CrimA 6659/06
CrimA 1757/07
CrimA 8228/07
CrimA 3261/08

1 . A
2. B
v
State of Israel

The Supreme Court sitting as the Court of Criminal Appeals
[5 March 2007]
Before President D. Beinisch and Justices E.E. Levy, A. Procaccia

Appeals of the decisions of the Tel-Aviv-Jaffa District Court (Justice Z. Caspi) on 16 July 2006, 19 July 2006, 13 February 2007 and 3 September 2007, and the decision of the Tel-Aviv-Jaffa District Court (Justice D. Rozen) on 20 March 2008.

Legislation cited:
Internment of Unlawful Combatants Law, 5762-2002
Emergency Powers (Detentions) Law, 5739-1979

Israel Supreme Court cases cited:
[1] CrimFH 7048/97 A v. Minister of Defence [2000] IsrSC 44(1) 721.
[2] HCJ 4562/92 Zandberg v. Broadcasting Authority [1996] IsrSC 50(2) 793.
[3] HCJ 9098/01 Ganis v. Ministry of Building and Housing [2005] IsrSC 59(4) 241; [2004] IsrLR 505.
[4] HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel (2006) (unreported).
[5] HCJ 393/82 Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria [1983] IsrSC 37(4) 785.
[6] HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 58(5) 807; [2004] IsrLR 264.
[7] HCJ 7015/02 Ajuri v. IDF Commander in West Bank [2002] IsrSC 56(6) 352; [2002-3] IsrLR 83.
[8] HCJ 3239/02 Marab v. IDF Commander in Judaea and Samaria [2003] IsrSC 57(2) 349; [2002-3] IsrLR 173.
[9] HCJ 7957/04 Marabeh v. Prime Minister of Israel [2006] IsrSC 60(2) 477; [2005] (2) IsrLR 106.
[10] HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of the Interior (2006) (not yet reported); [2006] (1) IsrLR 442.
[11] HCJ 2599/00 Yated, Children with Down Syndrome Parents Society v. Ministry of Education [2002] IsrSC 56(5) 834.

[12] HCJ 4542/02 Kav LaOved Worker's Hotline v. Government of Israel [2006] (1) IsrLR 260.
[13] HCJ 9132/07 Elbassiouni v. Prime Minister (2008) (unreported).
[14] ADA 8607/04 Fahima v. State of Israel [2005] IsrSC 59(3) 258.
[15] HCJ 554/81 Beransa v. Central Commander [1982] IsrSC 36(4) 247.
[16] HCJ 11026/05 A v. IDF Commander (2005) (unreported).
[17] CrimA 3660/03 Abeid v. State of Israel (2005) (unreported).
[18] HCJ 1853/02 Navi v. Minister of Energy and National Infrastructures (2003) (unreported).
[19] HCJ 6055/95 Tzemach v. Minister of Defense [1999] IsrSC 53(5) 241; [1998-9] IsrLR 635.
[20] HCJ 4827/05 Man, Nature and Law - Israel Environmental Protection Society v. Minister of the Interior (2005) (unreported).
[21] CA 7175/98 National Insurance Institute v. Bar Finance Ltd (in liquidation) (2001) (unreported).
[22] HCJ 5319/97 Kogen v. Chief Military Prosecutor [1997] IsrSC 51(5) 67; [1997] IsrLR 499.
[23] CrimA 4596/05 Rosenstein v. State of Israel (2005) (unreported); [2005] (2) IsrLR 232.
[24] CrimA 4424/98 Silgado v. State of Israel [2002] IsrSC 56(5) 529.
[25] HCJ 1661/05 Gaza Coast Regional Council v. Knesset [2005] IsrSC 59(2) 481.
[26] HCJ 4769/95 Menahem v. Minister of Transport [2003] IsrSC 57(1) 235.
[27] HCJ 3434/96 Hoffnung v. Knesset Speaker [1996] IsrSC 50(3) 57.
[28] HCJ 6893/05 Levy v. Government of Israel [2005] IsrSC 59(2) 876.
[29] HCJ 5016/96 Horev v. Minister of Transport [1997] IsrSC 51(4) 1; [1997] IsrLR 149.
[30] HCJ 5627/02 Saif v. Government Press Office [2004] IsrSC 58(5) 70; [2004] IsrLR 191.
[31] EA 2/84 Neiman v. Chairman of Central Elections Committee for Tenth Knesset [1985] IsrSC 39(2) 225; IsrSJ 8 83.
[32] CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village [1995] IsrSC 49(4) 221.
[33] HCJ 450/97 Tenufa Manpower and Maintenance Services Ltd. v. Minister of Labour and Social Affairs [1998] IsrSC 52(2) 433.
[34] AAA 4436/02 Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality [2004] IsrSC 58(3) 782.
[35] HCJ 2967/00 Arad v. Knesset [2000] IsrSC 54(2) 188.
[36] CrimApp 8780/06 Sarur v. State of Israel (2006) (unreported).
[37] HCJ 403/81 Jabar v. Military Commander [1981] IsrSC 35(4) 397.
[38] HCJ 102/82 Tzemel v. Minister of Defence [1983] IsrSC 37(3) 365.
[39] ADA 4794/05 Ufan v. Minister of Defence (2005) (unreported).

[40] ADA 7/94 Ben-Yosef v. State of Israel (1994) (unreported).
[41] ADA 8788/03 Federman v. Minister of Defence [2004] IsrSC 58(1) 176.
[42] HCJ 5445/93 Ramla Municipality v. Minister of the Interior [1996] IsrSC 50(1) 397.
[43] HCJ 2159/97 Ashkelon Coast Regional Council v. Minister of the Interior [1998] IsrSC 52(1) 75.
[44] HCJ 253/88 Sajadia v. Minister of Defence [1988] IsrSC 42(3) 801.
[45] ADA 334/04 Darkua v. Minister of the Interior [2004] IsrSC 58(3) 254.
[46] HCJ 4400/98 Braham v. Justice Colonel Shefi [1998] IsrSC 52(5) 337.
[47] HCJ 11006/04 Kadri v. IDF Commander in Judaea and Samaria (2004) (unreported).
[48] CrimApp 3514/97 A v. State of Israel (1997) (unreported).
[49] HCJ 5994/03 Sadar v. IDF Commander in West Bank (2003) (unreported).
[50] CrimA 5121/98 Yissacharov v. Chief Military Prosecutor [2006] (unreported), 2006 (1) IsrLR 320.
[51] HCJ 3412/93 Sufian v. IDF Commander in Gaza Strip [1993] IsrSC 47(2) 843.
[52] HCJ 6302/92 Rumhiah v. Israel Police [1993] IsrSC 47(1) 209.
[53] HCJ 2901/02 Centre for Defence of the Individual v. IDF Commander in West Bank [2002] IsrSC 56(3) 19.
[54] CrimA 1221/06 Iyyad v. State of Israel (2006) (unreported).

For the appellants - H. Abou-Shehadeh
For the respondent - Z. Goldner, O.J. Koehler, S. Nitzan, Y. Roitman.

JUDGMENT

President D. Beinisch:
Before us are appeals against the decisions of the Tel-Aviv-Jaffa District Court (Justice Z. Caspi), in which the internment of the appellants under the Internment of Unlawful Combatants Law, 5762-2002 (hereinafter: "the Internment of Unlawful Combatants Law" or "the Law") was upheld as lawful. Apart from the particular concerns of the appellants, the appeals raise fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law and the extent to which the Law is consistent with international humanitarian law, as well as the constitutionality of the arrangements prescribed in the Law.
The main facts and sequence of events
1. The first appellant is an inhabitant of the Gaza Strip, born in 1973, who was placed under administrative detention on 1 January 2002 by virtue of the Administrative Detentions (Temporary Provision) (Gaza Strip Region) Order (no. 941), 5748-1988. The detention of the first appellant was extended from time to time by the Military Commander and upheld on judicial review by the Gaza Military Court. The second appellant is also an inhabitant of Gaza, born in 1972, and he was

placed under administrative detention on 24 January 2003 pursuant to the aforesaid Order. The detention of the second appellant was also extended from to time and reviewed by the Gaza Military Court.
On 12 September 2005 a statement was issued by the Southern District Commander with regard to the end of military rule in the region of the Gaza Strip. On the same day, in view of the change in circumstances and also the change in the relevant legal position, internment orders were issued against the appellants; these were signed by the Chief of Staff by virtue of his authority under s. 3 of the Internment of Unlawful Combatants Law, on which the case before us focuses. On 15 September 2005 the internment orders were brought to the notice of the appellants. At a hearing that took place pursuant to the Law, the appellants indicated that they did not wish to say anything, and on 20 September 2005 the Chief of Staff decided that the internment orders under the aforesaid Law would remain in force.
2. On 22 September 2005 a judicial review hearing began in the Tel-Aviv-Jaffa District Court (Justice Z. Caspi) in the appellants' case. On 25 January 2006 the District Court held that there had been no defect in the procedure of issuing internment orders against the appellants, and that all the conditions laid down in the Internment of Unlawful Combatants Law were satisfied, including the fact that their release would harm state security. The appellants appealed this decision to the Supreme Court, and on 14 March 2006 their appeal was denied (Justice E. Rubinstein). In the judgment it was held that the material presented to the court evinced the appellants' clear association with the Hezbollah organization, as well as their participation in acts of combat against the citizens of Israel prior to their detention. The court emphasized in this context the personal threat presented by the two appellants and the risk that they would resume their activities if they were released, as could be seen from the material presented to the court.
3. On 9 March 2006 the periodic judicial review pursuant to s. 5(c) of the Law began in the District Court. In the course of this review, not only were the specific complaints of the appellants against their internment considered, but also fundamental arguments against the constitutionality of the Law, in the framework of an indirect attack on its provisions. On 16 July 2006 the District Court gave its decision with regard to the appellant's specific claims. In this decision it was noted that from the information that was presented to the court it could be seen that the appellants were major activists in the Hezbollah organization who would very likely return to terrorist activities if they were released now, and that their release was likely to harm state security. On 19 July 2006 the District Court gave its decision on the fundamental arguments raised by the appellants concerning the constitutionality of the Law. The District Court rejected the appellants' argument in this regard too, and held that the Law befitted the values of the State of Israel, its purpose was a proper one and its violation of the appellants' rights was proportionate. The court said further that in its opinion the Law was also consistent with the principles of international law. The appeal in CrimA 6659/06 is directed at these two decisions of 16 July 2006 and 19 July 2006.
On 13 February 2007 the District Court gave a decision in a second

periodic review of the appellants' detention. In its decision the District Court approved the internment orders, discussed the appellants' importance to the activity of the Hezbollah organization as shown by the testimonies of experts who testified before it and said that their detention achieved a preventative goal of the first order. The appeal in CrimA 1757/07 is directed at this decision.

On 3 September 2007 the District Court gave its decision in the third periodic review of the appellants' internment. In its decision the District Court noted that the experts remained steadfast in their opinion that it was highly probable that the two appellants would resume their terrorist activity if they were released, and as a result the operational abilities of the Hezbollah infrastructure in the Gaza Strip would be enhanced and the risks to the State of Israel and its inhabitants would increase. It also said that the fact that the Hamas organization had taken control of the Gaza Strip increased the aforesaid risks and the difficulty of contending with them. The court emphasized that there was information with regard to each of the appellants concerning their desire to resume terrorist activity if they were released, and that they had maintained their contacts in this area even while they were imprisoned. In such circumstances, the District Court held that the passage of time had not reduced the threat presented by the appellants, who were the most senior persons in the Hezbollah terrorist infrastructure in the Gaza Strip, and that there was no basis for cancelling the internment orders made against them. The appeal in CrimA 8228/07 is directed at this decision.

On 20 March 2008 the District Court gave its decision in the fourth periodic review of the appellants' detention. During the hearing, the court (Justice D. Rozen) said that the evidence against each of the two appellants contained nothing new from recent years. Nevertheless, the court decided to approve their continued internment after it found that each of the two appellants was closely associated with the Hezbollah organization; both of them were intensively active in that organization; the existing evidence regarding them showed that their return to the area was likely to act as an impetus for terrorist attacks, and the long period during which they had been imprisoned had not reduced the danger that they represent. The appeal in CrimA 3261/08 was directed at this decision.

Our judgment therefore relates to all of the aforesaid appeals together.

The arguments of the parties

4. The appellants' arguments before us, as in the trial court, focused on two issues: first, the appellants raised specific arguments concerning the illegality of the internment orders that were made in their cases, and they sought to challenge the factual findings reached by the District Court with regard to their membership in the Hezbollah organization and their activity in that organization against the security of the State of Israel. Secondly, once again the appellants indirectly raised arguments of principle with regard to the constitutionality of the Law. According to them, the Law in its present format violates the rights to liberty and dignity enshrined in Basic Law: Human Dignity and Liberty, in a manner that does not satisfy the conditions of the limitation clause in the Basic Law. The appellants also claimed that the Law is inconsistent with the rules of international humanitarian

law that it purports to realize. Finally the appellants argued that the end of Israel's military rule in the Gaza Strip prevents it, under the laws of war, from detaining the appellants.

The state's position was that the petitions should be denied. With regard to the specific cases of the appellants, the state argued that the internment orders in their cases were made lawfully and they were in no way improper. With regard to the arguments in the constitutional sphere, the state argued that the law satisfies the tests of the limitation clause in Basic Law: Human Dignity and Liberty, since it was intended for a proper purpose and its violation of personal liberty is proportionate. With regard to the rules of international law applicable to the case, the state argued that the Law is fully consistent with the norms set out in international law with regard to the detention of "unlawful combatants".

5. In order to decide the questions raised by the parties before us, we shall first address the background that led to the enactment of the Internment of Unlawful Combatants Law and its main purpose. With this in mind, we shall consider the interpretation of the statutory definition of "unlawful combatant" and the conditions that are required to prove the existence of a ground for detention under the law. Thereafter we shall examine the constitutionality of the arrangements prescribed in the law and finally we shall address the specific detention orders made in the appellants' cases.

The Internment of Unlawful Combatants Law - background to its enactment and its main purpose

6. The Internment of Unlawful Combatants Law gives the state authorities power to detain "unlawful combatants" as defined in s. 2 of the Law, i.e. persons who participate in hostile acts or who are members of forces that carry out hostile acts against the State of Israel, and who do not fulfil the conditions that confer prisoner of war status under international humanitarian law. As will be explained below, the Law allows the internment of foreign persons who belong to a terrorist organization or who participate in hostile acts against the security of the state, and it was intended to prevent these persons from returning to the cycle of hostilities against Israel.

The original initiative to enact the Law arose following the judgment in CrimFH 7048/97 A v. Minister of Defence [1], in which the Supreme Court held that the state did not have authority to hold Lebanese nationals in detention by virtue of administrative detention orders, if the sole reason for their detention was to hold them as "bargaining chips" in order to obtain the release of captives and missing servicemen. Although the original bill came into being against the background of a desire to permit the holding of prisoners as "bargaining chips", the proposal underwent substantial changes during the legislative process after many deliberations on this matter in the Knesset Foreign Affairs and Defence Committee, chaired by MK Dan Meridor. On 4 March 2002, the Internment of Unlawful Combatants Law was passed by the Knesset. Its constitutionality has not been considered by this court until now.

