בית המשפט העליון
THE SUPREME COURT OF ISRAEL

The Supreme Court of Israel sitting as the Court of Criminal Appeals

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

Before:	The honourable President D. Beinisch The honourable Justice A. Procaccia The honourable Justice E.E. Levy
The appellants:	1. A 2. B
	v.
The respondent:	State of Israel

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

Date of hearing:	15 Adar 5767 (5 March 2007)
For the appellants:	Adv. H. Abou-Shehadeh
For the respondent:	Adv. S. Nitzan, Y. Roitman, Z. Goldner, O.J. Koehler

JUDGMENT

President D. Beinisch:

We have before us appeals against the decisions of the Tel-Aviv-Jaffa District Court (Justice Z. Caspi), in which the detention of the appellants under the Internment of Unlawful Combatants Law, 5762-2002 (hereafter: 'the Internment of Unlawful Combatants Law' or 'the law') was upheld as lawful. Beyond the specific cases of the appellants, the appeals raise fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law, whether the arrangements provided in the law are constitutional and to what extent the law is consistent with international humanitarian 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 pursuant to the Administrative Detentions (Temporary Provision) (Territory of Gaza Strip) 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 published by the Southern District Commander with regard to the end of military rule in the territory 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 under section 3 of the Internment of Unlawful Combatants Law, which is the law that is the focus of the case before us. On 15 September 2005 the internment orders were brought to the attention of the appellants. At a hearing that took place pursuant to the law, the appellants said that they did not wish to say anything, and on 20 September 2005 the chief of staff decided that the detention orders under the aforesaid law would remain valid.

2. On 22 September 2005 a judicial review proceeding 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 impropriety in the procedure of issuing internment orders against the appellants and that all the conditions prescribed 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 from material that was presented to the court it could be seen that the appellants were clearly associated with the Hezbollah organization and that they participated in combat activities against the citizens of Israel before they were detained. The court emphasized in this context the individual threat presented by the two appellants and the risk that they would return to 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 under section 5(c) of the law began in the District Court. In the course of this review, not only did the court consider the specific complaints of the appellants against their detention but also fundamental arguments against the constitutionality of the law through an indirect attack on its provisions. On 16 July 2006 the District Court gave its decision with regard to the appellant's specific claims. This decision said 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 terror 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 claims raised by the appellants concerning the constitutionality of the law. The District Court also rejected the appellants' claims in this regard 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 rules 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 judicial 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' detention. In its decision the District Court said that the experts remained steadfast in their opinion that there was a high probability that the two appellants would return to their terrorist activity if they were released, and as a result the operative abilities of the Hezbollah infrastructure in the Gaza Strip would be improved 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 both of the appellants concerning their desire to return to terrorist activity if they were released, and that they had maintained their contacts in this regard 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. Notwithstanding, the court saw fit 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 with regard to them showed that their return to the territory was likely to act as an impetus for terror attacks and the long period during which both of them had been imprisoned had not reduced the threat that they present. The appeal in CrimA 3261/08 was directed at this decision.

Our judgment therefore addresses 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. *Second*, once again the appellants indirectly raised fundamental arguments 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 the Basic Law: Human Dignity and Liberty, in a manner that does not satisfy the conditions of the limitations 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 limitations clause in the 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 provided in the law and finally we shall address the specific detention orders made in the appellants' cases.

The Internment of Unlawful Combatants Law — the background to its legislation and its main purpose

6. The Internment of Unlawful Combatants Law gives the state authorities power to detain 'unlawful combatants' as defined in section 2 of the law, i.e., persons who participate in hostilities or are members of forces that carry out hostilities against the State of Israel and who do not satisfy the conditions that grant a prisoner of war status under international humanitarian law. As we shall explain below, the law allows the internment of *foreign* persons who belong to a terrorist organization or who

participate in hostilities against the security of the state, and it was intended to prevent these persons returning to the cycle of hostilities against Israel.

