, under Order 1500—and similarly under Orders 1505 and 1512—a detainee could be held for a period of eight days without being given the opportunity to voice his claims before the detaining authority. Respondent 1 asserted that these amendments had been made after consultation "and not without hesitation." It was reemphasized that the General Security Service, which is responsible for investigating detainees suspected of terrorist activities, could not have prepared for the dramatic increase in the number of detainees since operation Defensive Wall in March 2002. Respondent asserted that, even today, the logistical constraints of investigations demand that a detainee not be permitted to meet with his lawyer for a period of forty-eight hours and that there be guidelines regarding the length of the "screening process." He emphasized that these guidelines are reasonable and proportionate. Respondent noted that the war against terrorism demands professional and specialized skills, and is not akin to regular police investigation. The process of training General Security Service investigators is

exceptionally lengthy. Consequently, it was practically impossible to prepare for the increase in terror which began in March 2002, and which continues today. Respondent repeated that merely investing financial resources would not solve this problem. In conclusion, respondent requested that, if the information offered does not suffice to reject this petition, we hear, *ex parte*, from the General Security Service itself, a detailed description of the objective constraints which required the issuance of Order 1500. These restraints also required that the amended order be extended for an additional period. The respondents assert that Order 1500 cannot be deemed illegal before we hear this classified data.

The Issues Raised

18. An examination of this petition indicates that petitioners have raised four issues. First, petitioners contest the authority to detain. The petitioners claim that Orders 1500, 1502, 1505, 1512, and 1518 unlawfully create a new type of detention—the orders allow mass detention and free the authorities examining each case individually. Second, petitioners contest the lack of any possibility of judicial intervention. The petitioners claim that the detention period without possibility of judicial intervention—18 days under Order 1500, and 12 days under Orders 1505, 1512, and 1518—lacks proportion and, as such, is illegal. Third, petitioners contest the prevention of meetings with lawyers—such meetings can be for a period of 18 days under Order 1500, 4 days under Order 1505, and two days under Order 1518. Petitioners claim that such prevention lacks proportion and, as such, is illegal. Fourth, petitioners contest the fact that detainees cannot voice their claims before the detaining

authority. Petitioners cannot voice their claims for a period of eight days under Order 1500, 1505, and 1512, and for a period of four days under Order 1518. Petitioners claim that this order is illegal. We shall deal with each of these claims, beginning with the first.

The Authority to Detain for the Purpose of Investigation

19. Detention for the purpose of investigation infringes the liberty of the detainee. Occasionally, in order to prevent the disruption of investigatory proceedings or to ensure public peace and safety, such detention is unavoidable. A delicate balance must be struck between the liberty of the individual, who enjoys the presumption of innocence, and between public peace and safety. Such is the case with regard to the internal balance within the state—between the citizen and his state—and such is the case with regard to the external balance outside the state—between a state that is engaged in war, and between persons detained during that war. Such is the case with regard to this balance in time of peace, and such is the case with regard to this balance in time of war. Thus, the general provision of Article 9.1 of the International Covenant on Civil and Political Rights (1966), which provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention

The prohibition is not against detention, but rather against arbitrary detention. The various laws which apply to this matter, whether they concern times of peace or times of war, are intended to establish the proper balance by which the detention will no longer be arbitrary.

20. This approach accords with Israeli Law. Man's inherent liberty is at the foundation of the Jewish and democratic values of the State of Israel. "Personal liberty is a primary constitutional right, and from a practical point of view, is a condition for the realization of other fundamental rights." HCJ 6055/*95 Tzemach v. Minister of Defense*, at 261 (Zamir, J.) Nevertheless, this is not an absolute right. It may be restricted. A person may be detained for investigative purposes—in order to prevent the disruption of an investigation or to prevent a danger to the public presented by the detainee—where the proper balance between the liberty of the individual and public interest justifies the denial of that right. The balance demands that the detaining authority possess an evidentiary basis sufficient to establish suspicion against the individual detainee. Such is the case with regard to "regular" criminal detention, whether for investigative purposes or until the end of the proceedings. *See* sections 13, 21 and 23 of the Criminal Procedure (Enforcement Authorities- Detentions) Law-1996. Such is the case with regard to administrative detention. *See* section 2 of the Emergency Powers (Detentions) Law-1979, and HCJ *Citrin v. IDF Commander in Judea and Samaria* (unreported case); HCJ 1361/91 *Masalem v. IDF Commander in Gaza Strip*, at 444, 456; HCJ 554/81 *Branasa v. GOC Central Command*, at 247, 250; HCJ 814/88 *Nassrallah v. IDF Commander in the West Bank*, at 265, 271; HCJ 7015/0 *Ajuri v. IDF Commander in the West Bank*, at 352, 371.

Moreover, it must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty Detention is the exception. The general

rule is one of freedom. Confinement is an exception. *See* Crim.App. 2316/95 *Ganimat v. State of Israel*, at 649. There is no authority to detain arbitrarily. There is no need, in the context of this petition, to decide to what extent these principles apply to internal Israeli law regarding detention in the area. It suffices to state that we are convinced that internal Israeli law corresponds to international law in this matter. Furthermore, the fundamental principles of Israeli administrative law apply to the commander in the area. *See* HCJ *Jamit Askhan Al-Maalmon v. IDF Commander in Judea and Samaria*. The fundamental principles which are most important to the matter at hand are those regarding the duty of each public authority to act reasonably and proportionately, while properly balancing between individual liberty and public necessity.

21. International law adopts a similar approach concerning occupation in times of war. On the one hand, the liberty of each resident of occupied territory is, of course, recognized. On the other hand, international law also recognizes the duty and power of the occupying state, acting through the military commander, to preserve public peace and safety; s*ee* Article 43 of the Annex to the Hague Convention Regulations Respecting The Laws and Customs of War on Land-1907 [hereinafter Hague Regulations]. In this framework, the military commander has the authority to promulgate security legislation intended to allow the occupying state to fulfill its function of preserving the peace, protecting the security of the occupying state, and the security of its soldiers. *See* Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter the Fourth Geneva Convention].