At the outset it should be emphasized that the examination of the historical background to the enactment of the Law and the changes that were made to the original bill, what was said during the Knesset

debates, the wording of the Law as formulated at the end of the legislative process, and the effort that was made to ensure that it conformed to the provisions of international humanitarian law evident from the purpose clause of the statute, which we shall address below - all show that the Internment of Unlawful Combatants Law as it crystallized in the course of the legislative process was not intended to allow hostages to be held as "bargaining chips" for the purpose of obtaining the release of Israeli captives and missing servicemen being held in enemy territory, as alleged by the appellants before us. The plain language of the Law and its legislative history indicate that the Law was intended to prevent a person who endangers the security of the state due to his activity or his membership of a terrorist organization from returning to the cycle of combat. Thus, for example, MK David Magen, who was chairman of the Foreign Affairs and Defence Committee at the time of the debate in the plenum of the Knesset prior to the second and third readings, said as follows:

'The draft law is very complex and as is known, it gave rise to many disagreements during the Committee's deliberations. The Foreign Affairs and Defence Committee held approximately ten sessions at which it discussed the difficult questions raised by this Bill and considered all the possible ramifications of its passing the second and third readings. The Bill before you is the result of considerable efforts to present an act of legislation whose provisions are consistent with the rules of international humanitarian law and which satisfies the constitutional criteria, while being constantly mindful of and insistent upon maintaining a balance between security and human rights...

I wish to emphasize that the Bill also seeks to determine that a person who is an unlawful combatant, as defined in the new Law, will be held by the state as long as he represents a threat to its security. The criterion for interning a person is that he is dangerous. No person should be interned under the proposal as a punishment or, as many tend to think erroneously, as a bargaining chip. No mistake should be made in this regard. Nonetheless, we should ask ourselves whether it is conceivable that the state should release a prisoner who will return to the cycle of hostilities against the State of Israel?' [emphasis added].

The Law was therefore not intended to allow prisoners to be held as "bargaining chips". The purpose of the Law is to remove from the cycle of hostilities a person who belongs to a terrorist organization or who participates in hostile acts against the State of Israel. The background to this is the harsh reality of murderous terrorism, which has for many years plagued the inhabitants of the state, harmed the innocent and indiscriminately taken the lives of civilians and servicemen, the young and old, men, women and children. In order to realize the aforesaid purpose, the Law applies only to persons who take part in the cycle of hostilities or who belong to a force that carries out hostile acts against the State of Israel, and not to innocent civilians. We shall return to address the security purpose of the Law below.

Interpreting the provisions of the Law

7. As we have said, in their arguments before us the parties addressed in detail the question of the constitutionality of the arrangements prescribed in the Law. In addition, the parties addressed at length the

question of whether the arrangements prescribed in the Internment of Unlawful Combatants Law are consistent with international law. The parties addressed this question, inter alia, because in s. 1 of the Law, which is the purpose section, the Law states that it is intended to realize its purpose "in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law." As we shall explain below, this declaration is a clear expression of the basic outlook prevailing in our legal system that the existing law should be interpreted in a manner that is as consistent as possible with international law.

In view of the two main focuses of the basic arguments of the parties before us - whether the arrangements prescribed in the Law are constitutional and whether they are consistent with international humanitarian law - we should clarify that both the constitutional scrutiny from the viewpoint of the limitation clause and the question of compliance with international humanitarian law may be affected by the interpretation of the arrangements prescribed in the Law. Before deciding on the aforesaid questions, therefore, we should first consider the interpretation of the principal arrangements prescribed in the Internment of Unlawful Combatants Law. These arrangements will be interpreted in accordance with the language and purpose of the Law, and on the basis of two interpretive presumptions that exist in our legal system: one, the presumption of constitutionality, and the other, the presumption of interpretive compatibility with the norms of international law - both those that are part of Israeli law and those that Israel has taken upon itself amongst its undertakings in the international arena.

8. Regarding the presumption of constitutionality: in our legal system the legislature is presumed to be aware of the contents of the Basic Laws and their ramifications for every statute that is enacted subsequently. According to this presumption, the examination of a provision of statute involves an attempt to interpret it so that it is consistent with the protection that the Basic Laws afford to human rights. This realizes the presumption of normative harmony, whereby "we do not assume that a conflict exists between legal norms, and every possible attempt is made to achieve 'uniformity in the law' and harmony between the various norms" (A. Barak, Legal Interpretation - the General Theory of Interpretation (1992), at p. 155). In keeping with the presumption of constitutionality, we must, therefore, examine the meaning and scope of the internment provisions in the Internment of Unlawful Combatants Law while aspiring to uphold, insofar as possible, the provisions of Basic Law: Human Dignity and Liberty. It should immediately be said that the internment powers prescribed in the Law significantly and seriously violate the personal liberty of the prisoner. This violation is justified in appropriate circumstances in order to protect state security. However, in view of the magnitude of the violation of personal liberty, and considering the exceptional nature of the means of detention that are prescribed in the Law, an interpretive effort should be made in order to minimize the violation of the right to liberty as much as possible so that it is proportionate to the need to achieve the security purpose and does not go beyond this. Such an interpretation will be compatible with the basic conception

prevailing in our legal system, according to which a statute should be upheld by interpretive means and the court should refrain, insofar as possible, from setting it aside on constitutional grounds. In the words of President A. Barak:

'It is better to achieve a reduction in the scope of a statute by interpretive means rather than having to achieve the same reduction by declaring a part of a statute void because it conflicts with the provisions of a Basic Law.... A reasonable interpretation of a statute is preferable to a decision on the question of its constitutionality' (HCJ 4562/92 Zandberg v. Broadcasting Authority [2], at p. 812; see also HCJ 9098/01 Ganis v. Ministry of Building and Housing [3], at p. 276).

9. With respect to the presumption of conformity to international humanitarian law: as we have said, s. 1 of the Law declares explicitly that its purpose is to regulate the internment of unlawful combatants "… in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law." The premise in this context is that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel (see HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel [4], at paras. 18, 21; see also A. Cassese, International Law (second edition, 2005), at p. 420).

The international law that governs an international armed conflict is anchored mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereinafter: "the Hague Convention") and the regulations appended to it, whose provisions have the status of customary international law (see HCJ 393/82 Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria [5], at p. 793; HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [6], at p. 827; HCJ 7015/02 Ajuri v. IDF Commander in West Bank [7], at p. 364; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: "Fourth Geneva Convention"), whose customary provisions constitute a part of the law of the State of Israel and some of which have been considered in the past by this court (Ajuri v. IDF Commander in West Bank [7], at page 364; HCJ 3239/02 Marab v. IDF Commander in Judaea and Samaria [8]; HCJ 7957/04 Marabeh v. Prime Minister of Israel [9], at para. 14); and the Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereinafter: "First Protocol"), to which Israel is not a party, but whose customary provisions also constitute a part of the law of the State of Israel (see Public Committee against Torture in Israel v. Government of Israel [4], at para. 20). In addition, where there is a lacuna in the laws of armed conflict set out above, it is possible to fill it by resorting to international human rights law (see Public Committee against Torture in Israel v. Government of Israel [4], at para. 18; see also Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep. 226, at page 240; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 ILM 1009 (2004)).

It should be emphasized that no one in this case disputes that an

explicit statutory provision enacted by the Knesset overrides the provisions of international law (see in this regard President A. Barak in HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of the Interior [10], at para. 17). However, according to the presumption of interpretive consistency, an Israeli act of legislation should be interpreted in a manner that is consistent, insofar as possible, with the norms of international law to which the State of Israel is committed (see HCJ 2599/00 Yated, Children with Down Syndrome Parents Society v. Ministry of Education [11], at p. 847; HCJ 4542/02 Kav LaOved Worker's Hotline v. Government of Israel [12], at para. 37). According to this presumption, which as we have said is clearly expressed in the purpose clause of the Internment of Unlawful Combatants Law, the arrangements prescribed in the Law should be interpreted in a manner that is as consistent as possible with the international humanitarian law that governs the matter.

Further to the aforesaid it should be noted that when we approach the task of interpreting provisions of the statute in a manner consistent with the accepted norms of international law, we cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and to the phenomenon of terrorism that is changing the face and characteristics of armed conflicts and those who participate in them (see in this regard the remarks of President A. Barak in Ajuri v. IDF Commander in West Bank [7], at pp. 381-382). In view of this, we should do our best to interpret the existing laws in a manner that is consistent with the new realities and the principles of international humanitarian law.

10. Bearing all the above in mind, let us now turn to the interpretation of the statutory definition of "unlawful combatant" and of the conditions required for proving the existence of cause for internment under the Law. The presumption of constitutionality and the provisions of international law to which the parties referred will be our interpretive tools and they will assist us in interpreting the provisions of the Law and in evaluating the nature and scope of the power of internment it prescribes.

The definition of "unlawful combatant" and the scope of its application

11. S. 2 of the Law defines "unlawful combatant" as follows:

'Definitions

2. In this law -

"unlawful combatant" - a person 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, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War with respect to granting prisoner of war status in international humanitarian law, do not apply to him;

This statutory definition of "unlawful combatant" relates to those who take part in hostile acts against the State of Israel or who are members of a force that perpetrates such acts, and who are not prisoners of war under international humanitarian law. In this regard two points should be made: first, from the language of the aforesaid s. 2 it is clear that it is not essential for someone to take part in hostile acts against the

State of Israel; his membership in a "force perpetrating hostile acts" - i.e., a terrorist organization - may include that person within the definition of "unlawful combatant". We will discuss the significance of these two alternatives in the definition of "unlawful combatant" below (para. 21 .).

Secondly, as noted above, the purpose clause in the Law refers explicitly to the provisions of international humanitarian law. The definition of "unlawful combatant" in the aforesaid s. 2 also refers to international humanitarian law when it provides that the Law applies to a person who does not enjoy prisoner of war status under the Third Geneva Convention. In general, the rules of international humanitarian law were not intended to apply to the relationship between the state and its citizens (see, for example, the provisions of art. 4 of the Fourth Geneva Convention, according to which a "protected civilian" is someone who is not a citizen of the state that is holding him in circumstances of an international armed conflict). The explicit reference by the legislature to international humanitarian law, together with the stipulation in the wording of the Law that prisoner of war status does not apply, show that the Law was intended to apply only to foreign parties who belong to a terrorist organization that acts against the security of the state. We are not unaware that the draft law of 14 June 2000 contained an express provision stating that the Law would not apply to Israeli inhabitants (and also to inhabitants of the territories), except in certain circumstances that were set out therein (see s. 11 of the Internment of Enemy Forces Personnel Who Are Not Entitled to a Prisoner of War Status Bill, 5760-2000, Bills 5760, no. 2883, at p. 415). This provision was omitted from the final wording of the Law. Nevertheless, in view of the explicit reference in the Law to international humanitarian law and the laws concerning prisoners of war as stated above, the inevitable conclusion is that according to its wording and purpose, the Law was not intended to apply to local parties (citizens and residents of Israel) who endanger state security. For these other legal measures exist that are intended for a security purpose, which we shall address below.

It is therefore possible to sum up and say that an "unlawful combatant" under s. 2 of the Law is a foreign party who belongs to a terrorist organization that acts against the security of the State of Israel. This definition may include residents of a foreign country that maintains a state of hostilities against the State of Israel, who belong to a terrorist organization that acts against the security of the State and who satisfy the other conditions of the statutory definition of "unlawful combatant". This definition may also include inhabitants of the Gaza Strip, which today is no longer under belligerent occupation. In this regard it should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective

manner, the Gaza Strip should not be regarded as a territory that is subject to belligerent occupation from the viewpoint of international law, even though the unique situation that prevails there imposes certain obligations on the State of Israel vis-?-vis the inhabitants of the Gaza Strip (for the position that the Gaza Strip is not now subject to a belligerent occupation, see Yuval Shany, "Faraway So Close: The Legal Status of Gaza after Israel's Disengagement," 8 Yearbook of International Humanitarian Law 2005 (2007) 359; see also the judgment of the International Court of Justice in Democratic Republic of the Congo v. Uganda, where the importance of a physical presence of military forces was emphasized for the existence of a state of occupation: Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda (ICJ, 19 December 2005), at para.173; with regard to the existence of certain obligations that the State of Israel has in the prevailing circumstances vis-?-vis the inhabitants of the Gaza Strip, see HCJ 9132/07 Elbassiouni v. Prime Minister [13]. In our case, in view of the fact that the Gaza Strip is no longer under the effective control of the State of Israel, we must conclude that the inhabitants of the Gaza Strip constitute foreign parties who may be subject to the Internment of Unlawful Combatants Law in view of the nature and purpose of this Law.

With regard to the inhabitants of the territory (Judaea and Samaria) that is under the effective control of the State of Israel, for the reasons that will be stated later (in para. 36 below), I tend to the opinion that insofar as necessary for security reasons, the administrative detention of these inhabitants should be carried out pursuant to the security legislation that applies in the territories and not by virtue of the Internment of Unlawful Combatants Law. However, the question of the application of the aforesaid Law to the inhabitants of the territories does not arise in the circumstances of the case before us and it may therefore be left undecided.

Conformity of the definition of "unlawful combatant" to a category recognized by international law

12. The appellants argued that the definition of "unlawful combatant" in s. 2 of the Law is contrary to the provisions of international humanitarian law, since international law does not recognize the existence of an independent and separate category of "unlawful combatants". According to their argument, there are only two categories in international law - "combatants" and "civilians", who are subject to the provisions and protections enshrined in the Third and Fourth Geneva Conventions respectively. In their view international law does not have an intermediate category that includes persons who are not protected by either of these conventions.

With regard to the appellants' aforesaid arguments we would point out that the question of the conformity of the term "unlawful combatant" to the categories recognized by international law has already been addressed in our case law in Public Committee against Torture in Israel v. Government of Israel [4], in which it was held that the term "unlawful combatants" does not constitute a separate category, but rather, a sub-category of "civilians" recognized by international law. This conclusion is based on the approach of customary international

law, according to which the category of "civilians" includes everyone who is not a "combatant". We are therefore dealing with a negative definition. In the words of President A. Barak:

'The approach of customary international law is that "civilians" are persons who are not "combatants" (see article 50(1) of the First Protocol, and Sabel, supra, at page 432). In the Blaskic case, the International Tribunal for War Crimes in Yugoslavia said that civilians are "persons who are not, or no longer, members of the armed forces" (Prosecutor v. Blaskic (2000), Case IT-95-14-T, at paragraph 180). This definition is of a "negative" character. It derives the concept of "civilians" from it being the opposite of "combatants". Thus it regards unlawful combatants, who as we have seen are not "combatants", as civilians' (ibid., at para. 26 of the opinion of President A. Barak).