Originally the initiative to enact the law arose following the judgment in CrimFH 7048/97 *A v. Minister of Defence* [2000] IsrSC 44(1) 721, 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 the detention was holding them as 'bargaining chips' in order to obtain the release of captives and missing servicemen. Although the original draft law came into being against a background of a desire to allow detainees to be held as 'bargaining chips,' the proposal underwent significant changes during the legislative process after lengthy deliberations were held in this matter by the Knesset's Foreign Affairs and Defence Committee, which was 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 examining the historical background to the enactment of the law and the changes that were made to the original draft law, 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, as can be seen from the statute's purpose section which we shall address later, all show that the Internment of Unlawful Combatants Law as formulated during 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 simple language of the law and its legislative history indicate that the law was intended to prevent a person who represents a threat to the security of the state because of his activity or his belonging to a terrorist organization from returning to the cycle of hostilities. 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:

> 'The draft law is very complex and of course gave rise to many disagreements during the committee deliberations. The Foreign Affairs and Defence Committee held approximately ten sessions at which it discussed the difficult questions raised by this draft law and considered all the possible ramifications of its passing the second and third readings. The draft 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 tests, in consequence of our outlook and insistence that a balance should be maintained between security and human rights…
>
> I should like to emphasize that the draft 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 someone is whether he represents a threat. No one should be interned under the draft law as a punishment or, as many persons tend to think in error, as a bargaining chip*. No mistake should be made in this regard. Notwithstanding, we should ask ourselves whether it is conceivable that the state should release a detainee who will return to the cycle of hostilities against the State of Israel?' (emphasis supplied).

The law was therefore not intended to allow detainees to be held as 'bargaining chips.' The purpose of the law is to remove from the cycle of hostilities someone who belongs to a terrorist organization or who takes part in hostilities 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 hostilities against the State of Israel, and not to innocent civilians. We shall return to address the security purpose of the law later.

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 provided in the law. In addition, the parties addressed at length the question whether the arrangements provided in the Internment of Unlawful Combatants Law are consistent with international law. The parties addressed this question, *inter alia*, because in section 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 gives clear expression to 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 focal points in the fundamental 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 limitations clause and the question of compliance with international humanitarian law may be affected by the interpretation of the arrangements provided in the law. Because of this, before we decide the aforesaid questions, we should first consider the interpretation of the main arrangements prescribed in the Internment of Unlawful Combatants Law. The interpretation of these arrangements will be made 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 interpretive presumption of consistency with the norms of international law —

both those that are part of Israeli law and those which Israel has taken upon itself in its undertakings in the international arena.

8. Regarding the presumption of constitutionality, in our legal system there is a presumption that the legislature should be regarded as being aware of the content and the ramifications of the Basic Laws on every statute that is enacted subsequently. According to this presumption, a provision of statute is examined while attempting 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, according to which 'we do not assume that there exists a conflict 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 page 155). According to the presumption of constitutionality, we are therefore required to examine the meaning and scope of the detention provisions prescribed in the Internment of Unlawful Combatants Law while aspiring to realize, in so far as possible, the provisions of the Basic Law: Human Dignity and Liberty. It should immediately be said that the detention powers provided in the law significantly and seriously violate the personal liberty of the detainee. This violation is justified in appropriate circumstances in order to protect state security. Notwithstanding, in view of the extent of the violation of personal liberty and in view of the exceptional nature of the measure of detention that is provided 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 consistent with the basic outlook that prevails in our legal system, according to which a statute should be upheld by interpretive means and the court should refrain, in so far as possible, from setting it aside on constitutional grounds. In the words of President A. Barak:

> 'It is better to arrive at a reduced scope of a statute by interpretive means rather than being compelled to arrive at the same reduced scope 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* [1996] IsrSC 50(2) 793, at page 812; see also HCJ 9098/01 *Ganis v. Ministry of Building and Housing* [2005] IsrSC 59(4) 241; [2004] IsrLR 505, at page 276).

9. With regard to the presumption of conformity to international humanitarian law, as we have said, section 1 of the law expressly declares 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* (unreported judgment of 14 December 2006), at paragraphs 18, 21; see also A. Cassese, *International Law* (second edition, 2005), at page 420).