Consequently, the military commander has the authority to detain any person suspect of committing criminal offences, and any person he considers harmful to the security of the area. He may also set regulations concerning detention for investigative purposes—as in the matter at hand—or administrative detention—which is not our interest in this petition. Vice-President M. Shamgar, in HCJ 102/82 *Tzemel v. Minister of Defense*, at 369, stated in this regard:

> Among the authority of a warring party is the power to detain hostile agents who endanger its security due to the nature of their activities . . . Whoever endangers the security of the forces of the warring party may be imprisoned.

True, the Fourth Geneva Convention contains no specific article regarding the authority of the commander to order detentions for investigative purposes. However, this authority can be derived from the law in the area and is included in the general authority of the commander of the area to preserve peace and security. This law may be changed by security legislation under certain circumstances. Such legislation must reflect the necessary balance between security needs and the liberty of the individual in the territory. An expression of this delicate balance may be found in Article 27 of the Fourth Geneva Convention:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely

> treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity . . . However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Moreover, Article 78 of the Fourth Geneva Convention provides that residents of the area may, at most, be subjected to interment or assigned residence. This appears to allow for the possibility of detention for the purpose of investigating an offence against security legislation. We would reach this same conclusion if we were to examine this from the perspective of international human rights law. International law, of course, recognizes the authority to detain for investigative purposes, and demands that this authority be balanced properly against the liberty of the individual. Thus, regular criminal detention is acceptable, while arbitrary detention is unacceptable. Orders such as Orders 378 and 1226 were issued with this in mind.

22. The petitioners argued that Order 1500, as well as Orders 1502, 1505, 1512, and 1518, establish a new type of detention, aside from standard criminal detention and administrative detention. Petitioners assert that his new type of detention allows for detention without cause, and should thus be nullified. Indeed, we accept that the law which applies to the area recognizes only two types of detention: detention for the purpose of criminal investigation, as in Order 378, and administrative detention, as in Order 1226. There exists no authority to carry out detentions without "cause for detention." In *Tzemel*, Vice-President Shamgar expressed as

much after quoting the provisions of Article 78 of the Fourth Geneva Convention:

> The discussed Article allows for the imprisonment of persons, who, due to their behavior or personal data, must be detained for definitive defense reasons. As is our custom, we hold that every case of detention must be the result of a decision which weighs the interests and data regarding the person who is being considered for detention.

Tzemel at 375. Detentions which are not based upon the suspicion that the detainee endangers, or may be a danger to public peace and security, are arbitrary. The military commander does not have the authority to order such detentions. *See Prosecutor v. Delalic*, Tribunal for the Former Yugoslavia, IT-96-21. *Compare also* section 7(1) of the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism: "A person suspected of terrorist activities may only be arrested if there are suspicions." With this in mind, we turn to Order 1500.

23. Under Order 1500, an order may be given to hold a detainee in detention. Order 1500 defines a "detainee" as follows:

> Detainee—one who has been detained, since March 29, 2002, during warfare in the area and the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF or the public.

A similar provision exists in Order 1505:

> Detainee—one who has been detained in the area during anti-terrorism activities, while the circumstances of his detention raise the suspicion that he endangers or may be a danger to the security of the area, IDF security or the public.

From these provisions, we find that under Order 1500 as well as Order 1505—and similarly under Orders 1512 and 1518—detention may only be carried out where there is a "cause for detention." The cause required is that the circumstances of the detention raise the suspicion that the detainee endangers or may be a danger to security. Thus, a person should not be detained merely because he has been detained during warfare; a person should not be detained merely because he is located in a house or village wherein other detainees are located. The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security. Such a suspicion may be raised because he was detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he is suspect of being involved in warfare or terrorism.

Of course, the evidentiary basis for the establishment of this suspicion varies from one matter to another. When shots are fired at the defense forces from a house, any person located in the house with the ability to shoot may be suspect of endangering security. This basis may be established against a single person or a group of persons. However, this does not mean that Orders 1500, 1505, 1512 or 1518 allow for

"mass detentions," just as detaining a group of demonstrators for the purpose of investigation, when one of the demonstrators has shot at police officers, does not constitute mass detention. The only detention authority set in these orders is the authority to detain where there exists an individual cause for detention against a specific detainee. It is insignificant whether that cause applies to an isolated individual or if it exists with regard to that individual as part of a large group. The size of the group has no bearing. Rather, what matters is the existence of circumstances which raise the suspicion that the individual detainee presents a danger to security. Thus, for example, petitioner 1 was detained, as there is information that he is active in the Popular Front for the Liberation of Palestine, a terrorist organization. He recruited people for the terrorist organization. Petitioner 2 was detained because he is active in the *Tanzim*. Petitioner 3 was detained because he is a member of the *Tanzim* military. Thus, an individual cause for detention existed with regard to each of the individual petitioners.

24. Thus, the amended Order 1500 is included in the category of detention for investigative purposes. It is intended to prevent the disruption of investigative proceedings due to the flight of a detainee whose circumstances of detention raise the suspicion that he is a danger to security. The difference between this detention and regular criminal detention lies only in the circumstances under which they are carried out. Detention on the authority of the amended Order 1500 is carried out under circumstances of warfare, whereas regular criminal detention is carried out in cases controlled by the police. In both cases, we are dealing with individual detention based on an evidentiary basis that raises individual suspicion against the detainee. For these reasons, we reject the petitioners' first claim.

Appendix I

Detention Without Judicial Intervention

25. Petitioners' second claim relates to the detention period. The claim does not concentrate on the length of the period *per se*, since the length of the period is determined by the needs of the investigation. The claim focuses on the period between the detention and the first instance of judicial intervention. Under Order 1500, this period lasts 18 days; the petitioners claim that this period is excessive. Moreover, they claim that there are a number of detainees who have yet to be brought before a judge despite the fact that the 18-day period has passed. In order to rectify this situation Order 1502 was issued, under which such detainee are to be brought before a judge as soon as possible and no later than 10.5.2002, *see supra*, para. 12. The petitioners claim that, under the authority of this latter order, some detainees were held for a period of 42 days without judicial intervention. The petitioners also assert that Order 1505, under which the detention order may prevent judicial intervention for a period of 12 days, is also illegal, as the period specified there is also excessive. This period remains valid under Order 1512 and Order 1518.