In this context, two additional points should be made: first, the determination that "unlawful combatants" belong to the category of "civilians" in international law is consistent with the official interpretation of the Geneva Conventions, according to which in an armed conflict or a state of occupation, every person who finds himself in the hands of the opposing party is entitled to a certain status under international humanitarian law - the status of prisoner of war, which is governed by the Third Geneva Convention, or the status of protected civilian, which is governed by the Fourth Geneva Convention:

'There is no "intermediate status"; nobody in enemy hands can be outside the law' (O. Uhler and H. Coursier (eds.), Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary (ICRC, Geneva, 1950), commentary to art. 4, at page 51).

(See also S. Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror",' 87(857) IRRC 39 (2005), at pp. 48-49).

Secondly, it should be emphasized that prima facie, the statutory definition of "unlawful combatants" under s. 2 of the Law applies to a broader group of people than the group of "unlawful combatants" discussed in Public Committee against Torture in Israel v. Government of Israel [4], in view of the difference in the measures under discussion: the judgment in Public Committee against Torture in Israel v. Government of Israel [4] considered the legality of the measure of a military attack intended to cause the death of an "unlawful combatant". According to international law, it is permitted to attack an "unlawful combatant" only during the period of time when he is taking a direct part in the hostilities. By contrast, the Internment of Unlawful Combatants Law deals with the measure of internment. For the purposes of internment under the Law, it is not necessary for the "unlawful combatant" to participate directly in the hostilities, nor is it essential that the internment take place during the period of time that he is participating in hostile acts; all that is required is that the conditions of the definition of "unlawful combatant" in s. 2 of the Law are proved. This statutory definition does not conflict with the provisions of international humanitarian law since, as we shall clarify clear below, the Fourth Geneva Convention also permits the detention

of a protected "civilian"' who endangers the security of the detaining state. Thus we see that our reference to the judgment in Public Committee against Torture in Israel v. Government of Israel [4] was not intended to indicate that an identical issue was considered in that case. Its purpose was to support the finding that the term "unlawful combatants" in the Law under discussion does not create a separate category of treatment from the viewpoint of international humanitarian law; rather, it constitutes a sub-group of the category of "civilians".

13. Further to our finding that "unlawful combatants" belong to the category of "civilians" from the viewpoint of international law, it should be noted that this court has held in the past that international humanitarian law does not grant "unlawful combatants" the same degree of protection to which innocent civilians are entitled, and that in this respect there is a difference from the viewpoint of the rules of international law between "civilians" who are not "unlawful combatants" and "civilians" who are "unlawful combatants". (With regard to the difference in the scope of the protection from a military attack upon "civilians" who are not "unlawful combatants" as opposed to "civilians" who are "unlawful combatants", see Public Committee against Torture in Israel v. Government of Israel [4], at paras. 23-26). As we shall explain below, in the present context the significance of this is that someone who is an "unlawful combatant" is subject to the Fourth Geneva Convention, but according to the provisions of the aforesaid Convention it is possible to apply various restrictions to them and inter alia to detain them when they represent a threat to the security of the state.

In concluding these remarks it should be noted that although there are disagreements on principle between the parties before us as to the scope of the international laws that apply to "unlawful combatants", including the application of the Fourth Geneva Convention and the scope of the rights of which they may be deprived for security reasons under art. 5 of the Convention, we are not required to settle most of these disagreements. This is due to the state's declaration that in its opinion the Law complies with the most stringent requirements of the Fourth Geneva Convention, and because of the assumption that the appellants enjoy all the rights that are enshrined in this Convention (see paras. 334 and 382 of the state's response).

14. In summary, in view of the purpose clause of the Internment of Unlawful Combatants Law, according to which the Law was intended to regulate the status of "unlawful combatants" in a manner that is consistent with the rules of international humanitarian law, and bearing in mind the finding of this court in Public Committee against Torture in Israel v. Government of Israel [4] that "unlawful combatants" constitute a subcategory of "civilians" under international law, we are able to determine that, contrary to the appellants' claim, the Law does not create a new reference group from the viewpoint of international law; it merely determines special provisions for the detention of "civilians" (according to the meaning of this term in international humanitarian law) who are "unlawful combatants".

The nature of internment of "Unlawful Combatants" under the Law - administrative detention

15. Now that we have determined that the definition of "unlawful combatant" in the Law is not incompatible with division into the categories of "civilians" as opposed to "combatants'" in international law and in the case law of this court, let us proceed to examine the provisions of the Law that regulate the internment of unlawful combatants. S. 3(a) of the law provides the following:

'Internment of Unlawful Combatant
3. (a) Where the Chief of Staff has reasonable cause to believe that a person being held by state authorities is an unlawful combatant and that his release will harm state security, he may issue an order under his hand, directing that such person be interned at a place to be determined (hereinafter: "internment order"); an internment order shall include the grounds for internment, without prejudicing state security requirements.'
S. 7 of the Law adds a probative presumption in this context, which provides as follows:
'Presumption
7. For the purposes of this Law, a person who is a member of a force perpetrating hostile acts against the State of Israel or who has participated in hostile acts of such a force, either directly or indirectly, shall be deemed to be a person whose release would harm state security as long as the hostile acts of such force against the State of Israel have not yet ceased, unless proved otherwise.'
The appellants argued before us that the internment provisions in the Law create, de facto, a third category of detention, which is neither criminal arrest nor administrative detention, and which has no recognition in Israeli law or international law. We cannot accept this argument. The mechanism provided in the Law is a mechanism of administrative detention in every respect, which is carried out in accordance with an order of the Chief of Staff, who is an officer of the highest security authority. As we shall explain below, we are dealing with an administrative detention whose purpose is to protect state security by removing from the cycle of hostilities anyone who is a member of a terrorist organization or who is participating in the organization's operations against the State of Israel, in view of the threat that he represents to the security of the state and the lives of its inhabitants.
16. It should be noted that the actual authority provided in the Law for the administrative detention of a "civilian" who is an "unlawful combatant" due to the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law. Thus art. 27 of the Fourth Geneva Convention, which lists a variety of rights to which protected civilians are entitled, recognizes the possibility of a party to a dispute adopting "control and security measures" that are justified on security grounds. The wording of the aforesaid art. 27 is as follows:
'... 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.'
Regarding the types of control measures that are required for protecting state security, art. 41 of the Convention prohibits the

adoption of control measures that are more severe than assigned residence or internment in accordance with the provisions of arts. 42-43 of the Convention. Art. 42 entrenches the rule that a "civilian" should not be interned unless this is "absolutely necessary" for the security of the detaining power. Art. 43 proceeds to obligate the detaining power to approve the detention by means of judicial or administrative review, and to hold periodic reviews of the continuing need for internment at least twice a year. Art. 78 of the Convention concerns the internment of protected civilians who are inhabitants of a territory that is held by an occupying power, and it states that it is possible to invoke various security measures against them for essential security reasons, including assigned residence and internment. Thus we see that the Fourth Geneva Convention allows the internment of protected "civilians" in administrative detention, when this is necessary for reasons concerning the essential security needs of the detaining power.

17. In concluding these remarks we would point out that the appellants argued before us that the aforesaid provisions of the Fourth Geneva Convention are not applicable in their particular case. According to them, arts. 41-43 of the Convention concern the detention of protected civilians who are present in the territory of a party to a dispute, whereas the appellants were taken into detention when they were in the Gaza Strip in the period prior to the implementation of the disengagement plan, when the status of the Gaza Strip was that of territory under belligerent occupation. They argue that art. 78 of the Fourth Geneva Convention - relating to administrative detention in occupied territory - is not applicable to their case either, in view of the circumstances that arose after the implementation of the disengagement plan and the departure of IDF forces from the Gaza Strip. In view of this, the appellants argued that no provision of international humanitarian law exists that allows them to be placed in administrative detention, and therefore they argued that their detention under the Internment of Unlawful Combatants Law is contrary to the provisions of international law.

Our reply to these arguments is that the detention provisions set out in the Fourth Geneva Convention were intended to apply and realize the basic principle contained in the last part of art. 27 of the Convention, which was cited above. As we have said, this article provides that the parties to a dispute may adopt security measures against protected civilians insofar as this is required due to the belligerence. The principle underlying all the detention provisions in the Fourth Geneva Convention is that "civilians" may be detained for security reasons to the extent necessitated by the threat that they represent. According to the aforesaid Convention, the power of detention for security reasons exists, whether we are concerned with the inhabitants of an occupied territory or with foreigners who were apprehended in the territory of one of the states involved in the dispute. In the appellants' case, although Israeli military rule in the Gaza Strip has ended, the hostilities between the Hezbollah organization and the State of Israel have not ceased; therefore, detention of the appellants within the territory of the State of Israel for security reasons is not inconsistent with the detention provisions in the Fourth Geneva Convention.

The cause of detention under the Law - the requirement of an individual threat to security and the effect of the interpretation of the statutory definition of "unlawful combatant"

18. One of the first principles of our legal system is that administrative detention is conditional upon the existence of a cause of detention that derives from the individual threat posed by the detainee to the security of the state. This was discussed by President Barak when he said:

'[For cause of detention to exist] the circumstances of the detention must be such that they arouse, with respect to [the prisoner] - to him personally and not to someone else - concern that threatens security, whether because he was apprehended in the combat area when he was actually fighting or carrying out acts of terrorism, or because there is a concern that he is involved in fighting or terrorism' (Marab v. IDF Commander in Judaea and Samaria [8], at p. 367).

The requirement of an individual threat for the purpose of placing a person in administrative detention is an essential part of the protection of the constitutional right to dignity and personal liberty. This court has held in the past that administrative detention is basically a preventative measure; administrative detention was not intended to punish a person for acts that have already been committed or to deter others from committing them; its purpose is to prevent the tangible risk presented by the acts of the prisoner to the security of the state. It is this risk that justifies the use of the unusual measure of administrative detention that violates human liberty (see and cf. Ajuri v. IDF Commander in West Bank [7], at pp. 370-372, and the references cited there).

19. It will be noted that a personal threat to state security posed by the detainee is also a requirement under the principles of international humanitarian law. Thus, for example, in his interpretation of arts. 42 and 78 of the Fourth Geneva Convention, Pictet emphasizes that the state should resort to the measure of detention only when it has serious and legitimate reasons to believe that the person concerned endangers its security. In his interpretation Pictet discusses membership in organizations whose goal is to harm the security of the state as a ground for deeming a person to be a threat, but he emphasizes the meta-principle that the threat is determined in accordance with the individual activity of that person. In Pictet's words:

'To justify recourse to such measures, the state must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security' (J.S. Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958), at pp. 258-259).

20. No one here disputes that the provisions of the Internment of Unlawful Combatants Law should be interpreted in accordance with the aforesaid principles, whereby administrative detention is conditional upon proving the existence of cause that establishes an individual threat. Indeed, an examination of the provisions of the Law in accordance with the aforesaid principles reveals that the Law does not allow a person to be detained arbitrarily, and that the authority to detain by virtue of the Law is conditional upon the existence of a cause of detention that is based on the individual threat represented by

the prisoner: first, the definition of "unlawful combatant" in s. 2 of the Law requires that it be proven that the prisoner himself took part in or belonged to a force that is carrying out hostilities against the State of Israel, the significance of which we shall address below. Secondly, s. 3(a) of the Law expressly provides that the cause of detention under the Law arises only with regard to someone for whom there is reasonable basis to believe that "his release will harm state security." S. 5(c) of the Law goes on to provide that the District Court will set aside a detention order that was issued pursuant to the Law only when the release of the prisoner "will not harm state security" (or when there are special reasons that justify the release). To this we should add that according to the purpose of the Law, administrative detention is intended to prevent the "unlawful combatant" from returning to the cycle of hostilities, indicating that he was originally a part of that cycle.

The dispute between the parties before us in this context concerns the level of the individual threat that the state must prove for the purpose of administrative detention under the Law. This dispute arises due to the combination of two main provisions of the Law: one is the provision in s. 2 of the Law, a simple reading of which states that an "unlawful combatant" is not only someone who takes a direct or indirect part in hostile acts against the State of Israel, but also a person who is a "member of a force perpetrating hostile acts." The other is the probative presumption in s. 7 of the Law, whereby a person who is a member of a force that perpetrates hostile acts against the State of Israel shall be regarded as someone whose release will harm the security of the state unless the contrary is proved. On the basis of a combination of these two provisions of the Law, the state argued that it is sufficient to prove that a person is a member of a terrorist organization in order to prove his individual danger to the security of the state in such a manner that provides cause for detention under the Law. By contrast, the appellants' approach was that relying upon abstract "membership" in an organization that perpetrates hostile acts against the State of Israel as a basis for administrative detention under the Law renders meaningless the requirement of proving an individual threat, contrary to constitutional principles and international humanitarian law.

21. Resolution of the aforesaid dispute is largely affected by the interpretation of the definition of "unlawful combatant" in s. 2 of the Law. As we have said, the statutory definition of "unlawful combatant" contains two alternatives: the first, "a person who has participated either directly or indirectly in hostile acts against the State of Israel", and the second, a person who is "a member of a force perpetrating hostile acts against the State of Israel," when the person concerned does not satisfy the conditions granting prisoner of war status under international humanitarian law. These two alternatives should be interpreted with reference to the security purpose of the Law and in accordance with the constitutional principles and international humanitarian law that we discussed above, which require proof of an individual threat as grounds for administrative detention.

With respect to the interpretation of the first alternative concerning "a person who has participated either directly or indirectly in hostile acts

against the State of Israel " - according to the legislative purpose and the principles that we have discussed, the obvious conclusion is that in order to intern a person it is not sufficient that he made a remote, negligible or marginal contribution to the hostilities against the State of Israel. In order to prove that a person is an "unlawful combatant", the state must prove that he contributed to the perpetration of hostile acts against the state, either directly or indirectly, in a manner that is likely to indicate his personal dangerousness. Naturally it is not possible to define such a contribution precisely and exhaustively, and the matter must be examined according to the circumstances of each case on its merits.

With respect to the second alternative - a person who is "a member of a force carrying out hostilities against the State of Israel" - here too an interpretation that is consistent with the purpose of the Law and the constitutional principles and international humanitarian law discussed above is required: on the one hand it is insufficient to simply show some kind of tenuous connection with a terrorist organization in order to include the person within the cycle of hostilities in the broad meaning of this concept. On the other hand, in order to establish cause for the internment of a person who is a member of an active terrorist organization whose self-declared goal is to fight incessantly against the State of Israel, it is not necessary for that person to take a direct or indirect part in the hostilities themselves, and it is possible that his connection and contribution to the organization will be expressed in other ways that suffice to include him in the cycle of hostilities in its broad sense, such that his detention will be justified under the Law. Thus we see that for the purpose of internment under the Law, the state must furnish administrative proof that the prisoner is an "unlawful combatant" with the meaning that we discussed, i.e. that the prisoner took a direct or indirect part that involved a contribution to the fighting - a part that was neither negligible nor marginal in hostile acts against the State of Israel - or that the prisoner belonged to an organization that perpetrates hostile acts, in which case we should consider the prisoner's connection and the nature of his contribution to the cycle of hostilities of the organization in the broad sense of this concept.