The international law that governs an international armed conflict is enshrined mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter: '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* [1983] IsrSC 37(4) 785, at page 793; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; [2004] IsrLR 264, at page 827; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; [2002-3] IsrLR 83, at page 364); the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter: 'the 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*, at page 364; HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; [2002-3] IsrLR 173; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [2005] (2) IsrLR 106, at paragraph 14 of the judgment); 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 (hereafter: 'the 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*, at paragraph 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*, at paragraph 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 express provision of statute enacted by the Knesset overrides the provisions of international law (see in this regard the remarks of President A. Barak in HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [2006] (1) IsrLR 442, at paragraph 17). Notwithstanding, according to the presumption of interpretive consistency, an Israeli act of legislation should be interpreted in a manner that is consistent, in so far 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* [2002] IsrSC 56(5) 834, at page 847; HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* [2006] (1) IsrLR 260, at paragraph 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 provided 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 the phenomenon of terrorism that is changing the form 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*, at pages 381-382). In view of this, we should do our best in order to interpret the existing laws in a manner that is consistent with new realities and the principles of international humanitarian law.

10. In view of all of the aforesaid, let us now turn to the interpretation of the statutory definition of 'unlawful combatant' and the interpretation of the conditions required for proving the existence of a ground for detention 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 statute and in evaluating the nature and scope of the power of detention provided in it.

The definition of 'unlawful combatant' and its scope of application

11. Section 2 of the law defines 'unlawful combatant' as follows:

> 'Definitions 2. In this law —
> …
> 'Unlawful combatant' — a person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War;
> …'

This statutory definition of 'unlawful combatant' relates to those persons who take part in hostilities against the State of Israel or who are members of a force that carries out such hostilities, 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 section 2 it can clearly be seen that it is not essential for someone to take part in hostilities against the State of Israel; his being a member of a 'force carrying out hostilities' — 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' later (paragraph 21 below).

Second, as we said above, the purpose clause in the law refers expressly to the provisions of international humanitarian law. The definition of 'unlawful combatant'

in the aforesaid section 2 also refers to international humanitarian law when it provides that the law applies to someone who does not enjoy a prisoner of war status under the Third Geneva Convention. As a rule, 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 article 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 express reference by the legislature to international humanitarian law, together with the requirement stipulated in the wording of the law that there is no prisoner of war status, show that the law was intended to apply only to *foreign* parties who belong to a terror organization that operates against the security of the state. We are not unaware that in the draft law of 14 June 2000 there was a provision that stated expressly 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 section 11 of the draft Internment of Enemy Forces Personnel Who Are Not Entitled to a Prisoner of War Status Law, 5760-2000, *Draft Laws 5760*, no. 2883, at page 415). This provision of statute was omitted from the final wording of the law. Notwithstanding, in view of the express reference made by the law to international humanitarian law and the laws concerning prisoners of war as stated above, we are drawn to the conclusion that according to the wording and purpose of the law it was not intended to apply to *local* parties (citizens and residents of Israel) who endanger state security. For these there are other legal measures that are intended for a security purpose, which we shall address later.

It is therefore possible to summarize the matter by saying that an 'unlawful combatant' under section 2 of the law is a *foreign* party who belongs to a terrorist organization that operates 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 operates 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 held 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 required 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 a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to 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 judgments 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 paragraph 173; with regard to the existence of certain obligations that the State of Israel has in the prevailing circumstances vis-à-vis the inhabitants of the Gaza Strip, see HCJ 9132/07 *Elbassiouni v. Prime Minister* (unreported decision of 31 January 2008). 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 are drawn to the conclusion 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 paragraph 36 below), I tend to the opinion that in so far as this is required 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. Notwithstanding, 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 before us that the definition of 'unlawful combatant' in section 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.' In their view 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 should 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*, in which it was held that the term 'unlawful combatants' does not constitute a separate category but is 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 its being the opposite of "combatants." Thus it regards unlawful combatants, who as we have seen are not "combatants," as civilians' (*ibid*., at paragraph 26 of the opinion of President A. Barak).

In this context, two additional points should be made: *first*, the finding 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 — a prisoner of war status which is governed by the Third Geneva Convention or a protected civilian status 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 article 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 pages 48-49).