26. Judicial intervention with regard to detention orders is essential. As Justice I. Zamir correctly noted:

> Judicial review is the line of defense for liberty, and it must be preserved beyond all else.

HCJ 2320/98 *El-Amla v. IDF Commander in Judea and Samaria*, at 350.

Appendix I

Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. *See Brogan v. United Kingdom* (1988) EHRR 117, 134. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of detention. *See* AMA 10/94 *Anon. v. Minister of Defense*, at 105. Internal Israeli law has established clear laws in this regard. In "regular" criminal detention, the detainee is to be brought before a judge within 24 hours. *See* section 29(a) of the Criminal Procedure (Enforcement Powers-Detentions) Law-1996. In this case, the order is issued by the judge himself. In "administrative" detention, the detention order is to be brought before the president of the district court within 48 hours. *See* section 4 (a) of the Emergency Powers (Detentions) Law-1979. The decision of district court president is an integral part of the development of the administrative detention order. *See* AMA 2/86 *Anon. v. Minister of Defense*, at 515.

Similarly, in detaining an "unlawful combatant," the detainee is to be brought before a justice of the district court within 14 days of the issuance of the imprisonment order by the Chief of Staff. *See* section 5 of the Imprisonment of Unlawful Combatants Law-2002. With regard to the detention of military soldiers, section 237A of the Military Justice Law-1955 provided that the detainee is to be brought before a military justice within 96 hours. We reviewed this provision, and concluded that it was unconstitutional, as it unlawfully infringed upon personal liberty, and was not proportionate. *See Tzemach*. Subsequent to our judgment, the law was amended, and it now provides that in detaining a military soldier under the Military Justice Law, the detainee

is to be brought before a judge within 48 hours. What is the law with regard to detentions carried out in the area?

27. International law does not specify the number of days during which a detainee may be held without judicial intervention. Instead, it provides a general principle, which is to be applied to the circumstances of each and every case. This general principle, which pervades international law, is that the question of detention is to be brought promptly before a judge or other official with judiciary authority. *See* F. Jacobs and R. White, *The European Convention on Human Rights* 89 (2nd ed., 1996). Thus, for example, Article 9.3 of the Covenant on Civil and Political Rights-1966 provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power.

This provision is perceived as part of customary international law. *See* N. Rodley, *The Treatment of Prisoners Under International Law* 340 (2nd ed., 1999). A similar provision may be found in the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which was ratified by the UN General Assembly in 1988 (hereinafter the Principles of Protection from Detention or Imprisonment). Principle 1.11 provides:

> A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.

Appendix I

According to the interpretation of the UN Human Rights Committee "[D]elays must not exceed a few days." *See* Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), quoted by Rodley, *Id.*, at 335. On a similar note, Article 5(3) of the European Convention for the Protection of human Rights and Fundamental Freedoms-1950 provides:

> 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.

In one of the cases in which the European Court of Human Rights interpreted this provision, *Brogan v. United Kingdom*, EHRR 117, 134 (1988), it stated:

> The degree of flexibility attaching to the notion "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

In that case, the British authorities had been holding a number of detainees, who had been detained with regard to terrorist activities in Northern Ireland. They were released after four days and six hours, without having been brought before a judge. The European court determined that in so doing, England had violated its duty to bring the detainees before a judge promptly. A number of additional cases were similarly decided. *See McGoff v. Sweden*, 8 EHRR 246 (1984); *De Jong v. Netherlands*, 8 EHRR 20 (1984); *Duinhoff v. Netherlands*, 13 EHRR 478 (1984); *Koster v. Netherlands*, 14 EHRR 196 (1991); *Aksoy v. Turkey*, 23 EHRR 553 (1986) *See also Human Rights Law and Practice* 121-22 (Lester and Pannik eds.,1999).

28. Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter the Fourth Geneva Convention] includes a general provision under which:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

The Fourth Geneva Convention does not include provisions which specify set detention periods or occasions for judicial intervention with regard to detention. It only includes provisions concerning administrative detention

(internment). The first provision, Article 43, which applies to detentions carried out by the occupying state, provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

The second provision, Article 78, which applies to detentions carried out in the occupied territory, provides:

> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.

There are no additional provisions which relate to this matter, or to the issue of judicial intervention into detention which is not administrative.

29. Finally, there is security legislation relating to "regular" criminal detention and administrative detention, in the area. With regard to "regular" criminal detention, Order 378 provides that a police officer, who has reasonable reason to believe that a crime has been committed, has the authority to issues a detention order for a period of up to 18 days, *see*

section 78(3). Following the recommendations of the *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity* (*Landau Commission*), Order 378 was amended, and the detention period without judicial intervention was reduced to 8 days. In a petition submitted in this matter, the Court held that "at this time, there is no room for this Court to intervene to reduce the maximum period of detention permitted before bringing persons detained in the territories before a military judge." HCJ 2307/00 *Natsha v. IDF Commander in the West Bank* (unreported case case).

With regard to administrative detention in the area, such detentions were initially carried out under the Emergency Defense Regulations, which apply to the area. Later on, provisions regarding administrative detention were included in the Defense Regulations Order (Judea and Samaria) (Number 378)-1970. Under these provisions, if a person was detained on the authority of an administrative order, he was to be brought before a judge within 96 hours, *see* section 87B(a). These provisions were suspended by Order 1226. This Order provided that any person who had been administratively detained would be brought before a judge within 8 days. With the issuance of Order 1500, this was changed, and this provision was substituted by one which provided that an administrative detainee should be brought before a judge within 18 days. With the issuance of Order 1505, Order 1226 was once again amended, and it provided that if an administrative detention order was issued against a person who had been formerly being detained under Order 1500, his case was to be brought for judicial review within 10 days of his detention.