It should be noted that proving the conditions of the definition of an "unlawful combatant" in the aforesaid sense naturally includes proof of an individual threat that derives from the type of involvement in the organization. It should also be noted that only after the state has proved that the prisoner fulfils the conditions of the statutory definition of "unlawful combatant" can it have recourse to the probative presumption set out in s. 7 of the Law, according to which the release of the prisoner will harm state security as long as the contrary has not been proved. It is therefore clear that s. 7 of the Law does not negate the obligation of the state to prove the threat represented by the prisoner, which derives from the type of involvement in the relevant organization, as required in order to prove him to be an "unlawful combatant" under s. 2 of the Law. In view of this, the inevitable conclusion is that the argument that the Law does not include a requirement of an individual threat goes too far and should be rejected.

Proving someone to be an "unlawful combatant" under the Law - the need for clear and convincing administrative evidence

22. Above, we discussed the interpretation of the definition of "unlawful combatant". According to the aforesaid interpretation, the state is required to prove that the prisoner took a substantial, direct or indirect part in hostile acts against the State of Israel, or that he belonged to an organization that perpetrates hostile acts: all this, taking into consideration his connection and the extent of his contribution to the organization's cycle of hostilities. In these circumstances internment of a person may be necessary in order to remove him from the cycle of hostilities that prejudices the security of the citizens and residents of the State of Israel. The question that arises here is this: what evidence is required in order to convince the court that the prisoner satisfies the conditions of the definition of an "unlawful combatant" with the aforesaid meaning?

This court has held in the past that since administrative detention is an unusual and extreme measure, and in view of its violation of the constitutional right to personal liberty, clear and convincing evidence is required in order to prove a security threat that establishes a cause for administrative detention (see Ajuri v. IDF Commander in West Bank [7], at p. 372, where this was the ruling with regard to the measure of assigned residence; also cf. per Justice A. Procaccia in ADA 8607/04 Fahima v. State of Israel [14], at p. 264; HCJ 554/81 Beransa v. Central Commander [15]). It would appear that the provisions of the Internment of Unlawful Combatants Law should be interpreted similarly. Bearing in mind the importance of the right to personal liberty and in view of the security purpose of the said Law, the provisions of ss. 2 and 3 of the Law should be interpreted as obligating the state to prove, with clear and convincing administrative evidence, that even if the prisoner did not take a substantial, direct or indirect part in hostile acts against the State of Israel, he belonged to a terrorist organization and made a significant contribution to the cycle of hostilities in its broad sense, such that his administrative detention is justified in order to prevent his return to the aforesaid cycle of hostilities.

The significance of the requirement that there be clear and convincing evidence is that importance should be attached to the quantity and quality of the evidence against the prisoner and the degree to which the relevant intelligence information against him is current; this is necessary both to prove that the prisoner is an "unlawful combatant" under s. 2 of the Law and also for the purpose of the judicial review of the need to continue the detention, to which we shall return below. Indeed, the purpose of administrative detention is to prevent anticipated future threats to the security of the state; naturally we can learn of these threats from tangible evidence concerning the prisoner's acts in the past (see per President M. Shamgar in Beransa v. Central Commander [15], at pp. 249-250; HCJ 11026/05 A v. IDF Commander [16], at para. 5). Nevertheless, for the purposes of long-term internment under the Internment of Unlawful Combatants Law, satisfactory administrative evidence is required, and a single piece of evidence about an isolated act carried out in the distant past is insufficient.

23. It follows that for the purposes of internment under the Internment of Unlawful Combatants Law, the state is required to provide clear and convincing evidence that even if the prisoner did not take a substantial direct or indirect part in hostile acts against the State of Israel, he belonged to a terrorist organization and contributed to the cycle of hostilities in its broad sense. It should be noted that this requirement is not always easy to prove, for to prove that someone is a member of a terrorist organization is not like proving that someone is a member of a regular army, due to the manner in which terrorist organizations work and how people join their ranks. In Public Committee against Torture in Israel v. Government of Israel [4], the court held that unlike lawful combatants, unlawful combatants do not as a rule bear any clear and unambiguous signs that they belong to a terrorist organization (see ibid. [4], at para. 24). Therefore, the task of proving that a person belongs to an organization as aforesaid is not always an easy one. Nevertheless, the state is required to furnish sufficient administrative evidence to prove the nature of the prisoner's connection to the terrorist organization, and the degree or nature of his contribution to the broad cycle of combat or hostile acts carried out by the organization.

It should also be noted that in its pleadings before us, the state contended that the power of internment prescribed in the Internment of Unlawful Combatants Law was intended to apply to members of terrorist organizations in a situation of ongoing belligerence in territory that is not subject to the full control of the State of Israel, where in the course of the hostilities a relatively large number of unlawful combatants may fall into the hands of the security forces and it is necessary to prevent them returning to the cycle of hostilities against Israel. The special circumstances that exist in situations of this kind require a different course of action from that which is possible within the territory of the state or in an area subject to belligerent occupation. In any case, it must be assumed that the said reality may pose additional difficulties in assembling evidence as to whether those persons detained by the state on the battle-field belong to a terrorist organization and how great a threat they represent.

The probative presumptions in ss. 7 and 8 of the Law

24. As we have said, s. 7 of the Law establishes a presumption whereby a person who satisfies the conditions of the definition of "unlawful combatant" shall be regarded as someone whose release will harm the security of the state as long as the hostile acts against the State of Israel have not ceased. This is a rebuttable presumption, and the burden of rebutting it rests on the prisoner. We will emphasize what we said above, that the presumption in the said s. 7 is likely to be relevant only after the state has proved that the prisoner satisfies the conditions of the definition of "unlawful combatant". In such circumstances it is presumed that the release of the prisoner will harm state security as required by s. 3(a) of the Law.

As noted above, one of the appellants' main claims in this court was that the aforesaid presumption obviates the need to prove an individual threat from the prisoner, and that this is inconsistent with constitutional principles and international humanitarian law. The respondent countered this argument but went on to declare before us

that as a rule, the state strives to present a broad and detailed evidentiary basis with regard to the threat presented by prisoners, and it has done so to date in relation to all prisoners under the Law, including in the appellants' case. The meaning of this assertion is that in practice, the state refrains from relying on the probative presumption in s. 7 of the Law and it proves the individual threat presented by prisoners on an individual basis, without resorting to the said presumption. It should be noted that this practice of the state is consistent with our finding that proving fulfillment of the conditions of the definition of "unlawful combatant" in s. 2 of the Law involves proving the individual threat that arises from the type of involvement in an organization as explained above.

In any case, since the state has refrained until now from invoking the presumption in s. 7 of the Law, the questions of the extent to which the said presumption reduces the requirement of proving the individual threat for the purpose of internment under the Law, and whether this is an excessive violation of the constitutional right to liberty and of the principles of international humanitarian law, do not arise. We can therefore leave these questions undecided, for as long as the state produces prima facie evidence of the individual threat presented by the prisoner and does not rely on the presumption under discussion, the question of the effect of the presumption on proving an individual threat remains theoretical. It will be noted that should the state choose to invoke the presumption in s. 7 of the Law in the future rather than proving the threat to the required degree, it will be possible to bring the aforesaid questions before the court, since it will be necessary to resolve them concretely rather than theoretically (see CrimA 3660/03 Abeid v. State of Israel [17]; HCJ 1853/02 Navi v. Minister of Energy and National Infrastructures [18]; HCJ 6055/95 Tzemach v. Minister of Defence [19], at p. 250 {641}; HCJ 4827/05 Man, Nature and Law - Israel Environmental Protection Society v. Minister of the Interior [20], at para. 10; CA 7175/98 National Insurance Institute v. Bar Finance Ltd (in liquidation) [21]).

25. Regarding the probative presumption in s. 8 of the Law, this section states as follows:

'Determination regarding hostile acts

8. A determination of the Minister of Defence, by a certificate under his hand, that a particular force is perpetrating hostile acts against the State of Israel or that hostile acts of such force against the State of Israel have ceased or have not yet ceased, shall serve as proof in any legal proceedings, unless proved otherwise.

The appellants argued before us that the said probative presumption transfers the burden of proof to the prisoner in respect of a matter which he will never be able to refute, since it is subject to the discretion of the Minister of Defence. The state countered that in all the proceedings pursuant to the Law it has refrained from relying solely on the determination of the Minister of Defence, and it has presented the court and counsel for the prisoners with an updated and detailed opinion concerning the relevant organization to which the prisoner belongs. This was done in the case of the appellants too, who allegedly belong to the Hezbollah organization. In view of this, we are not required to decide on the fundamental questions raised by the

appellants regarding the said s. 8. In any case, it should be stated that in the situation prevailing in our region, in which the organizations that operate against the security of the State of Israel are well known to the military and security services, it should not be assumed that it is difficult to prove the existence and nature of the activity of hostile forces by means of a specific and updated opinion, in order to provide support for the determination of the Minister of Defence, as stated in s. 8 of the Law.

The Constitutional Examination

26. Up to this point we have dealt with the interpretation of the statutory definition of "unlawful combatant" and the conditions required for proving the existence of a cause for internment under the Law. This interpretation takes into account the language and purpose of the Internment of Unlawful Combatants Law, and it is compatible with the presumption of constitutionality and with the principles of international humanitarian law to which the purpose clause of the Law expressly refers.

Now that we have considered the scope of the Law's application and the nature of the power of internment by virtue thereof, we will proceed to the arguments of the parties concerning the constitutionality of the arrangements prescribed in its framework. These arguments were raised in the District Court and in this court in the course of the hearing on the appellants' internment, in the framework of an indirect attack on the said Law.

Violation of the constitutional right to personal liberty

27. S. 5 of Basic Law: Human Dignity and Liberty provides as follows:

'Personal liberty

5. There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.

There is no dispute between the parties before us that the Internment of Unlawful Combatants Law violates the constitutional right to personal liberty entrenched in the aforesaid s. 5. This is a significant and serious violation, in that the Law allows the use of the extreme measure of administrative detention, which involves depriving a person of his personal liberty. It should be clarified that the Internment of Unlawful Combatants Law was admittedly intended to apply to a foreign entity belonging to a terrorist organization that operates against the state security (see para. 11 above). In Israel, however, the internment of unlawful combatants is carried out by the government authorities, who are bound in every case to respect the rights anchored in the Basic Law (see ss. 1 and 11 of the Basic Law). Accordingly, the violation inherent in the arrangements of the Internment of Unlawful Combatants Law should be examined in keeping with the criteria in the Basic Law.

Examining the violation of the constitutional right from the perspective of the limitation clause

28. No one disputes that the right to personal liberty is a constitutional right with a central role in our legal system, lying at the heart of the values of the State of Israel as a Jewish and democratic state (see Marab v. IDF Commander in Judaea and Samaria [8], at para. 20). It has been held in our case law that "personal liberty is a

constitutional right of the first degree, and from a practical viewpoint it is also a condition for realizing other basic rights" (Tzemach v. Minister of Defence [16], at p. 251; see also HCJ 5319/97 Kogen v. Chief Military Prosecutor [22], at p. 81 {513}; CrimA 4596/05 Rosenstein v. State of Israel [23], at para. 53; CrimA 4424/98 Silgado v. State of Israel [24], at pp. 539-540). Nevertheless, like all protected human rights the right to personal liberty is not absolute, and a violation of the right is sometimes necessary in order to protect essential public interests. The balancing formula in this context appears in the limitation clause in s. 8 of the Basic Law, which states:

'Violation of Rights

8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or according to a law as stated by virtue of explicit authorization therein. '

The question confronting us is whether the violation of the right to personal liberty engendered by the Internment of Unlawful Combatants Law complies with the conditions of the limitation clause. The arguments of the parties before us focused on the requirements of proper purpose and proportionality, and these will be the focus of our deliberations as well.

29. At the outset, and before we examine the provisions of the Law from the perspective of the limitation clause, we should mention that the court will not hasten to intervene and set aside a statutory provision enacted by the legislature. The court is bound to uphold the law as a manifestation of the will of the people (HCJ 1661/05 Gaza Coast Regional Council v. Knesset [25], at pp. 552-553; HCJ 4769/95 Menahem v. Minister of Transport [26], at pp. 263-264; HCJ 3434/96 Hoffnung v. Knesset Speaker [27], at pp. 66-67). Thus the principle of the separation of powers finds expression: the legislative authority determines the measures that should be adopted in order to achieve public goals, whereas the judiciary examines whether these measures violate basic rights in contravention of the conditions set for this purpose in the Basic Law. It is the legislature that determines national policy and formulates it in statute, whereas the court scrutinizes the constitutionality of the legislation to reveal the extent to which it violates constitutional human rights (see per President A. Barak in Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of the Interior [10], at para. 78). It has therefore been held in the case law of this court that when examining the legislation of the Knesset from the perspective of the limitation clause, the court will act "with judicial restraint, caution and moderation" (Menahem v. Minister of Transport [26], at p. 263). The court will not refrain from constitutional scrutiny of legislation, but it will act with caution and exercise its constitutional scrutiny in order to protect human rights within the constraints of the limitation clause, while refraining from reformulating the policy that the legislature saw fit to adopt. Thus the delicate balance between majority rule and the principle of the separation of powers on the one hand, and the protection of the basic values of the legal system and human rights on the other, will be preserved.

The requirement of a proper purpose

30. According to the limitation clause, a statute that violates a constitutional right must have a proper purpose. It has been held in our case law that a legislative purpose is proper if it is designed to protect human rights, including by determining a reasonable and fair balance between the rights of individuals with conflicting interests, or if it serves an essential public purpose, an urgent social need or an important social concern whose purpose is to provide an infrastructure for coexistence and a social framework that seeks to protect and promote human rights (see ibid. [26], at p. 264; HCJ 6893/05 Levy v. Government of Israel [28], at pp. 889-890; HCJ 5016/96 Horev v. Minister of Transport [29], at pp. 52-53, {206}). It has also been held that not every purpose justifies a violation of constitutional basic rights, and that the essence of the violated right and the magnitude of the violation are likely to have ramifications for the purpose that is required to justify the violation.

In our remarks above we explained that the Internment of Unlawful Combatants Law, according to its wording and its legislative history, was intended to prevent persons who threaten the security of the state due to their activity or their membership in terrorist organizations that carry out hostile acts against the State of Israel from returning to the cycle of hostilities (see para. 6 above). This legislative purpose is a proper one. Protecting state security is an urgent and even essential public need in the harsh reality of unremitting, murderous terrorism that harms innocent people indiscriminately. It is difficult to exaggerate the security importance of preventing members of terrorist organizations from returning to the cycle of hostilities against the State of Israel in a period of relentless terrorist activity that threatens the lives of the citizens and residents of the State of Israel. In view of this, the purpose of the Law under discussion may well justify a significant and even serious violation of human rights, including the right to personal liberty. Thus was discussed by President A. Barak when he said that -

'There is no alternative - in a freedom and security seeking democracy - to striking a balance between liberty and dignity on the one hand and security on the other. Human rights should not become a tool for depriving the public and the state of security. A balance - a delicate and difficult balance - is required between the liberty and dignity of the individual and state and public security' (A v. Minister of Defence [1], at p.741).