Second, it should be emphasized that *prima facie* the statutory definition of 'unlawful combatant' under section 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*, in view of the difference in the measures under discussion: the judgment in *Public Committee against Torture in Israel v. Government of Israel* considered the legality of the measure of a military operation 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 addresses the measure of internment. For the purposes of detention under the law, it is not necessary that the 'unlawful combatant' will take a *direct* part in the hostilities, nor is it essential that his detention will take place during the period of time when he is taking part in hostilities; all that is required is that the conditions of the definition of 'unlawful combatant' in section 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* 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, but constitutes a sub-group of the category of 'civilians.'

13. Further to our finding that 'unlawful combatants' are members of 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*, at paragraphs 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 normative disagreements 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 article 5 of the convention, we are not required to decide most of these disagreements. This is because of 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 paragraphs 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 in view of the finding of this court in *Public Committee against Torture in Israel v. Government of Israel* that 'unlawful combatants' constitute a subcategory of 'civilians' under international law, it is possible to determine that, contrary to the appellants' claim, the law does not create a new reference group from the viewpoint of international law, but 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 detention of 'unlawful combatants' under the law — administrative detention

15. Now that we have determined that the definition of 'unlawful combatant' in the law does not conflict with the two-category classification of 'civilians' and 'combatants' in international law and the case law of this court, let us turn to examine the provisions of the law that regulate the detention of unlawful combatants. Section 3(a) of the law provides the following:

> 'Internment of unlawful combatant
>
> 3. (a) If the chief of staff has a reasonable basis for believing that a person who is held by state authorities is an unlawful combatant and that his release will harm state security, he may make an order with his signature requiring his internment in a place that he will determine (hereafter — an internment order); an internment order will include the reasons for internment without harming the security needs of the state.
>
> …'

Section 7 of the law adds in this context a probative presumption, which provides the following:

> 'Presumption
>
> 7. With regard to this law, a person who is a member of a force that carries out hostilities against the State of Israel or who took part in the hostilities of such a force, whether directly or indirectly, shall be regarded as someone whose release will harm state security as long as the hostilities of that force against the State of Israel have not ended, as long as the contrary has not been proved.'

The appellants argued before us that the detention provisions provided in the law *de facto* create a third category of detention, which is neither criminal arrest nor administrative detention, and which is not recognized at all by 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 taking part 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 power provided in the law for the administrative detention of a 'civilian' who is an 'unlawful combatant' on account of the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law. Thus article 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 article 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.'

With regard to the types of control measures that are required for protecting state security, article 41 of the convention prohibits the adoption of control measures that are more severe that assigned residence or internment in accordance with the provisions of articles 42-43 of the convention. Article 42 enshrines the rule that a 'civilian' should not be interned unless it is 'absolutely necessary' for the security of the detaining power. Article 43 goes on to oblige the detaining power to approve the detention in a judicial or administrative review, and to hold periodic reviews of the continuing need for internment at least twice a year. Article 78 of the convention concerns the internment of protected civilians that are inhabitants of a territory that is held by an occupying power, and it provides that it is possible to employ 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 should point out that the appellants argued before us that the aforesaid provisions of the Fourth Geneva Convention are not appropriate in their case. According to them, articles 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 and the departure of IDF forces from the Gaza Strip. In view of this, the appellants argued that there is no provision of international humanitarian law 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.

With regard to these arguments we shall reply that the detention provisions set out in the Fourth Geneva Convention were intended to apply and realize the basic rule provided in the last part of article 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 in so far as this is required as a result of the war. The principle underlying all the detention provisions provided in the Fourth Geneva

Convention is that it is possible to detail 'civilians' for security reasons in accordance with the extent of the threat that they represent. According to the aforesaid convention, there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or we are concerned with foreigners who were found in the territory of one of the states involved in the dispute. In the appellants' case, although the Israeli military rule in the Gaza Strip has ended, the hostilities between the Hezbollah organization and the State of Israel have not ended, and therefore the detention of the appellants in the territory of the State of Israel for security reasons is not inconsistent with the detention provisions in the Fourth Geneva Convention.