30. Against this normative background, which demands prompt judicial review of detention orders, the question again arises whether the arrangement established in Order 1500—under which a person may be detained for a period of 18 days without having been brought before a judge—is legal. Similarly, is the arrangement established in Order 1505 legal? This arrangement—which was unaffected by Order 1512 or Order 1518—provided that a person may be detained for a period of 12 days without having being brought before a judge. In answering these questions, the special circumstances of the detention must be taken into account. "Regular" police detention is not the same as detention carried out "during warfare in the area," Order 1500, or "during anti-terrorism operations" Order 1505. It should not be demanded that the initial investigation be performed under conditions of warfare, nor should it be demanded that a judge accompany the fighting forces. We accept that there is room to postpone the beginning of the investigation, and naturally also the judicial intervention. These may be postponed until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly. Thus, the issue at hand rests upon the question: where a detainee is in a detention facility which allows for carrying out the initial investigation, what is the timeframe available to investigators for carrying out the initial investigation without judicial intervention?

31. In this regard, the respondents claim before us that it was necessary to allow the investigating officials 18 days—and after Order 1505, 12 days—to carry out "initial screening activities, before the detainee's case is brought before the examination of a judge." This was due to the large number

of persons being investigated, and constraints on the number of professional investigators. In their response, the respondents emphasized that "during the warfare operations, thousands of people were apprehended by the IDF forces, under circumstances which raised the suspicion that they were involved in terrorist activities and warfare. The object of Order 1500 was to allow the "screening" and identification of unlawful combatants who were involved in terrorist activities. This activity was necessary due to the fact that the terrorists had been carrying out their activities in Palestinian populations centers, without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violation of the laws of warfare." *See* para. 51 of the response brief from May 15, 2002. The respondents added that it is pointless to bring detainees before a judge, when they have not yet been identified, and the investigative material against them has not yet undergone the necessary processing. This initial investigation, performed prior to bringing the detainee before the judge, is difficult and often demands considerable time. This is due, among other reasons, to "the lack of cooperation on the part of those being investigated and their attempts to hide their identities, their hostility towards the investigating authorities due to nationalistic and ideological views, the inability to predetermine the time and place of the detentions, the fact that most of the investigations are based on confidential intelligence information which cannot be revealed to the person being investigated, and the difficulty of reaching potential witnesses." *See* para. 62 of the response brief from June 11, 2002.

Appendix I

32. The respondents thus claim that the investigating authorities must be allowed the time necessary for the completion of the initial investigation. This will, of course, not exceed a period of 18 days, under Order 1500, or 12 days, under Order 1505, as it was amended in Orders 1512 and 1518. In this timeframe, all those detainees against whom there is insufficient evidence will be released. Only those detainees, whose initial investigation has been completed, such that the investigation is ready for judicial examination, will remain in detention.

In our opinion, this approach is in conflict with the fundamentals of both international and Israeli law. This approach is not based on the presumption that investigating authorities should be provided with the minimal time necessary for the completion of the investigation, and that only when such time has passed is there room for judicial review. The accepted approach is that judicial review is an integral part of the detention process. Judicial review is not "external" to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not "appeal" his detention before a judge. Appearing before a judge is an "internal" part of the dentition process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.

Appendix I

Indeed, the laws regarding detention for investigative purposes focus mainly on judicial decisions. In a "natural" state of affairs, the initial detention is performed on the authority of a judicial order. *See* H. Zandberg, *Interpretation of the Detentions Law* 148 (2001). Of course, this state of affairs does not apply to the circumstances at hand. It is natural that the initial detention not be carried out on the authority of a judicial order. It is natural that the beginning of the initial investigation in the facility be performed within the context of the amended Order 1500. Judicial review will naturally come later. Even so, everything possible should be done to ensure prompt judicial review. Indeed, the laws of detention for investigative purposes are primarily laws which guide the judge as to under what circumstances he should allow the detention of a person and under what circumstances he should order the detainee's release. Judicial detention is the norm, while detention by one who is not a judge is the exception. This exception applies to the matter at hand, since naturally, the initial detention is done without a judicial order. Nevertheless, everything possible should be done to rapidly pass the investigation over to the regular track, placing the detention in the hands of a judge and not an investigator. Indeed, the authority to detain as set by Order 1500, as well as the detention authority under Orders 1505, 1512, and 1518, is not unique. This detention authority is part of the regular policing authority, *see* para. 24. Otherwise it could not be conferred upon an authorized officer. This nature of the detention authority affects its implementation. Like every detention authority, it must be passed over to the regular track of judicial intervention as quickly as possible.

33. Of course, such judicial intervention takes the circumstances of the case into account. In evaluating the detention for investigative purposes, the judge does not ask himself whether there exists *prima facie* evidence of the detainee's guilt. That is not the standard which needs to be tested. At this primary stage, there must be reasonable suspicion that the detainee committed a security crime and reasonable reason to presume that his release will disturb security or the investigation. Regarding this reasonable suspicion, Justice M. Cheshin stated:

> "Reasonable suspicion" will exist even if it is not supported by "prima facie evidence for proving guilt," where there is evidence which connects the suspect to the crime at hand to a reasonable extent that justifies, in the balancing of the interests on each side, allowing the police the opportunity to continue and complete the investigation.

VCA 6350/97 *Rosenstien v. State of Israel* (unreported case); VCA 157/02 *Tzinman v. State of Israel* (unreported case).

Indeed, the judge may often learn of the existence of reasonable suspicion from the circumstances of the detention themselves, which raise the suspicion that the individual detainee presents a danger to the security of the area, *see* the definition of detainee in Orders 1500 and 1505. The judge will review the circumstances and examine whether they raise reasonable suspicion that the crime has been committed. He will, of course, consider additional materials submitted to him. He will inquire into the intended course of investigation and the difficulties of the investigation—whether they be the

lack of manpower or difficulties in the investigation itself—in order to be convinced that the investigators are truly in need of additional time for their investigation. All these will ensure that the decision regarding the continuation of the detention, even if it is only based upon initial investigative materials, will not be made by the investigating authority, but rather by a judicial official. This is the object which lays at the base of both the international and Israeli regulation of detention for investigative purposes.

It is possible, that in the end, the judge will decide to allow the continuation of the detention, as would an authorized officer. This is irrelevant, since the judge's intervention is intended to guarantee that only the proper considerations be taken into account, and that the entire matter be examined from a judicial perspective. This is the minimum required by both the international and Israeli legal frameworks. President Shamgar, in HCJ 253/88 *Sajadia v. Minister of Defense*, at 819-820, expressed the same in reference to judicial review over administrative detention, which also applies to the matter at hand:

> It would be proper for the authorities to act effectively to reduce the period of time between the detention and the submission of the appeal, and the judicial review.