(See also Ajuri v. IDF Commander in West Bank [7], at p. 383; per Justice D. Dorner in HCJ 5627/02 Saif v. Government Press Office [30], at pp. 76-77, {para.6 at pp. 197-198}; EA 2/84 Neiman v. Chairman of Central Elections Committee for Tenth Knesset [31], at p. 310 {160}).

The purpose of the Internment of Unlawful Combatants Law is therefore a proper one. But this is not enough. Within the framework of constitutional scrutiny, we are required to proceed to examine whether the violation of the right to personal liberty does not exceed what is necessary for realizing the purpose of the Law. We shall now examine this question.

The requirement that the measure violating a human right is not excessive

31. The main issue that arises with respect to the constitutionality of the Law concerns the proportionality of the arrangements it prescribes. As a rule, it is customary to identify three subtests that constitute fundamental criteria for determining the proportionality of a statutory act that violates a constitutional human right: the first is the rational connection test, whereby the legislative measure violating the constitutional right and the purpose that the Law is intended to realize must be compatible; the second is the least harmful measure test, which requires that the legislation violate the constitutional right to the smallest degree possible in order to achieve the purpose of the Law; and the third is the test of proportionality in the narrow sense, according to which the violation of the constitutional right must be commensurate with the social benefit it bestows (see Menahem v. Minister of Transport [26], at p. 279; Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of the Interior [10], at paras. 65-75; Beit Sourik Village Council v. Government of Israel [6], at pp. 839-840).

It has been held in the case law of this court that the test of proportionality, with its three subtests, is not a precise test since by its very nature it involves assessment and evaluation. The subtests sometimes overlap and each of them allows the legislature a margin of discretion. There may be circumstances in which the choice of an alternative measure that violates the constitutional right slightly less results in a significant reduction in the realization of the purpose or the benefit derived from it; it would not be right therefore to obligate the legislature to adopt the aforesaid measure. Consequently this court has accorded recognition to "constitutional room for maneuver" which is also called the "zone of proportionality". The bounds of the constitutional room for maneuver are determined by the court in each case on its merits and according to its circumstances, bearing in mind the nature of the right that is being violated and the extent of the violation as opposed to the nature and substance of the competing rights or interests. This court will not substitute its own discretion for the criteria chosen by the legislature and will refrain from intervention as long as the measure chosen by the legislature falls within the zone of proportionality. The court will only intervene when the chosen measure significantly departs from the bounds of the constitutional room for maneuver and is clearly disproportionate (see CA 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village [32], at p. 438; HCJ 450/97 Tenufa Manpower and Maintenance Services Ltd. v. Minister of Labour and Social Affairs [33]; AAA 4436/02 Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality [34], at p. 815; Gaza Coast Regional Council v. Knesset [25], at pp. 550-551).

In the circumstances of the case before us, the violation of the constitutional right to personal liberty is significant and even severe in its extent. Nevertheless, as we said above, the legislative purpose of removing "unlawful combatants" from the cycle of hostilities in order to protect state security is essential in view of the reality of murderous terrorism that threatens the lives of the residents and citizens of the State of Israel. In these circumstances, I think that the existence of relatively wide room for legislative maneuver should be recognized, to allow the selection of the suitable measure for realizing the purpose of

the Law.

The First Subtest: A Rational Connection Between the Measure and the Purpose

32. The measure chosen by the legislature in order to realize the purpose of the Internment of Unlawful Combatants Law is administrative detention. As we explained in para. 21 above, for the purpose of internment under the Law the state must provide clear and convincing proof that the prisoner is an "unlawful combatant" within the meaning that we discussed. The state is therefore required to prove the personal threat presented by the prisoner, deriving from his particular form of involvement in the organization. Administrative detention constitutes a suitable means of averting the security threat presented by the prisoner, in that it prevents the "unlawful combatant" from returning to the cycle of hostilities against the State of Israel and thereby serves the purpose of the Law. Therefore the first subtest of proportionality - the rational connection test - is satisfied.

The main question concerning the proportionality of the Law under discussion concerns the second subtest, i.e. the question of whether there exist alternative measures that involve a lesser violation of the constitutional right. In examining this question, we should first consider the appellants' argument that there are more proportionate measures for realizing the purpose of the Internment of Unlawful Combatants Law. Next we should consider the specific arrangements prescribed in the Law and examine whether they exceed the zone of proportionality. Finally we should examine the Law in its entirety and examine whether the combination of arrangements that were prescribed in the Law fulfils the test of proportionality in the narrow sense, i.e. whether the violation of the right to personal liberty is reasonably commensurate with the public benefit that arises from it in realizing the legislative purpose.

The argument that there are alternative measures to detention under the Law

33. The appellants' main argument concerning proportionality was that alternative measures to administrative detention exist by virtue of the Law, involving a lesser violation of the right to liberty. In this context, the appellants raised two main arguments: first, it was argued that for the purpose of realizing the legislative purpose it is not necessary to employ the measure of administrative detention, and the appellants ought to be recognized as prisoners of war; alternatively, recourse should be had to the measure of trying the appellants on criminal charges. Secondly, it was argued that even if administrative detention is necessary in the appellants' case, this should be carried out under the Emergency Powers (Detentions) Law, 5739-1979, for according to their argument, the violation that it involves is more proportionate than that of the Internment of Unlawful Combatants Law.

The first argument - that the appellants should be declared prisoners of war - must be rejected. In HCJ 2967/00 Arad v. Knesset [35], which considered the case of Lebanese prisoners, a similar argument to the one raised in the present appellants' case was rejected:

'We agree with the position of Mr Nitzan that the Lebanese prisoners should not be regarded as prisoners of war. It is sufficient that they do

not satisfy the provisions of art. 4(2)(d) of the Third Geneva Convention, which provides that one of the conditions that must be satisfied in order to comply with the definition of "prisoners of war" is "that of conducting their operations in accordance with the laws and customs of war." The organizations to which the Lebanese prisoners belonged are terrorist organizations, which operate contrary to the laws and customs of war. Thus, for example, these organizations deliberately attack civilians and shoot from the midst of the civilian population, which they use as a shield. All of these are operations that are contrary to international law. Indeed, Israel's consistent position over the years was not to regard the various organizations such as Hezbollah as organizations to which the Third Geneva Convention applies. We have found no reason to intervene in this position' (ibid. [35], at p. 191).

(See also CrimApp 8780/06 Sarur v. State of Israel [36]; HCJ 403/81 Jabar v. Military Commander [37]; and also HCJ 102/82 Tzemel v. Minister of Defence [38], at pp. 370-371).

Similar to what was said in Arad v. Knesset [35], in the circumstances of the case before us, too, the appellants should not be accorded prisoner of war status, since they do not satisfy the conditions of art. 4 of the Third Geneva Convention, and primarily, the condition concerning the observance of the laws of war.

The appellants' argument that a more proportionate measure would be to try the prisoners on criminal charges should also be rejected, in view of the fact that trying a person on criminal charges is different in essence and purpose from the measure of administrative detention. Putting a person on trial is intended to punish him for acts committed in the past, and it is dependent upon the existence of evidence that can be brought before a court in order to prove guilt beyond a reasonable doubt. Administrative detention, on the other hand, was not intended to punish but to prevent activity that is prohibited by law and endangers the security of the state. The quality of evidence that is required for administrative detention is different from that required for a criminal trial. Moreover, as a rule recourse to the extreme measure of administrative detention is justified in circumstances where other measures, including the conduct of a criminal trial, are impossible, due to the absence of sufficient admissible evidence or the impossibility of revealing privileged sources, or when a criminal trial does not provide a satisfactory solution to averting the threat posed to the security of the state in circumstances in which, after serving his sentence, the person is likely to revert to being a security risk (see, inter alia, ADA 4794/05 Ufan v. Minister of Defence [39]; ADA 7/94 Ben-Yosef v. State of Israel [40]; ADA 8788/03 Federman v. Minister of Defence [41], at pp. 185-189; Fahima v. State of Israel [14], at pp. 263-264). In view of all the above, it cannot be said that a criminal trial constitutes an alternative measure for realizing the purpose of the Internment of Unlawful Combatants Law.

34. As we have said, the appellants' alternative claim before us was that even if it is necessary to place them in administrative detention, this should be done pursuant to the Emergency Powers (Detentions) Law. According to this argument, the Emergency Powers (Detentions) Law violates the right to personal liberty to a lesser degree than the

provisions of the Internment of Unlawful Combatants Law. Thus, for example, it is argued that the Emergency Powers (Detentions) Law requires an individual threat as a cause for detention, without introducing presumptions that transfer the burden of proof to the prisoner, as provided in the Internment of Unlawful Combatants Law. Moreover, the Emergency Powers (Detentions) Law requires a judicial review to be conducted within forty-eight hours of the time of detention, and a periodic review every three months, whereas the Internment of Unlawful Combatants Law allows a prisoner to be brought before a judge as much as fourteen days after the time he is detained, and it requires a periodic review only once every half year; under the Emergency Powers (Detentions) Law, the power of detention is conditional upon the existence of a state of emergency in the State of Israel, whereas internment under the Internment of Unlawful Combatants Law does not set such a condition and it is even unlimited in time, apart from the stipulation that the internment will end by the time that the hostilities against the State of Israel have ceased. To this it should be added that detention under the Emergency Powers (Detentions) Law is effected by an order of the Minister of Defence, whereas internment under the Internment of Unlawful Combatants is effected by an order of the Chief of Staff, who is authorised to delegate his authority to an officer with the rank of major-general. Taking into consideration all the above, the appellants' argument before us is that detention under the Emergency Powers (Detentions) Law constitutes a more proportionate alternative than administrative detention under the Internment of Unlawful Combatants Law.

35. Prima facie the appellants are correct in their argument that in certain respects the arrangements prescribed in the Emergency Powers (Detentions) Law violate the right to personal liberty to a lesser degree than the Internment of Unlawful Combatants Law. However, we accept the state's argument in this context that the Internment of Unlawful Combatants Law is intended for a different purpose than that of the Emergency Powers (Detentions) Law. In view of the different purposes, the two laws contain different arrangements, such that the Emergency Powers (Detentions) Law does not constitute an alternative measure for achieving the purpose of the Law under discussion in this case. Let us clarify our position.

The Emergency Powers (Detentions) Law applies in a time of emergency and in general, its purpose is to prevent threats to state security arising from internal entities (i.e., citizens and residents of the state). Accordingly, the Law prescribes the power of administrative detention that is usually invoked with regard to isolated individuals who threaten state security and whose detention is intended to last for relatively short periods of time, apart from exceptional cases. On the other hand, as we clarified in para. 11 above, the Internment of Unlawful Combatants Law is intended to apply to foreign entities who operate within the framework of terrorist organizations against the security of the state. The Law was intended to apply at a time of organized and persistent hostile acts against Israel on the part of terrorist organizations. The purpose of the Law is to prevent persons who belong to these organizations or who take part in hostile acts

under their banner from returning to the cycle of hostilities, as long as the hostilities against the State of Israel continue. In order to achieve the aforesaid purpose, the Internment of Unlawful Combatants Law contains arrangements that are different from those in the Emergency Powers (Detentions) Law (we will discuss the question of the proportionality of these arrangements below). Moreover, according to the state, the power of detention prescribed in the Internment of Unlawful Combatants Law was intended to apply to members of terrorist organizations in a persistent state of war in a territory that is not a part of Israel, where a relatively large number of enemy combatants is likely to fall into the hands of the military forces during the fighting. The argument is that these special circumstances justify recourse to measures that are different from those usually employed. Thus we see that even though the Emergency Powers (Detentions) Law and the Internment of Unlawful Combatants Law prescribe a power of administrative detention whose purpose is to prevent a threat to state security, the specific purposes of the aforesaid laws are different and therefore the one cannot constitute an alternative measure for achieving the purpose of the other. In the words of the trial court: "We are dealing with a horizontal plane on which there are two acts of legislation, one next to the other. Each of the two was intended for a different purpose and therefore, in circumstances such as our case, they are not alternatives to one another" (p. 53 of the decision of the District Court of 19 July 2006). It should be clarified that in appropriate circumstances, the Emergency Powers (Detentions) Law could well be used to detain foreigners who are not residents or citizens of the State of Israel. Despite this, the premise is that the specific purposes of the Emergency Powers (Detentions) Law and the Internment of Unlawful Combatants Law are different, and therefore it cannot be determined in a sweeping manner that detention under the Emergency Powers (Detentions) Law constitutes a more appropriate and proportionate alternative to detention under the Internment of Unlawful Combatants Law.

36. In concluding these remarks it will be mentioned that the appellants, who are inhabitants of the Gaza Strip, were first detained in the years 2002-2003, when the Gaza Strip was subject to belligerent occupation. At that time, the administrative detention of the appellants was carried out under the security legislation that was in force in the Gaza Strip. A change occurred in September 2005, when Israeli military rule in the Gaza Strip ended and the territory ceased to be subject to belligerent occupation (see para. 11 above). One of the ancillary consequences of the end of the Israeli military rule in the Gaza Strip was the repeal of the security legislation that was in force there. Consequently, the Chief of Staff issued detention orders for the appellants under the Internment of Unlawful Combatants Law.

In view of the nullification of the security legislation in the Gaza Strip, no question arises in relation to inhabitants of that region as to whether administrative detention by virtue of security legislation may constitute a suitable and more proportionate measure than internment under the Internment of Unlawful Combatants Law. Nonetheless, I think it noteworthy that the aforesaid question may arise with regard to inhabitants of the territories that are under the belligerent

occupation of the State of Israel (Judaea and Samaria). As emerges from the abovesaid in para. 11, prima facie I tend to the opinion that both under the international humanitarian law that governs the matter (art. 78 of the Fourth Geneva Convention) and according to the test of proportionality, administrative detention of inhabitants of Judaea and Samaria should be carried out by virtue of the current security legislation that is in force in the territories, and not by virtue of the Internment of Unlawful Combatants Law in Israel. This issue does not, however, arise in the circumstances of the case before us and therefore I think it right to leave it for future consideration.

Proportionality of the specific arrangements prescribed in the Law

37. In view of all of the reasons elucidated above, we have reached the conclusion that the measures identified by the appellants in their pleadings cannot constitute alternative measures to administrative detention by virtue of the Law under discussion. The appellants further argued that the specific arrangements prescribed in the Internment of Unlawful Combatants Law violate the right to personal liberty excessively, and more proportionate arrangements that violate personal liberty to a lesser degree could have been set. Let us therefore proceed to examine this argument with regard to the specific arrangements prescribed in the Law.

(1) Conferring the power of detention on military personnel

38. S. 3(a) of the Law, cited in para. 15 above, provides that an internment order by virtue of the Law will be issued by the Chief of Staff "under his hand" and will include the grounds for the internment "without prejudicing state security requirement." S. 11 of the Law goes on to provide that "the Chief of Staff may delegate his powers under this Law to any officer of the rank of major-general that he may determine." According to the appellants, conferring the power of detention by virtue of the Law on the Chief of Staff, who may delegate it to an officer of the rank of major-general, is an excessive violation of the prisoners' right to personal liberty. In this context, the appellants emphasized that the Emergency Powers (Detentions) Law confers the power of administrative detention on the Minister of Defence only.