The ground for 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. It is one of the first principles of our legal system that administrative detention is conditional upon the existence of a ground for detention that derives from the individual threat of the detainee to the security of the state. This was discussed by President Barak when he said that:

> '[In order that there may be a ground for detention] it is necessary that the circumstances of the detention are such that they give rise with regard to [the detainee] — with regard to him personally and not with regard to someone else — to a concern of a risk to security, whether because he was found in the combat area when he was actually fighting or carrying out terrorist acts, or because there is a concern that he is involved in fighting or terrorism' (*Marab v. IDF Commander in Judaea and Samaria*, at page 367).

The requirement of an individual threat for the purposes of placing someone 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 someone for acts that have already been committed or to deter others from committing them, but its purpose is to prevent the tangible risk presented by the acts of the detainee 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*, at pages 370-372, and the references cited there).

19. It should be noted that the individual threat to the security of the state represented by the detainee is also required by the principles of international humanitarian law. Thus, for example, in his interpretation of articles 42 and 78 of the Fourth Geneva Convention Pictet emphasizes that the state should make use of 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 the

membership of organizations whose goal is to harm the security of the state as a ground for recognizing a threat, but he emphasizes the supreme 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 pages 258-259).

20. No one before us disputes that the provisions of the Internment of Unlawful Combatants Law should be interpreted in accordance with the aforesaid principle, which make administrative detention conditional upon proving the existence of a ground that establishes an individual threat. Indeed, an examination of the provisions of the law in accordance with the aforesaid principles shows that the law does not allow anyone to be detained arbitrarily, and that the power of detention under the law is conditional upon the existence of a ground of detention that is based on the individual threat represented by the detainee: *first*, the definition of 'unlawful combatant' in section 2 of the law requires proof that the detainee himself took part or belonged to a force that is carrying out hostilities against the State of Israel, the significance of which we shall address below. *Second*, section 3(a) of the law expressly provides that the ground of detention under the law arises only with regard to someone for whom there is a reasonable basis to believe 'that his release will harm state security.' Section 5(c) of the law goes on to provide that the District Court shall set aside a detention order that was issued pursuant to the law only when the release of the detainee '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, the administrative detention is intended to prevent the 'unlawful combatant' from returning to the cycle of hostilities, thus indicating that he was originally a part of that cycle.

The dispute between the parties before us in the context under discussion concerns the level of the individual threat that the state is liable to prove for the purpose of administrative detention under the law. This dispute arises because of the combination of two main provisions of the law: *one* is the provision of section 2 of the law that according to a simple reading states that an 'unlawful combatant' is not only someone who takes a direct or indirect part in hostilities against the State of Israel, but also someone who is a 'member of a force carrying out hostilities.' The *other* is the probative presumption provided in section 7 of the law, according to which a person who is a member of a force that carries out hostilities against the State of Israel shall be regarded as someone whose release will harm the security of the state unless the contrary is proved. Relying on the combination of these two provisions of the law taken together, 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 threat to the security of the

state in such a manner that gives rise to a ground for detention under the law. By contrast, the appellants' approach was that relying upon a vague 'membership' in an organization that carries out hostilities against the State of Israel as a basis for administrative detention under the law makes the requirement of proving an individual threat meaningless, which is contrary to constitutional principles and international humanitarian law.

21. Deciding the aforesaid dispute is affected to a large degree by the interpretation of the definition of 'unlawful combatant' in section 2 of the law. As we have said, the statutory definition of 'unlawful combatant' contains two limbs: one, 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' and the other, a person who is 'a member of a force carrying out hostilities against the State of Israel,' when the person concerned does not satisfy the conditions granting a prisoner of war status under international humanitarian law. These two limbs 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 the proof of an individual threat as a ground for administrative detention.

With regard to the interpretation of the first limb that concerns 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' according to the legislative purpose and the principles that we have discussed, we are drawn to the conclusion that in order to detain a person it is not sufficient for him to have made a remote, negligible or marginal contribution to the hostilities against the State of Israel. In order to prove that someone is an 'unlawful combatant,' the state needs to prove that the detainee made a contribution to the waging of hostilities against the state, whether directly or indirectly, in a manner that can indicate his individual threat. Naturally it is not possible to define the nature of such a contribution precisely and exhaustively, and the matter will be examined on a case by case basis according to the circumstances.