Of course, this does not mean that the judicial review should be superficial. On the contrary, "it is highly significant that a judge thoroughly examine the material, and ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect

either quality or the extent of the judicial examination." President Shamgar in *Sajadia*, at 820. In exercising his discretion, in each and every case, the judge will balance security needs, on the one hand, and individual liberty, on the other. He will keep in mind President Shamgar's words in *Sajadia*, at 821, which were said with reference to administrative detention, but apply to our case as well:

> Depriving one of his liberty, without the decision of a judicial authority, is a severe step, which the law only allows for in circumstances which demand that such be done for overwhelming reasons of security. Proper discretion, which must be exercised in issuing the order, must relate to the question of whether each concrete decision regarding detention reflects the proper balance between security needs—which have no other reasonable solution—and the fundamental tendency to respect man's liberty.

34. With this in mind, we are of the opinion that detention periods of 18 days, under Order 1500, and 12 days, under Orders 1505, 1512 and 1518, exceed appropriate limits. This detention period was intended to allow for initial investigation. However, that is not its proper function. According to the normative framework, soon after the authorized officer carries out the initial detention, the case should be transferred to the track of judicial intervention. The case should not wait for the completion of the initial or other investigation before it is brought before a judge. The need to complete the initial investigation will be presented before the judge himself, and he will decide whether there

exists reasonable suspicion of the detainee's involvement to justify the continuation of his detention. Thus, Order 1500, as well as Orders 1505, 1512, and 1518, unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect.

35. How can this problem be resolved? We doubt that it would be suitable to substitute the periods of detention without judicial intervention set in Order 1500 and the amended Order 1505 with a shorter predetermined detention period. As we have seen, everything rests upon the changing circumstances, which are not always foreseeable. It seems, that due to the unique circumstances before us, the approach adopted by international law, which avoids prescribing set periods and instead requires that a judge be approached promptly, is justified. In any case, this is a matter for the respondents and not for us. Of course, presumably, this means that it will be necessary to substantially enlarge the staff of judges who will deal with detention. It was not argued before us that there is a lack of such judges. In any case, even if the claim had been raised before us, we would have rejected it and quoted President Shamgar's words in *Sajadia*, at 821:

> What are the practical implications of what has been said? If there are a large number of detainees, it will be necessary to increase the number of judges. Difficulty in organizing such an arrangement, which will increase the number of judges who are called to service in order that a detainee's appeal be heard promptly and effectively, cannot justify the length of the period

> during which the detainee is held before his case has been judicially reviewed. The current emergency conditions undoubtedly demanded large-scale deployment of forces to deal with the riots occurring in Judea, Samaria and the Gaza Strip, and the matter at hand—the establishment of a special facility in Kziot—is an example of this deployment of forces. However, by the same standards, effort and resources must be invested into the protection of the detainees' rights, and the scope of judicial review should be broadened. If the large number of appeals so demands, ten or more judges may be called upon to simultaneously review the cases, and not only the smaller number of judges who are currently treating these matters. Such is the case—aside from the differences which stem from the nature of the matter—with regard to prosecutors as well. The number of prosecutors may also be increased, due to the need to hasten the appeal proceedings and the preparations thus involved.

Notably, under international law, judicial intervention may be carried out by a judge or by any other public officer authorized by law to exercise judicial power. This public officer must be independent of the investigators and prosecutors. He must be free of any bias. He must be authorized to order the release of the detainee. *See Ireland v. United Kingdom*, 2 EHRR 25 (1978); *Schiesser v.* Switzerland, 2 EHRR 417 (1979).

36. Thus, we hold the 18-day detention period without judicial oversight under Order 1500, and the 12-day detention period without judicial oversight under Orders 1505, 1512, and 1518, to be null and void. They will be substituted by a different period, to be set by the respondents. To this end, the respondents should be allowed to consider the matter. Therefore, we hold that this declaration of nullification will be effective six months from the date at which this judgment is given. *Compare Tzemach*, at 284. We have considered respondents' request to present us with classified information. We are of the opinion that such is neither appropriate nor desirable. We hope that the half-year suspension will allow for the reorganization required by both international and internal law.

Preventing Meetings with a Lawyer

37. Order 378 distinguishes between a "regular" criminal detainee and a detainee suspect of committing a crime set out in security legislation, with regard to the issue of meeting with a lawyer. In the case of the former, the detainee is allowed to meet and consult with his lawyer, *see* section 78B(a). The meeting may only be prevented if the detainee is currently under investigation or subject to other activities connected to the investigation, and even then the delay is only for "a number of hours." *See* section 78B(d). The prevention may be extended for reasons security for up to 96 hours from the time of detention. This is not so in the latter case, of one suspected of a security crime. In this case, the head of the investigation may order that the detainee be prohibited from meeting with a lawyer for a period of 15 days from the day of his detention, if the head of the

investigation is of the opinion that such is necessary for the security of the area or for the benefit of the investigation. *See* section 78C(c). An approving authority may order that the detainee not be allowed to meet with a lawyer for an additional 15 days, if it is convinced that such is necessary for the security of the area or the benefit of the investigation.

38. Order 1500 altered the arrangement set out in Order 378. Section 3 of Order 1500 provides:

> (a) Despite that which is stated in sections 78(b) and 78(c) of the Defense Regulations Order, a detainee shall not meet with a lawyer during the detention period.
>
> (b) At the end of the detention period, a meeting between a detainee and a lawyer shall only be prevented on the order of an approving authority, in accordance with section 78C(c)(2) of the Defense Regulations Order.

Thus, Order 1500 substituted the 15-day detention period set by Order 378, during which a detainee was prevented from meeting with a lawyer, with an 18-day prevention period. After these 18 days, we return to Order 378, and an approving authority may order that the detainee not be allowed to meet with a lawyer for a period of up to 15 days.