In the circumstances of the case, we have come to the conclusion that the state is correct in its argument that conferring the power of detention on the Chief of Staff or an officer of the rank of major-general falls within the zone of proportionality and we should not intervene. First, as we said above, the specific purposes of the Internment of Unlawful Combatants Law and the Emergency Powers (Detentions) Law are different, and there is therefore a difference in the arrangements prescribed in the two Laws. Since the Law under consideration before us was intended to apply, inter alia, in a situation of combat and prolonged military activity against terrorist organizations in a territory that is not subject to the total control of the State of Israel, there is logic in establishing an arrangement that confers the power of internment on military personnel of the highest rank. Secondly, it should be made clear that the provisions of international law do not preclude the power of detention of the military authority responsible for the security of a territory in which there are protected civilians. This may support the conclusion that

conferring the power of detention on the Chief of Staff or an officer of the rank of major-general does not, in itself, violate the right to personal liberty disproportionately.

(2) The prisoner's right to a hearing after an internment order is issued

39. Ss. 3(b) and 3(c) of the Law provide as follows:

Internment of unlawful combatant

3. (a) ...

(b) An internment order may be granted in the absence of the person held by the state authorities.

(c) An internment order shall be brought to the attention of the prisoner at the earliest possible date, and he shall be given an opportunity to put his submissions in respect of the order before an officer of at least the rank of lieutenant-colonel to be appointed by the Chief of General Staff; the submissions of the prisoner shall be recorded by the officer and shall be brought before the Chief of General Staff; if the Chief of General Staff finds, after reviewing the submissions of the prisoner, that the conditions prescribed in subsection (a) have not been fulfilled, he shall quash the internment order.

According to s. 3(b) above, an internment order may be granted by the Chief of Staff (or a major-general appointed by him) without the prisoner being present. S. 3(c) of the Law goes on to provide that the order shall be brought to the attention of the prisoner "at the earliest possible date" and that he shall be given a hearing before an army officer of at least the rank of lieutenant-colonel, in order to allow him to put his submissions; the prisoner's submissions shall be recorded by the officer and brought before the Chief of Staff (or the major-general acting for him). According to the Law, if after reviewing the prisoner's arguments the Chief of Staff (or the major-general) is persuaded that the conditions for detention under the Law are not fulfilled, the internment order shall be quashed.

The appellants' argument in this context was that this arrangement violates the right to personal liberty excessively in view of the fact that the prisoner may put his submissions only after the event, i.e., after the internment order has been issued, and only before an officer of the rank of lieutenant-colonel, who will pass the submissions on to the Chief of Staff (or a major-general), in order that they reconsider their position. According to the appellants, it is the person who issues the order - the Chief of Staff or the major-general - who should hear the prisoner's arguments, even before the order is issued. These arguments should be rejected, for several reasons: first, it is established case law that the person who makes the decision does not need to conduct the hearing personally, and that it is also permissible to conduct the hearing before someone who has been appointed for this purpose by the person making the decision, provided that the person making the decision - in our case the Chief of Staff or the major-general acting on his behalf - will have before him all of the arguments and facts that were raised at the hearing (see HCJ 5445/93 Ramla Municipality v. Minister of the Interior [42], at p. 403; HCJ 2159/97 Ashkelon Coast Regional Council v. Minister of the Interior [43], at pp. 81-82). Secondly, from a practical viewpoint, establishing

a duty to conduct hearings in advance, in the personal presence of the Chief of Staff or the major-general in times of combat and in circumstances in which there are liable to be many detentions in the combat zone as well, may present significant logistical problems. Moreover, conducting a hearing in the manner proposed by the appellants is contrary to the purpose of the Law, which is to allow the immediate removal of the "unlawful combatants" from the cycle of hostilities in an effective manner. It should be emphasized that the hearing under s. 3(c) of the Law is a preliminary process whose main purpose is to prevent mistakes of identity. As will be explained below, in addition to the preliminary hearing, the Law requires that a judicial review take place before a District Court judge no later than fourteen days from the date of issue of the internment order, thereby lessening the violation claimed by the appellants. In view of all of the above, it cannot be said that the arrangement prescribed in the Law with respect to the hearing falls outside the zone of proportionality.

(3) Judicial review of internmentunder the Law

40. S. 5 of the Law, entitled "Judicial Review", prescribes the following arrangement in subsecs. (a) - (d):

5. (a) A prisoner shall be brought before a judge of the District Court no later than fourteen days after the date of granting the internment order; where the judge of the District Court finds that the conditions prescribed in s. 3(a) have not been fulfilled he shall quash the internment order.

(b) Where the prisoner is not brought before the District Court and where the hearing has not commenced before it within fourteen days of the date of granting the internment order, the prisoner shall be released unless there exists another ground for his detention under provisions of any law.

(c) Once every six months from the date of issue of an order under s. 3(a) the prisoner shall be brought before a judge of the District Court; where the Court finds that his release will not harm State security or that there are special grounds justifying his release, it shall quash the internment order.

(d) A decision of the District Court under this section is subject to appeal within thirty days to the Supreme Court, a single judge of which shall hear the appeal with; the Supreme Court shall have all the powers vested in the District Court under this Law.

The appellants argued before us that the judicial review process prescribed in s. 5 violates the right to personal liberty excessively, for two main reasons: first, under s. 5(a) of the Law, the prisoner should be brought before a District Court judge no later than fourteen days from the date of his detention. According to the appellants, this is a long period of time that constitutes an excessive violation of the right to personal liberty and of the prisoner's right of access to the courts. In this context the appellants argued that in view of the constitutional status of the right to personal liberty and in accordance with the norms applicable in international law, the legislature should have determined that the prisoner be brought to a judicial review "without delay." Secondly, it was argued that the period of time set in s. 5(c) of the Law for conducting periodic judicial review of the internment - every six months - is too long as well as disproportionate. By way of

comparison, the appellants pointed out that the Emergency Powers (Detentions) Law prescribes in this regard a period of time that is shorter by half - only three months. In reply, the state argued that in view of the purpose of the Law, the periods of time set in s. 5 are proportionate and they are consistent with the provisions of international law.

41. S. 5 of the Law is based on the premise that judicial review constitutes an integral part of the administrative detention process. In this context it has been held in the past that -

'Judicial intervention in the matter of detention orders is essential. Judicial intervention is a safeguard against arbitrariness; it is required by the principle of the rule of law…. It ensures that the delicate balance between the liberty of the individual and the security of the public - a balance that lies at the heart of the laws of detention - will be maintained' (per President A. Barak in Marab v. IDF Commander in Judaea and Samaria [8], at page 368).

The main thrust of the dispute regarding the constitutionality of s. 5 of the Law concerns the proportionality of the periods of time specified therein.

With respect to the periods of time between the internment of the prisoner and the initial judicial review of the internment order, it has been held in the case law of this court that in view of the status of the right to personal liberty and in order to prevent mistakes of fact and of discretion whose price is likely to be a person's loss of liberty without just cause, the administrative prisoner should be brought before a judge "as soon as possible" in the circumstances (per President M. Shamgar in HCJ 253/88 Sajadia v. Minister of Defence [44], at pp. 819-820). It should be noted that this case law is consistent with the arrangements prevailing in international law. International law does not specify the number of days during which it is permitted to detain a person without judicial intervention; rather, it lays down a general principle that can be applied in accordance with the circumstances of each case on its merits. According to the aforesaid general principle, the decision on internment should be brought before a judge or another person with judicial authority "promptly" (see art. 9(3) of the International Covenant on Civil and Political Rights, 1966, which is regarded as being of a customary nature; see also the references cited in Marab v. IDF Commander in Judaea and Samaria [8], at pp. 369-370). A similar principle was established in arts. 43 and 78 of the Fourth Geneva Convention whereby the judicial (or administrative) review of a detention decision should be made "as soon as possible" (as stated in art. 43 of the Convention) or "with the least possible delay" (as stated in art. 78 of the Convention). Naturally the question as to what is the earliest possible date for bringing a prisoner before a judge depends upon the circumstances of the case.

In the present case, the Internment of Unlawful Combatants Law provides that the date for conducting the initial judicial review is "no later than fourteen days from the date of granting the internment order." The question that arises in this context is whether the said period of time violates the right to personal liberty excessively. The answer to this question lies in the purpose of the Law and in the special circumstances of the particular internment, as well as in the

interpretation of the aforesaid provision of the Law. As we have said, the Internment of Unlawful Combatants Law applies to foreign entities who belong to terrorist organizations and who are engaged in ongoing hostilities against the State of Israel. As noted, the Law was intended to apply, inter alia, in circumstances in which a state of belligerence exists in territory that is not a part of Israel, in the course of which a relatively large number of enemy combatants may fall into the hands of the military forces. In view of these special circumstances, we do not agree that the maximum period of time of fourteen days for holding an initial judicial review of the detention order departs from the zone of proportionality in such a way as to justify our intervention by shortening the maximum period prescribed in the Law. At the same time, it should be emphasized that the period of time prescribed in the Law is a maximum period and it does not exempt the state from making an effort to conduct a preliminary judicial review of the prisoner's case as soon as possible in view of all the circumstances. In other words, although we find no cause to intervene in the proportionality of the maximum period prescribed in the Law, the power of detention in each specific case should be exercised proportionately, and fourteen whole days should not be allowed to elapse before conducting an initial judicial review where it is possible to conduct a judicial review earlier (cf. ADA 334/04 Darkua v. Minister of the Interior [45], at p. 371, in which it was held that even though under the Entry into Israel Law, 5712-1952, a person taken into custody must be brought before the Custody Review Tribunal no later than fourteen days from the date on which he was taken into custody, the whole of the aforesaid fourteen days should not be used when there is no need to do so).

In concluding these remarks it should be noted that s. 3(c) of the Law, cited above, provides that "An internment order shall be brought to the attention of the prisoner at the earliest possible date, and he shall be given an opportunity to put his submissions in respect of the order before an officer of at least the rank of lieutenant-colonel to be appointed by the Chief of General Staff" [emphasis added - D.B.]. Thus we see that although s. 5(a) of the Law prescribes a maximum period of fourteen days for an initial judicial review, s. 3(c) of the Law imposes an obligation to conduct a hearing for the prisoner before a military officer at the earliest possible time after the order is issued. The aforesaid hearing is certainly not a substitute for a review before a judge of the District Court, which is an independent and objective judicial instance, but the very fact of conducting an early hearing as soon as possible after the issuing of the order may somewhat reduce the concern over an erroneous or ostensibly unjustified detention, which will lead to an excessive violation of the right to liberty.

42. As stated, the appellants' second argument concerned the frequency of the periodic judicial review of internment under the Law. According to s. 5(c) of the Law, the prisoner must be brought before a District Court judge once every six months from the date of issuing the order; if the court finds that the release of the prisoner will not harm state security or that there are special reasons that justify his release, the court will quash the internment order.

The appellants' argument before us was that a frequency of once every

six months is insufficient and it disproportionately violates the right to personal liberty. Regarding this argument, we should point out that the periodic review of the necessity of continuing the administrative detention once every six months is consistent with the requirements of international humanitarian Law. Thus, art. 43 of the Fourth Geneva Convention 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. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.'

It emerges from art. 43 that periodic review of a detention order "at least twice yearly" is consistent with the requirements of international humanitarian law, in a manner that supports the proportionality of the arrangement prescribed in s. 5(c) of the Law. Moreover, whereas art. 43 of the Fourth Geneva Convention considers an administrative review that is carried out by an administrative body to be sufficient, the Internment of Unlawful Combatants Law provides that it is a District Court judge who must conduct a judicial review of the internment orders under the Law, and his decision may be appealed to the Supreme Court which will hear the appeal with a single judge (s. 5(d) of the Law). In view of all this, it cannot be said that the arrangement prescribed in the Law with regard to the nature and frequency of the judicial review violates the constitutional right to personal liberty excessively.

(4) Departure from the rules of evidence and reliance upon privileged evidence within the framework of proceedings under the Law

43. S. 5(e) of the Law provides as follows:

'Judicial review

5. ...

(e) It shall be permissible to depart from the laws of evidence in proceedings under this Law, for reasons to be recorded; the court may admit evidence, even in the absence of the prisoner or his legal representative, or not disclose such evidence to the aforesaid if, after having reviewed the evidence or heard the submissions, even in the absence of the prisoner or his legal representative, it is convinced that disclosure of the evidence to the prisoner or his legal representative is likely to harm state security or public security; this provision shall not derogate from any right not to give evidence under Chapter 3 of the Evidence Ordinance [New Version], 5731-1971.

The appellants' argument before us was that the arrangement prescribed in the aforesaid s. 5(e) disproportionately violates the right to personal liberty, since it allows the judicial review of an internment order by virtue of the Law to depart from the laws of evidence and it allows evidence to be heard ex parte in the absence of the prisoner and his legal representative and without it being disclosed to them.

With respect to this argument it should be noted that by their very nature, administrative detention proceedings are based on administrative evidence concerning security matters. The nature of

administrative detention for security reasons requires recourse to evidence that does not satisfy the admissibility tests of the laws of evidence and that therefore may not be submitted in a regular criminal trial. Obviously the confidentiality of the sources of the information is important, and it is therefore often not possible to disclose all the intelligence material that is used to prove the grounds for detention. Reliance on inadmissible administrative evidence and on privileged material for reasons of state security lies at the heart of administrative detention, for if there were sufficient admissible evidence that could be shown to the prisoner and brought before the court, as a rule the measure of criminal indictment should be chosen (see Federman v. Minister of Defence [41], at p. 185-186). There is no doubt that a proceeding that is held ex parte in order to present privileged evidence to the court has many drawbacks. But the security position in which we find ourselves in view of the persistent hostilities against the security of the State of Israel requires recourse to tools of this kind when granting a detention order under the Internment of Unlawful Combatants Law, the Emergency Powers (Detentions) Law or the security legislation in areas under military control.

It should be emphasized that in view of the problems inherent in relying upon administrative evidence for the purpose of detention, over the years the judiciary has developed a tool for control and scrutiny of intelligence material, to the extent possible in a proceeding of the kind that takes place in judicial review of administrative detention. In the framework of these proceedings the judge is required to question the validity and credibility of the administrative evidence that is brought before him and to assess its weight. In this regard the following was held in HCJ 4400/98 Braham v. Justice Colonel Shefi [46], at p. 346, per Justice T. Or:

'The basic right of every human being as such to liberty is not an empty slogan. The protection of this basic value requires that we imbue the process of judicial review of administrative detention with meaningful content. In this framework, I am of the opinion that the professional judge can and should consider not only the question of whether, prima facie, the competent authority was authorized to decide what it decided on the basis of the material that was before it; the judge should also consider the question of the credibility of the material that was submitted as a part of his assessment of the weight of the material. Indeed, that fact that certain "material" is valid administrative evidence does not exempt the judge from examining the degree of its credibility against the background of the other evidence and all the circumstances of the case. In this context, the "administrative evidence" label does not exempt the judge from having to demand and receive explanations from those authorities that are capable of providing them. To say otherwise would mean weakening considerably the process of judicial review, and allowing the deprivation of liberty for prolonged periods on the basis of flimsy and insufficient material. Such an outcome is unacceptable in a legal system that regards human liberty as a basic right.'