39. Order 1505 modified this arrangement. It included two new provisions. First, the original period of preventing the meeting with a lawyer was shortened to four days, *see* section 4 (a). Second, at the end of those four days, the

head of the investigation may order that the detainee not be allowed to meet with his lawyer for an additional period of up to 15 days, if the head of the investigation is of the opinion that such is necessary for the security of the area or the benefit of the investigation. Afterwards, returning to the regular track, an approving authority may order that the detainee not be allowed to meet with a lawyer for an additional period of up to 15 days. Thus, the arrangement set in Order 1500, which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 33 days inclusive—18 days on the authority of the Order itself and an additional 15 days on the authority of the decision of an approving authority—was substituted by a new arrangement which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 34 days inclusive—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority.

40. Another change occurred in this regard with the issue of Order 1518, which further reduced the initial period, during which a meeting with a lawyer could be prevented, to two days, *see* section 3. Thus, the period for preventing a meeting, which had formerly been 34 days under Order 1505—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority, was now 32 days.

41. Are the arrangements set out in Orders 1500, 1505 or 1518 in accord with international law? Upon inspecting international law, one finds that the International Covenant

on Civil and Political Rights-1966 does not include an explicit provision referring to this matter. The provision which most closely relates to this matter may be found in Article 14.3 of the Covenant, which applies to any person who has been criminally charged. It provides, in this regard, that the accused must be guaranteed a facility in which he can prepare his defense with an attorney, *see* sub-section (b), and that in court, he will be defended by an attorney, sub-section (d). A more explicit provision may be found in the Principles of Protection from Detention or Imprisonment. Principle 18.1 provides that:

> A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

This principle has an exception which is significant to the matter at hand. Under Principle 18.3:

> The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

42. The Fourth Geneva Convention does not include any explicit provision regarding meetings with a lawyer. There is, of course, the general provision in Article 27 of the

Convention, quoted above in para. 28, which protects the dignity and liberty of the residents of the territory, but which, at the same time, provides that the hostile state may take necessary security measures. Aside from this general provision, the provision most closely related to this matter may be found in Article 113 of the Convention:

> The Detaining Powers shall provide all reasonable facilities for the transmission, through the Protecting Power or the Central Agency provided in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or dispatched by them.
>
> In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

This right is subject to security arrangements. Pictet expressed this in noting:

> It was important, however, that these facilities for the transmission of documents should not serve as a pretext for the giving of information for subversive purposes; hence the wording "all reasonable facilities," which enables suspicious correspondence to be eliminated.

See J. S. Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War

471-472. In summarizing this issue, Vice-President Shamgar, in *Tzemel*, at 377, noted:

> That which is stated in Article 113 and in the interpretation of the Red Cross International Committee, which was subsequently published, indicates that the defense considerations of the detaining power are legitimate considerations.

Another provision of the Fourth Geneva Convention, Article 72, which relates to a detainee who has been criminally charged, provides:

> Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

43. Thus, under both Israeli and international law, the principle that meetings between detainees and attorneys should generally be permitted constitutes the normative framework in which the legality of the arrangement should be examined. This stems from every person's right to personal liberty. *See* HCJ 3412/91 *Sophian v. Commander of the IDF Forces in the Gaza* Strip, at 847; HCJ 6302/92 *Rumhiah v. Israeli Police Department*, at 212. Nevertheless, such rights are not absolute. In *Sophian*, at 848, Vice-President M. Elon correctly noted:

> The right to meet with a lawyer, like other fundamental rights, is not an absolute right, but rather

> a relative right, and it should be balanced against other rights and interests.

Thus, a meeting between a detainee and a lawyer may be prevented if significant security considerations justify the prevention of the meeting. I expressed this in *Rumhiah*, at 213:

> Preventing a meeting between a detainee and his lawyer is a serious injury to the detainee's right. Such an injury is tolerable only when it is demanded by security and essential for the benefit of the investigation. Regarding the benefit of the investigation—which is the respondents' claim in the matter before us—it is essential to find that allowing the meeting between the detainee and the lawyer will frustrate the investigation. It was correctly noted stated that "it is insufficient that it would be more comfortable, beneficial or desirable"; HCJ 128/84, at 27. It must be shown that such is necessary and essential to the investigation.

International law does not prescribe set maximum periods during which meetings may be prevented. These should be inferred from the specific circumstances, according to tests of reasonability and proportionality. A similar approach has been adopted in the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism. These Guidelines provide:

> The imperative of fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to the arrangements for access to and contact with counsel.

44. It may be inferred from this that the detainee should not be allowed to meet with his lawyer so long as the warfare continues. This Court recently stated as much:

> It is inconceivable that the respondent should allow meetings with persons during warfare or close to it, when there exists a suspicion that they endanger or may be a danger to the security of the area, the security of the IDF forces, or the security of the lawyers. This remains the case until conditions develop as to allow for the consideration of the individual circumstances of each and every detainee.

HCJ 2901/02 *The Center for the Defense of the Individual founded by Dr. Lota Salzbereger v. IDF Commander in the West Bank* (unreported case).

What is the law where the detainee is already in an organized detention facility, and conditions which allow for the consideration of the individual circumstances of each and every detainee have developed?

45. Our answer is that the standard rule in this situation should be that the fundamental right of meeting with a lawyer should be realized. However, significant security considerations may prevent this. Thus, for example, the respondent noted in his response that a meeting with a lawyer may be prevented where there is suspicion that "the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility." *See* para. 54 of the response brief from 5.5.2002. We are in agreement with this. There is also room to prevent a meeting when it may damage or disrupt the investigation. It should be emphasized, however, that advancing the investigation

is not a sufficient reason to prevent the meeting. "The focus is on the damage that may be caused to national security if the meeting with the lawyer is not prevented." HCJ 4965/94 *Kahalani v. Minister of Police* (unreported case) (Goldberg, J.). Thus, "it is insufficient that it is comfortable, beneficial or desirable to prevent a meeting with a layer. The expression 'is required' indicates that there must be an element of necessity which connects the decision to the reasons it is based upon." HCJ 128/84 *Hazan v. Meir*, at 27 (Shamgar, P.) With this in mind, we are of the opinion that there are no flaws in the arrangements set in Orders 1500, 1505, and Order 1518 regarding the prevention of meetings with lawyers.

46. Before concluding this matter, we wish to relate to one of the petitioners' claims. The claim is that, by preventing meetings with lawyers on the authority of Order 1500, 1505, or 1518, the detainees remain incommunicado for a period of 18 days, under Order 1500, 4 days, under Order 1505, or two days, under Order 1518. We reject this claim. Even if meetings with lawyers are prevented, this does not justify the claim that the detainee is isolated from the outside world. It is sufficient to note that when the detainees are moved to the detention facility, which occurs within 48 hours of their detention during warfare, they have the right to be visited by the Red Cross, and their families are informed of their whereabouts. At any time, they may appeal to the High Court of Justice in a petition against their detention. *See* section 15(d)(1) of the Basic Law: The Judiciary. Not only may the detainee himself appeal to the Court, but his family may also do so. Furthermore, under our approach to the issue of standing, any person or organization interested in the fate of the detainee may also do so. Indeed, the petition before was submitted by, among others, seven associations or

organizations that deal with human rights. Their claims were heard and the issue of standing was not even raised in these proceedings. Under these circumstances, it cannot be said that those detained on the authority of Order 1500, *a fortiori* those detained on the authority of Order 1505, and certainly not those who were detained on the authority of Order 1518, are in a state of isolation from the outside world.

Detention Without Investigation

47. Section 2(b) of Order 1500 provides:

> The detainee shall be given the opportunity to voice his claims within eight days of his detention.

This provision remains valid under Order 1505. Section 2 of Order 1518 shortens this period of detention without investigation to four days. The petitioners claim that the provision itself is illegal. They assert that it constitutes an excessive violation of the detainee's liberty. It undermines the right to liberty and denies due process. It may lead to mistaken or arbitrary detrainments. Conversely, the respondents claim that the significance of the provision is that it compels the investigators to question the detainee within eight days, in order to make an initial investigation of his identity and hear his account of his detention. This period cannot be shortened due to the large number of detainees, on the one hand, and the constraints limiting the number of professional investigators, on the other. It was noted before us that the investigating officials have limited capabilities, and they are not equipped to deal with such a large number of detainees in a more compact schedule.

Appendix I

48. We accept that investigations should not be performed during warfare or during military operations, nor can the detainee's account be heard during this time. The investigation can only begin when the detainee, against whom there stands an individual cause for detention, is brought to a detention facility which allows for investigation. Moreover, we also accept that at a location which holds large number of detainees, some time may pass before it is possible to organize for initial investigations. This, of course, must be done promptly. It is especially important to begin the investigation rapidly at this initial stage, since simple facts such as age, circumstances of detention and identity, which may determine whether the detention should be continued, may become clear at this stage. Of course, often this initial investigation is insufficient, and the investigation must continue. All of this must be done promptly.

Respondents are of course aware of this. Their argument is simple: there is a lack of professional investigators. Unfortunately, this explanation is unsatisfactory. Security needs, on the one hand, and the liberty of the individual on the other, all lead to the need to increase the number of investigators. This is especially true during these difficult times in which we are plagued by terrorism, and even more so when it was expected that the number of detainees would rise due to Operation Defensive Wall. Regarding the considerations of individual liberty that justify such an increase, Justice Dorner has stated:

> Fundamental rights essentially have a social price. The preservation of man's fundamental rights is not only the concern of the individual, but of all of society, and it shapes society's image.

Ganimat, at 645. In a similar spirit, Justice Zamir, in *Tzemach*, at 281, has noted:

Appendix I

> A society is measured, among other things, by the relative weight it attributes to personal liberty. This weight must express itself not only in pleasant remarks and legal literature, but also in the budget. The protection of human rights often has its price. Society must be ready to pay a price to protect human rights.

Such is the case in the matter at hand. A society which desires both security and individual liberty must pay the price. The mere lack of investigators cannot justify neglecting to investigate. Everything possible should be done to increase the number of investigators. This will guarantee both security and individual liberty. Furthermore, the beginning of the investigation is also affected by our holding that the arrangements according to which a detainee may be held for 18 days without being brought before a judge, under Order 1500, and for 12 days, under Order 1505, 1512, and 1518, to be illegal. Now, the detainee's own appeal to a judge will require that the investigation be carried out sooner.

49. We conclude, from this, that the provisions of section 2(b) of Order 1500 and section 2 of Order 1518 are invalid. The respondents must decide on a substitute arrangement. For this reason, we suspend our declaration that section 2(b) of Order 1500 and section 2 of Order 1518 are void. It will become valid only after six months pass from the date of this judgment. *Compare Tzemach*, at 284. Here too, we considered the respondents' request to present us with confidential information, *see supra* para. 36, and here too we are of the opinion that such is neither appropriate nor desirable. This suspension period should be utilized for reorganization, which should be in accord with international and Israeli law.

Appendix I

The petition is denied in part, with regard to the authority to detain provided in Orders 1500, 1505, 1512 and 1518, and with regard to the prevention of meetings between detainees and lawyers. The petition is granted in part in the sense that we declare the provision of section 2(a) of Order 1500, as later amended by Order 1505 and extended by Orders 1512 and 1518, the provision of section 2(b) of Order 1500 and the provision of section 2 of Order 1518 to be null and void. This declaration of nullification will become effective six months after the day on which this judgment is given.

Justice D. Dorner
I agree.

Justice I. Englard
I agree.

Decided as stated in the opinion of President A. Barak.
5.2.2003

APPENDIX II

COMPARISON *ISRAEL AND UNITED STATES*	
Population	
Israel 6,500,000	*United States* 300,000,000
Deaths from Terrorism (since January 1, 2001)	
Israel 1067 deaths	*United States* 3000 deaths
Rate of Deaths from Terrorism per 100,000 population (since January 1, 2001)	
Israel 16.4 deaths per 100,000	*United States* 1 death per 100,000
Number of Deaths from Terrorism, Adjusted for Population Size	
Israel 1067 deaths	*United States* (at Israeli rate) 49,150 deaths

DETENTION OF UNLAWFUL COMBATANTS	
Time for Initial Review of Basis for Detention	
Israel Judicial review is required within no more than 14 days. Incarceration of Unlawful Combatants Law ["UCL"], 5762-2002, (Isr.) §§ 3(a), 5(a).	*United States (Guantánamo)* *Boumediene* and *al Odah* petitioners were held for years prior to any hearing. The CSRTs were created in July 2004 and proceedings began thereafter. The CSRT procedures set no timetable for hearings regarding new detentions. Memo. from Hon. Gordon R. England, Sec'y of the Navy, regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba (July 29, 2004) ["CSRT Procedures"], Encls. (1)-(9); Memo. from Hon. Gordon R. England, Sec'y of the Navy, regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Sept. 14, 2004) ["ARB Procedures"], Encls. (1)-(12).