It has also been held in our case law that in view of the problems inherent in submitting privileged evidence ex parte, the court that conducts a judicial review of an administrative detention is required to

act with caution and great precision when examining the material that is brought before it for its eyes only. In such circumstances, the court has a duty to act with extra caution and to examine the privileged material brought before it from the viewpoint of the prisoner, who has not seen the material and cannot argue against it. In the words of Justice A. Procaccia: "… the court has a special duty to act with great care when examining privileged material and to act as the 'mouth' of the prisoner where he has not seen the material against him and cannot defend himself" (HCJ 11006/04 Kadri v. IDF Commander in Judaea and Samaria [47], at para. 6; see also CrimApp 3514/97 A v. State of Israel [48]).

Thus we see that in view of the reliance on administrative evidence and the admission of privileged evidence ex parte, the court conducting a judicial review under the Internment of Unlawful Combatants Law is required to act with caution and precision in examining the material brought before it. The scope of the judicial review cannot be defined ab initio and it is subject to the discretion of the judge, who will take into account the circumstances of each case on its merits, such as the quantity, level and quality of the privileged material brought before him for his inspection, as opposed to the activity attributed to the prisoner that gives rise to the allegation that he represents a threat to state security. In a similar context the following was held:

'Information relating to several incidents is not the same as information concerning an isolated incident; information from one source is not the same as information from several sources; and information that is entirely based on the statements of agents and informers only is not the same as information that is also supported or corroborated by documents submitted by the security or intelligence services that derive from employing special measures' (per Justice E. Mazza in HCJ 5994/03 Sadar v. IDF Commander in West Bank [49], at para. 6).

Considering all the aforesaid reasons, the requisite conclusion is that reliance on inadmissible evidence and privileged evidentiary material is an essential part of administrative detention. In view of the fact that the quality and quantity of the administrative evidence that supports the cause of detention is subject to judicial review, and in view of the caution with which the court is required to examine the privileged material brought before it ex parte, it cannot be said that the arrangement prescribed in s. 5(e) of the Law, per se, violates the rights of prisoners disproportionately.

(5) Prisoner's meeting with his lawyer

44. S. 6 of the Law, which is entitled "Right of prisoner to meet with lawyer'" provides the following:

'6. (a) The internee may meet with a lawyer at the earliest possible date on which such a meeting may be held without harming state security requirements, but no later than seven days prior to his being brought before a judge of the District Court, in accordance with the provisions of s. 5(a).

(b) The Minister of Justice may, by order, confine the right of representation in the proceedings under this Law to a person authorized to act as defence counsel in the military courts under an

unrestricted authorization, pursuant to the provisions of s. 318(c) of the Military Justice Law, 5715-1955.'

The appellants raised two main arguments against the proportionality of the arrangements prescribed in the aforesaid s. 6: first, it was argued that under s. 6(a) of the Law, it is possible to prevent a meeting of a prisoner with his lawyer for a period of up to seven days, during which a hearing is supposed to be conducted for the prisoner under s. 3(c) of the Law. It is argued that conducting a hearing without allowing the prisoner to consult a lawyer first is likely to render the hearing meaningless in a manner that constitutes an excessive violation of the right to personal liberty. Secondly, it was argued that s. 6(b) of the Law, which makes representation dependent upon an unrestricted authorization for the lawyer to act as defence counsel, also violates the rights of the prisoner disproportionately.

Regarding the appellants' first argument: no one disputes that the right of the prisoner to be represented by a lawyer constitutes a major basic right that has been recognized in our legal system since its earliest days (see in this regard CrimA 5121/98 Yissacharov v. Chief Military Prosecutor [50], at para. 14, and the references cited there). According to both the basic principles of Israeli law and the principles of international law, the rule is that a prisoner should be allowed to meet with his lawyer as a part of the right of every human being to personal liberty (see the remarks of President A. Barak in Marab v. IDF Commander in Judaea and Samaria [8], at pp. 380-381). Therefore, s. 6(a) of the Law provides that a prisoner should be allowed to meet with his lawyer "at the earliest possible date." It should, however, be recalled that like all human rights, the right to legal counsel, too, is not absolute, and it may be restricted if this is essential for protecting the security of the state (see HCJ 3412/93 Sufian v. IDF Commander in Gaza Strip [51], at p. 849; HCJ 6302/92 Rumhiah v. Israel Police [52], at pp. 212-213). As such, s. 6(a) of the Law provides that the meeting of the prisoner with his lawyer may be postponed for security reasons, but no more than seven days may elapse before he is brought before a District Court judge pursuant to s. 5(a) of the Law. Since pursuant to the aforementioned s. 5(a) a prisoner must be brought before a District Court judge no later than fourteen days from the date on which the internment order is granted, this means that a meeting between a prisoner and his lawyer may not be prevented for more than seven days from the time the detention order is granted against him.

Bearing in mind the security purpose of the Internment of Unlawful Combatants Law and in view of the fact that the aforesaid Law was intended to apply in prolonged states of hostilities and even in circumstances where the army is fighting in a territory that is not under Israeli control, it cannot be said that a maximum period of seven days during which a meeting of a prisoner with a lawyer may be prevented when security needs so require falls outside the zone of proportionality (see and cf. Marab v. IDF Commander in Judaea and Samaria [8], where it was held that "[a]s long as the hostilities continue, there is no basis for allowing a prisoner to meet with a lawyer," (at p. 381); see also HCJ 2901/02 Centre for Defence of the Individual v. IDF Commander in West Bank [53]).

In addition to the above, two further points should be made: first, even

though the prisoner may be asked to make his submissions in the course of the hearing under s. 3(c) of the Law without having first consulted a lawyer, s. 6(a) of the Law provides that the state should allow the prisoner to meet with his defence counsel "no later than seven days prior to his being brought before a judge of the District Court…." It follows that as a rule, the prisoner is represented in the process of judicial review of the granting of the detention by virtue of the Law. It seems that this could reduce the impact of the violation of the right to consult a lawyer as a part of the right to personal liberty. Secondly, it should be emphasized that the maximum period of seven days does not exempt the state from its obligation to allow the prisoner to meet with his lawyer at the earliest possible opportunity, in circumstances where security needs permit this. Therefore the question of the proportionality of the period during which a meeting between the prisoner and his defence counsel is prevented is a function of the circumstances of each case on its merits. It should be noted that a similar arrangement exists in international law, which determines the period of time during which a meeting with a lawyer may be prevented with regard to all the circumstances of the case, without stipulating maximum times for preventing the meeting (see in this regard, Marab v. IDF Commander in Judaea and Samaria [8], at p. 381).

45. The appellants' second argument concerning s. 6(b) of the Law should also be rejected. Making representation dependent upon an unrestricted authorization for the lawyer to act as defence counsel under the provisions of s. 318(c) of the Military Justice Law, 5715-1955, is necessary for security reasons, in view of the security-sensitive nature of administrative detention proceedings. The appellants did not argue that the need for an unrestricted authorization as aforesaid affected the quality of the representation that they received, and in any case they did not point to any real violation of their rights in this regard. Consequently the appellants' arguments against the proportionality of the arrangement prescribed in s. 6 of the Law should be rejected.

(6) The length of internment under the Law

46. From the provisions of ss. 3, 7 and 8 of the Internment of Unlawful Combatants Law it emerges that an internment order under the Law need not include a defined date for the end of the internment. The Law itself does not prescribe a maximum period of time for the internment imposed thereunder, apart from the determination that it should not continue after the hostile acts of the force to which the prisoner belongs against the State of Israel "have ceased" (see ss. 7 and 8 of the Law). According to the appellants, this is an improper internment without any time limit, which disproportionately violates the constitutional right to personal liberty. In reply, the state argues that the length of the internment is not "unlimited", but depends on the duration of the hostilities being carried out against the security of the State of Israel by the force to which the prisoner belongs.

It should be said at the outset that issuing an internment order that does not include a specific time limit for its termination does indeed raise a significant difficulty, especially in the circumstances that we are addressing, where the "hostile acts" of the various terrorist

organizations, including the Hezbollah organization which is relevant to the appellants' cases, have continued for many years, and naturally it is impossible to know when they will cease. In this reality, prisoners under the Internment of Unlawful Combatants Law may remain in detention for prolonged periods of time. Nevertheless, as we shall explain immediately, the purpose of the Law and the special circumstances in which it was intended to apply, lead to the conclusion that the fundamental arrangement that allows detention orders to be issued without a defined date for their termination does not depart from the zone of proportionality, especially in view of the judicial review arrangements prescribed in the Law.

As we have said, the purpose of the Internment of Unlawful Combatants Law is to prevent "unlawful combatants" as defined in s. 2 of the Law from returning to the cycle of hostilities, as long as the hostile acts are continuing and threatening the security of the citizens and residents of the State of Israel. On the basis of a similar rationale, the Third Geneva Convention allows prisoners of war to be interned until the hostilities have ceased, in order to prevent them from returning to the cycle of hostilities as long as the fighting continues. Even in the case of civilians who are detained during an armed conflict, the rule under international humanitarian law is that they should be released from detention immediately after the concrete cause for the detention no longer exists and no later than the date of cessation of the hostilities (see J. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law (vol. 1, 2005), at page 451; also cf. Hamdi v. Rumsfeld, 542 U.S. 507 (2004), at pages 518-519, where the United States Supreme Court held that the detention of members of forces hostile to the United States and operating against it in Afghanistan until the end of the specific dispute that led to their arrest is consistent with basic and fundamental principles of the laws of war).

The conclusion that emerges in view of the aforesaid is that the fundamental arrangement that allows a internment order to be granted under the Law without a defined termination date, except for the determination that the internment will not continue after the hostile acts against the State of Israel have ended, does not exceed the bounds of the room for constitutional maneuver. It should, however, be emphasized that the question of the proportionality of the duration of internment under the Law should be examined in each case on its merits and according to its specific circumstances. As we have said, the Internment of Unlawful Combatants Law prescribes a duty to conduct a periodic judicial review once every six months. The purpose of the judicial review is to examine whether the threat presented by the prisoner to state security justifies the continuation of the internment, or whether the internment order should be cancelled in circumstances where the release of the prisoner will not harm the security of the state or where there are special reasons justifying the release (see s. 5(c) of the Law). When examining the need to extend the internment, the court should take into account inter alia the period of time that has elapsed since the order was issued. The ruling in A v. Minister of Defence [1] concerning detention under the Emergency Powers (Detentions) Law, per President A. Barak, holds true in our

case as well:
'Administrative detention cannot continue indefinitely. The longer the period of detention has lasted, the more significant the reasons that are required to justify a further extension of detention. With the passage of time the measure of administrative detention becomes onerous to such an extent that it ceases to be proportionate' (ibid., at p. 744).
Similarly it was held in A v. IDF Commander [16] with regard to administrative detention by virtue of security legislation in the region of Judea and Samaria that -
'The duration of the detention is a function of the threat. This threat is examined in accordance with the circumstances. It depends upon the level of risk that the evidence attributes to the administrative prisoner. It depends upon the credibility of the evidence itself and how current it is. The longer the duration of the administrative detention, the greater the onus on the military commander to demonstrate the threat presented by the administrative prisoner' (ibid., at para. 7).
Indeed, as opposed to the arrangements prescribed in the Emergency Powers (Detentions) Law and in the security legislation, a court acting pursuant to the Internment of Unlawful Combatants Law does not conduct a judicial review of the extension of the internment order, but examines the question of whether there is a justification for cancelling an existing order, for the reasons listed in s. 5(c) of the Law. Nevertheless, even an internment order under the Internment of Unlawful Combatants Law cannot be sustained indefinitely. The period of time that has elapsed since the order was granted constitutes a relevant and important consideration in the periodic judicial review for determining whether the continuation of the internment is necessary. In the words of Justice A. Procaccia in a similar context:
'The longer the period of the administrative detention, the greater the weight of the prisoner's right to his personal liberty when balanced against considerations of public interest, and therefore the greater the onus placed upon the competent authority to show that it is necessary to continue holding the person concerned in detention. For this purpose, new evidence relating to the prisoner's case may be required, and it is possible that the original evidence that led to his internment in the first place will be insufficient' (Kadri v. IDF Commander in Judaea and Samaria [47], at para. 6).
In view of all the above, a court that conducts a judicial review of an internment under the Internment of Unlawful Combatants Law is authorized to confine and shorten the period of internment in view of the nature and weight of the evidence brought before it regarding the security threat presented by the prisoner as an "unlawful combatant" and in view of the time that has passed since the internment order was issued. By means of judicial review it is possible to ensure that the absence of a concrete termination date for the internment order under the Law will not constitute an excessive violation of the right to personal liberty, and that prisoners under the Law will not be interned for a longer period greater than that required by material security considerations.
(7) The possibility of conducting criminal proceedings parallel to an internment proceeding by virtue of the Law
47. S. 9 of the Law, which is entitled "Criminal proceedings",

provides the following:
'9. (a) Criminal proceedings may be initiated against an unlawful combatant under the provisions of any law.
(b) The Chief of Staff may make an order for the internment of an unlawful combatant under s. 3, even if criminal proceedings have been initiated against him under the provisions of any law.'
According to the appellants, the aforesaid s. 9 violates the right to personal liberty disproportionately since it makes it possible to detain a person under the Internment of Unlawful Combatants Law even though criminal proceedings have already been initiated against him, and vice versa. The argument is that by conducting both sets of proceedings it is possible to continue to intern a person even after he has finished serving the sentence imposed on him in the criminal proceeding, in a manner that allegedly amounts to cruel punishment.
In reply the state argued that this is a fitting and proportionate arrangement in view of the fact that it is intended to apply in circumstances in which a person will shortly finish serving his criminal sentence and hostilities are still continuing between the organization of which he is a member and the State of Israel; consequently, his release may harm state security.
In relation to these arguments we should reiterate what we said earlier (at para. 33 above), i.e. that initiating a criminal trial against a person is different in its nature and purpose from the measure of administrative detention. In general it is desirable and even preferable to make use of criminal proceedings where this is possible. Recourse to the extreme measure of administrative detention is justified in circumstances where other measures, including the conduct of a criminal trial, are not possible, due to lack of sufficient admissible evidence or because it is impossible to disclose privileged sources. However, the reality of prolonged terrorist operations is complex. There may be cases in which a person is detained under the Internment of Unlawful Combatants Law and only at a later stage evidence is discovered that makes it possible to initiate criminal proceedings. There may be other cases in which a person has been tried and convicted and has served his sentence, but this does not provide a satisfactory solution to preventing the threat that he presents to state security in circumstances in which, after having served the sentence, he may once again become a security threat. Since a criminal trial and administrative detention are proceedings that differ from each other in their character and purpose, they do not rule each other out, even though in my opinion substantial and particularly weighty security considerations are required to justify recourse to both types of proceeding against the same person. In any case, the normative arrangement that allows criminal proceedings to be conducted alongside detention proceedings under the Law does not, in itself, create a disproportionate violation of the right to liberty of the kind that requires our intervention.
Interim summary
48. Our discussion thus far of the requirement of proportionality has led to the following conclusions: first, the measure chosen by the legislator, i.e. administrative detention that prevents the "unlawful combatant" from returning to the cycle of hostilities against the State

of Israel, realizes the legislative purpose and therefore satisfies the requirement of a rational connection between the legislative measure and the purpose that the Law is intended to realize. Secondly, the measures mentioned by the appellants in their arguments before us, i.e. recognizing them as prisoners of war, bringing them to a criminal trial or detaining them under the Emergency Powers (Detentions) Law, do not realize the purpose of the Internment of Unlawful Combatants Law and therefore they cannot constitute a suitable alternative measure to internment in accordance with the Law. Thirdly, the specific arrangements prescribed in the Law do not, per se and irrespective of the manner in which they are implemented, violate the right to personal liberty excessively, and they fall within the bounds of the room for constitutional maneuver granted to the legislature. In view of all this, the question that remains to be examined is whether the combination of the arrangements prescribed in the Law satisfies the test of proportionality in the narrow sense. In other words, is the violation of the right to personal liberty reasonably commensurate with the public benefit that arises from it in achieving the legislative purpose? Let us now examine this question.