Appeal of Detention Decisions	
Israel Detainee has the right of appeal to a court of independent civil or military judges, followed by the right to petition for review by the Israeli Supreme Court; appellate review is a *de novo* determination based on the whole record. State of Israel, Ministry of Justice, Foreign Relations & Int'l Org. Dep't, The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism 4 (March 2003) ["Ministry of Justice, The Legal Framework"].	*United States (Guantánamo)* Detainee has a limited right of appeal to the United States Court of Appeals for the District of Columbia Circuit, which can review only a claim brought by an alien detained by the Department of Defense in Guantánamo and for which a CSRT hearing has been conducted. The scope of review is limited to whether the status determination was consistent with the CSRT procedures. These procedures impose a preponderance of the evidence standard and provide for a rebuttable presumption in favor of the government's evidence. To the extent the Constitution and federal laws are applicable, the scope of review also includes whether the status determination process was consistent with the Constitution and federal law. Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(e)(2), 119 Stat. 3476 (2006).

<table>
<tr><td colspan="2">Independence of Tribunal Conducting the Review</td></tr>
<tr><td>Israel

Review tribunal is composed of civilian or military judges, all of whom are independent of the executive and military detaining authorities.

UCL § 5(a); Emergency Powers (Detention) Law 1979 [“EPDL”], S.H. 76, § 4(c); Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 254 (2005).</td><td>United States (Guantánamo)

The CSRT is composed of officers assigned by a political appointee in the Department of Defense. Only one of the officers is a judge-advocate. CSRT officers lack the guarantees of independence afforded to U.S. military judges under the Uniform Code of Military Justice, 10 U.S.C. § 826(c).

CSRT Procedures, Encl. (1), § C(1).</td></tr>
<tr><td colspan="2">Standard Required to Support Detention</td></tr>
<tr><td>Israel

Detention requires a determination that the detainee poses a threat to State security and that no other means are available to neutralize the threat.

UCL §§ 3(a), 5(a); EPDL § 2(a); Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (number 1500)-2002, § 2(a) (Heb.); HCJ 253/88 Sajadia v. Minister of Defense [1988] IsrSC 42(3) 801.</td><td>United States (Guantánamo)

The CSRT is to determine if the detainee meets the criteria to be designated an enemy combatant. Enemy combatant is defined as an individual that was part of or supporting the Taliban or al Qaida forces engaged in hostilities against the United State or its coalition partners. Threat to security is not an issue for consideration.

Memo. from Deputy Sec’y of Def. Paul Wolfowitz regarding Order Establishing Combatant Status Review Tribunal (July 7, 2004), ¶ (a).</td></tr>
</table>

Scope of Review of Detention Decision	
Israel Judges must undertake a searching *de novo* examination of the record; absent sufficient evidentiary support, judges will order immediate release of the detainee. HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801; HCJ 3239/02 *Marab v. IDF Commander in the West Bank* [2003] IsrSC 57(2) 349.	*United States (Guantánamo)* The CSRT decides whether a preponderance of the evidence supports the conclusion that the detainee is an enemy combatant; CSRT conclusions are advisory only; and the CSRT has no power to order release. CSRT Procedures, Encl. (1), § G(11).
Coerced Testimony	
Israel Coercive and inhumane methods of interrogation are prohibited; testimony obtained by such methods is subject to exclusion. Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8; HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817; Evidence Ordinance (New Version) 5731-1971, 2 LSI 198 (1968-72) (Isr.), § 12; CrimA 5121/98 *Isacharov v. State of Israel* (unpublished) IsrSC.	*United States (Guantánamo)* CSRTs and Administrative Review Boards ("ARBs") are permitted to consider "the probative value (if any)" of any statement "derived from or obtained by coercion.' Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(b)(1), 119 Stat. 3476 (2006).

Classified Material	
Israel Independent civilian or military judge is empowered to determine whether classified material may be withheld from detainee and may order the government to produce such material to the detainee. The government may refuse, but then it must release the detainee. UCL § 5(e); Itzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375, 398-99 (1989).	*United States (Guantánamo)* CSRTs and ARBs have no authority to declassify classified material. CSRTs and ARBs cannot order disclosure of classified materials to detainees. CSRT Procedures, Encl. (1), § D(3); ARB Procedures, Encl. (3), § 4(d).
Right to Counsel for Detainees	
Israel Detainees have access to counsel within no more than 34 days. HCJ 3239/02 *Marab v. IDF Commander of the West Bank* [2003] IsrSC 57(2) 349.	*United States (Guantánamo)* Detainees are not permitted to have access to counsel. CSRT Procedures, Encl. (1), § F(5); ARB Procedures, Encls. (3), (4), (9), (10).

Frequency and Character of Periodic Review	
Israel Detention orders must be reviewed at least once every six months in the same independent judicial forum in which the orders were first issued. The renewal hearing is fully adversarial, with the detainee represented by counsel of his choice. If the judge finds that the detainee no longer poses a threat, the detainee must be released, and if the detention order is renewed, the renewal is subject to review at two levels by independent appellate courts. UCL § 5(c); Ministry of Justice, The Legal Framework, at 4.	*United States (Guantánamo)* Periodic review occurs only once a year, by ARB members who are appointed by Deputy Secretary of Defense and are not guaranteed independence. The review proceeding is non-adversarial, and the detainee is not permitted to be represented by counsel. The ARB may base continued detention either on a finding that detainee is still a threat or on other reasons, and the ARB's opinion is advisory only, with the decision to detain indefinitely remaining entirely within the executive branch. After the detainee's initial determination by the CSRT and limited review by the United States Court of Appeals for the District of Columbia Circuit, there is no further right of access to counsel or to the courts. ARB Procedures, Encls. (3), (4), (9), (10); 28 U.S.C. § 2241(e).