Proportionality in the narrow sense - A reasonable relationship between violation of the constitutional right and the public benefit it engenders

49. The Internment of Unlawful Combatants Law was enacted against the background of a harsh security situation. The citizens and residents of the State of Israel have lived under the constant threat of murderous terrorism of which they have been victim for years and which has harmed the innocent indiscriminately. In view of this, we held that the security purpose of the Law - the removal of "unlawful combatants" from the terrorist organizations' cycle of hostilities against the State of Israel - constitutes a proper purpose that is based on a public need of a kind that is capable of justifying a significant violation of the right to personal liberty. For all these reasons, we were of the opinion that the legislature should be accorded relatively wide room for maneuver to allow it to choose the proper measure for realizing the legislative purpose (see para. 31 above).

As we have said, the measure that the legislature chose in order to realize the purpose of the Internment of Unlawful Combatants Law is administrative detention in accordance with the arrangements that are prescribed in the Law. There is no doubt that this is a damaging measure that should be employed as little as possible. However, a look at the combined totality of the above arrangements, in the light of the interpretation that we discussed above, leads to the conclusion that according to constitutional criteria, the violation of the constitutional right is reasonably commensurate with the social benefit that arises from the realization of the legislative purpose. This conclusion is based on the following considerations taken together:

First, for the reasons that we discussed at the beginning of our deliberations, the scope of application of the Law is relatively limited: the Law does not apply to citizens and residents of the State of Israel but only to foreign parties who endanger the security of the state (see para. 11 above).

Secondly, the interpretation of the definition of "unlawful combatant"

in s. 2 of the Law is subject to constitutional principles and international humanitarian law that require proof of an individual threat as a basis for administrative detention. Consequently, for the purpose of internment under the Internment of Unlawful Combatants Law, the state must furnish administrative proof that the prisoner directly or indirectly played a material part - one which is neither negligible nor marginal - in hostile acts against the State of Israel; or that the prisoner belonged to an organization that is perpetrating hostile acts, taking into account his connection and the extent of his contribution to the organization's cycle of hostilities in the broad sense of this concept. In our remarks above we said that proving the conditions of the definition of "unlawful combatant" in the said sense includes proof of a personal threat that arises from the form in which the prisoner was involved in the terrorist organization. We also said that the state has declared before us that until now it has taken pains to prove the personal threat of all the prisoners under the Law specifically, and it has refrained from relying on the probative presumptions in ss. 7 and 8 of the Law. In view of this, we saw no reason to decide the question of the constitutionality of those presumptions (see paras. 24 and 25 above).

Thirdly, we held that in view of the fact that administrative detention is an unusual and extreme measure, and in view of its significant violation of the constitutional right to personal liberty, the state is required to prove, by means of clear and convincing evidence, that the conditions of the definition of "unlawful combatant" are fulfilled and that the continuation of the internment is essential. This must be done in both the initial and the periodic judicial reviews. In this context we held that importance should be attached both to the quantity and the quality of the evidence against the prisoner and to the extent that the relevant intelligence information against him is current (see paras. 22 and 23 above).

Fourthly, we attributed substantial weight to the fact that internment orders under the Internment of Unlawful Combatants Law are subject to preliminary and periodic judicial reviews before a District Court judge, whose decisions may be appealed to the Supreme Court, which will hear the case with a single judge. Within the framework of these proceedings, the judge is required to consider the question of the validity and credibility of the administrative evidence that is brought before him and to assess its weight. In view of the reliance upon administrative evidence and the fact that privileged evidence is admitted ex parte, we held that the judge should act with caution and great precision when examining the material brought before him. We also held that a court that conducts a judicial review of internment under the Law may restrict and shorten the period of internment in view of the nature and weight of the evidence brought before it regarding the security threat presented by the prisoner as an "unlawful combatant", and in view of the time that has elapsed since the internment order was issued. For this reason we said that it is possible, through the process of judicial review, to ensure that the absence of a specific date for the termination of the detention order under the Law does not violate the right to personal liberty excessively, and that prisoners by virtue of the Law will not be interned for a longer period

than what is required by substantial security considerations (para. 46 above).

Finally, although the arrangements prescribed in the Law for the purpose of exercising the power of internment are not the only possible ones, we reached the conclusion that the statutory arrangements that we considered do not exceed the bounds of the room for maneuver to an extent that required our intervention. In our remarks above we emphasized that the periods of time prescribed by the Law for conducting a preliminary judicial review after the internment order has been granted, and with respect to preventing a meeting between the prisoner and his lawyer, constitute maximum periods that do not exempt the state from the duty to make an effort to shorten these periods in each case on its merits, insofar as this is possible in view of the security constraints and all the circumstances of the case. We also held that internment under the Internment of Unlawful Combatants Law cannot continue indefinitely, and that the question of the proportionality of the duration of the detention must also be examined in each case on its merits according to the particular circumstances.

In view of all of the aforesaid considerations, and in view of the existence of relatively wide room for constitutional maneuver in view of the essential purpose of the Law as explained above, our conclusion is that the Internment of Unlawful Combatants Law satisfies the third subtest of the requirement of proportionality, i.e., that the violation of the constitutional right to personal liberty is reasonably commensurate with the benefit accruing to the public from the said legislation. Our conclusion is based on the fact that according to the interpretation discussed above, the Law does not allow the internment of innocent persons who have no real connection to the cycle of hostilities of the terror organizations, and it establishes mechanisms whose purpose is to ameliorate the violation of the prisoners' rights, including a cause of detention that is based on a threat to state security and the conducting of a hearing and preliminary and periodic judicial reviews of internment under the Law.

Therefore, for all the reasons that we have mentioned above, it is possible to determine that the violation of the constitutional right to personal liberty as a result of the Law, although significant and severe, is not excessive. Our conclusion is therefore that the Internment of Unlawful Combatants Law satisfies the conditions of the limitation clause, and there is no constitutional ground for our intervention.

From the General to the Specific

50. As we said at the outset, the appellants, who are inhabitants of the Gaza Strip, were originally detained in the years 2002-2003, when the Gaza Strip was subject to belligerent occupation. At that time, the administrative detention of the appellants was carried out pursuant to security legislation that was in force in the Gaza Strip. Following the end of military rule in the Gaza Strip in September 2005 and the nullification of the security legislation in force there, on 20 September 2005 the Chief of Staff issued internment orders for the appellants under the Internment of Unlawful Combatants Law.

On 22 September 2005 the Tel-Aviv-Jaffa District Court began the initial judicial review of the appellants' case. From then until now the

District Court has conducted four periodic judicial reviews of the appellants' continuing internment. The appeal against the decision of the District Court not to order the release of the appellants within the framework of the initial judicial review was denied by this court on 14 March 2006 (Justice E. Rubinstein in CrimA 1221/06 Iyyad v. State of Israel [54]). Before us are the appeals on three additional periodic decisions of the District Court not to rescind the appellants' internment orders.

51. In their pleadings, the appellants raised two main arguments regarding their particular cases: first, it was argued that according to the provisions of the Fourth Geneva Convention, Israel should have released the appellants when the military rule in the Gaza Strip ended, since they were inhabitants of an occupied territory that was liberated. Secondly, it was argued that even if the Internment of Unlawful Combatants Law is constitutional, no cause for internment thereunder has been proved with respect to the appellants. According to this argument, it was not proved that the appellants are members of the Hezbollah organization, nor has it been proved that their release would harm state security.

52. We cannot accept the appellants' first argument. The end of military rule in the Gaza Strip did not obligate Israel to automatically release all the prisoners it held who are inhabitants of the Gaza Strip, as long as the personal threat posed by the prisoners persisted against the background of the continued hostilities against the State of Israel. This conclusion is clearly implied by the arrangements set out in arts. 132-133 of the Fourth Geneva Convention. Art. 132 of the Convention establishes the general principle that the date for the release of prisoners is as soon as the reasons that necessitated their internment no longer exist. The first part of art. 133 of the Convention, which relates to a particular case that is included within the parameters of the aforesaid general principle, goes on to provide that the internment will end as soon as possible after the close of hostilities. Art. 134 of the Convention, which concerns the question of the location at which the prisoners should be released, also relates to the date on which hostilities end as the date on which prisoners should be released from internment. Unfortunately, the hostile acts of the terrorist organizations against the State of Israel have not yet ceased, and they result in physical injuries and mortalities on an almost daily basis. In such circumstances, the laws of armed conflict continue to apply. Consequently it cannot be said that international law requires Israel to release the prisoners that it held when military rule in the Gaza Strip came to an end, when it is possible to prove the continued individual danger posed by the prisoners against the background of the continued hostilities against the security of the state.

53. With regard to the specific internment orders against the appellants by virtue of the Internment of Unlawful Combatants Law, the District Court heard the testimonies of experts on behalf of the security establishment and studied the evidence brought before it. We too studied the material that was brought before us during the hearing of the appeal. The material clearly demonstrates the close links of the appellants to the Hezbollah organization and their role in the organization's ranks, including involvement in hostile acts against

Israeli civilian targets. We are therefore convinced that the individual threat of the appellants to state security has been proved, even without resorting to the probative presumption in s. 7 of the Law (see and cf. per Justice E. Rubinstein in Iyyad v. State of Israel [54], at para. 8(11) of his opinion). In view of the aforesaid, we cannot accept the appellants' contention that the change in the form of their detention - from detention by virtue of an order of the IDF Commander in the Gaza Strip to internment orders under the Law - was done arbitrarily and without any real basis in the evidence. As we have said, the change in the form of detention was necessitated by the end of the military rule in the Gaza Strip, and that is why it was done at that time. The choice of internment under the Internment of Unlawful Combatants Law as opposed to detention under the Emergency Powers (Detentions) Law was made, as we explained above, because of the purpose of the Law under discussion and because it is suited to the circumstances of the appellants' cases.

The appellants further argued that their release does not pose any threat to state security since their family members who were involved in terrorist activities have been arrested or killed by the security forces, so that the terrorist infrastructure that existed before they were detained no longer exists. They also argued that the passage of time since they were arrested reduces the risk that they present. Regarding these arguments it should be said that after inspecting the material submitted to us, we are convinced that the arrest or death of some of the appellants' family members does not per se remove the security threat that the appellants would present were they to be released from detention. We are also convinced that, in the circumstances of the case, the time that has passed since the appellants were first detained has not reduced the threat that they present. In its decision in the third periodic review, the trial court addressed this issue as follows:

'The total period of the detention is not short. But this is countered by the anticipated threat to state security if the prisoners are released. As we have said, a proper balance should be struck between the two. The experts are once again adamant in their opinion that there is a strong likelihood that the two prisoners will resume their terrorist activity if they are released. In such circumstances, the operational abilities of the Hezbollah infrastructure in the Gaza Strip and outside it will be enhanced and the threats to the security of the state and its citizens will increase. The current situation in the Gaza Strip is of great importance to our case. The fact that the Hamas organization has taken control of the Gaza Strip and other recent events increase the risks and, what is more, the difficulty of dealing with them.... It would therefore be a grave and irresponsible act to release these two persons, especially at this time, when their return to terrorism can be anticipated and is liable to increase the activity in this field. I cannot say, therefore, that the passage of time has reduced the threat presented by the two prisoners, who are senior figures in the terrorist infrastructure, despite the differences between them. Neither has the passage of time reduced the threat that they represent to an extent that would allow their release.'

In its decision in the fourth periodic review the trial court also emphasized the great threat presented by the two appellants:

'The privileged evidence brought before me reveals that the return of the two to the field is likely to act as a springboard for serious attacks and acts of terror. In other words, according to the evidence brought before me, the respondents are very dangerous. In my opinion it is not at all possible to order their release. This conclusion does not ignore the long years that the two of them have been held behind prison walls. The long period of time has not reduced the threat that they represent' (at page 6 of the court's decision of 20 March 2008).

In view of all of these reasons, and after having studied the material that was brought before us and having been convinced that there is sufficient evidence to prove the individual security threat represented by the appellants, we have reached the conclusion that the trial court was justified when it refused to cancel the internment orders in their cases. It should be pointed out that the significance of the passage of time naturally increases when we are dealing with administrative detention. At the present time, however, we find no reason to intervene in the decision of the trial court.

In view of the result that we have reached, we are not required to examine the appellants' argument against the additional reason that the trial court included in its decision, relating to the fact that the evidence was strengthened by the silence of the first appellant in the judicial review proceeding that took place in his case, a proceeding that was based, inter alia, on privileged evidence that was not shown to the prisoner and his legal representative. The question of the probative significance of a prisoner's silence in judicial review proceedings under the Internment of Unlawful Combatants Law does not require a decision in the circumstances of the case before us and we see no reason to express a position on this matter.

Therefore, for all of the reasons set out above, we have reached the conclusion that the appeals should be denied.

Justice E.E. Levy:

I agree with the comprehensive opinion of my colleague, the President.

It is in the nature of things that differences may arise between the rules of international humanitarian law - especially written rules - and the language of Israeli security legislation, if only because those conventions that regulate the conduct of players on the international stage were formulated in a very different reality, and their drafters did not know of entities such as the Hezbollah organization and the like. Therefore, insofar as it is possible to do so by means of legal interpretation, the court will try to narrow these differences in a way that realizes both the principles of international law and the purpose of internal legislation. In this regard I will say that I would have preferred to refrain from arriving at any conclusions, even in passing, regarding the provisions of ss. 7 and 8 of the Internment of Unlawful Combatants Law, 5762-2002. These provisions are a central part of this Law, as enacted by the Knesset. Insofar as there are differences between them and the provisions of international law, as argued by the appellants and implied by the state's declarations with regard to the manner in which it conducts itself de facto, the legislature ought to take the initiative and address the matter.

Justice A. Procaccia:
I agree with the profound opinion of my colleague, President Beinisch.
Appeals denied as per the judgment of President D. Beinisch.
8 Sivan 5768
11 June 2008