With regard to the second limb that concerns a person who is 'a member of a force carrying out hostilities against the State of Israel,' here too we require an interpretation that is consistent with the purpose of the law and the constitutional principles and international humanitarian law that we discussed above: on the one hand it is insufficient to show any tenuous connection with a terrorist organization in order to be included within the cycle of hostilities in the broad meaning of this concept. On the other hand, in order to establish a ground for detention with regard to someone who is a member of an active terrorist organization whose self-declared goal is to fight unceasingly 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 are sufficient to include him in the cycle of hostilities in its broad sense, in such a way that his detention will be justified under the law.

Thus we see that for the purpose of detention under the law at issue, the state is liable to prove with administrative proofs that the detainee is an 'unlawful combatant' with the meaning that we discussed, namely that the detainee took a direct or indirect part that involved a contribution to the fighting — a part that is not negligible or marginal — in the hostilities against the State of Israel, or that the detainee belongs to an organization that is carrying out hostilities, in which case we should consider the detainee'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 providing 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 detainee satisfies the conditions of the statutory definition of 'unlawful combatant' can the state make use of the probative presumption set out in section 7 of the law, according to which the release of the detainee will harm state security as long as the contrary has not been proved. It is therefore clear that section 7 of the law does not negate the duty imposed on the state to prove the threat represented by the detainee, which derives from the type of involvement in the relevant organization that is required in order to prove him to be an 'unlawful combatant' under section 2 of the law. In view of this, we are drawn to the conclusion that the argument that the law includes no 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. In our remarks above, we discussed the interpretation of the definition of 'unlawful combatant.' According to the aforesaid interpretation, the state is required to prove that the detainee took a direct or indirect part, which was of significance, in the hostilities against the State of Israel, or that the detainee belonged to an organization that carries out hostilities, all of which while taking into account the connection and the extent of his contribution to the organization's cycle of hostilities. In these circumstances a person's detention may be required in order to remove him from the cycle of hostilities that harms the security of the citizens and residents of the State of Israel. The question that arises in this regard is: what evidence is required in order to persuade the court that the detainee 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 basis for administrative detention (see *Ajuri v. IDF Commander in West Bank*, at page 372, where this rule was determined with regard to the measure of assigned residence; also see and cf. the remarks of Justice A. Procaccia in ADA 8607/04 *Fahima v. State of Israel* [2005] IsrSC 59(3) 258, at page 264; HCJ 554/81 *Beransa v. Central Commander* [1982] IsrSC 36(4) 247). It would appear that

the provisions of the Internment of Unlawful Combatants Law should be interpreted similarly. In view of the importance of the right to personal liberty and in view of the security purpose of the aforesaid law, the provisions of sections 2 and 3 of the law should be interpreted in such a way that the state is liable to prove, with clear and convincing administrative evidence, that even if the detainee did not take a direct or indirect part in the hostilities 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, in such a way that his administrative detention is justified in order to prevent his returning to the aforesaid cycle of hostilities.

The significance of the requirement that there is clear and convincing evidence is that importance should be attached to the quantity and quality of the evidence against the detainee and the degree to which the relevant intelligence information against him is up to date; this is necessary both for proving the detainee to be an 'unlawful combatant' under section 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 later. Indeed, the purpose of administrative detention is to prevent anticipated future threats to the security of the state, and naturally we can learn of these threats from tangible evidence concerning the detainee's acts in the past (see the remarks of President M. Shamgar in *Beransa v. Central Commander*, at pages 249-250; HCJ 11026/05 *A v. IDF Commander* (unreported decision of 22 December 2005), at paragraph 5). Notwithstanding, for the purposes of long-term detention under the Internment of Unlawful Combatants Law, adequate administrative evidence is required, and a single piece of evidence with regard to an isolated act carried out in the distant past is insufficient.

23. It follows that for the purposes of detention under the Internment of Unlawful Combatants Law the state is required to prove with clear and convincing evidence that, even if the detainee did not take a significant direct or indirect part in the hostilities against the State of Israel, he belonged to a terror organization and made a contribution to the cycle of hostilities in its broad sense. It should be noted that this requirement is not always easy to prove, since proving that someone is a member of a terrorist organization is not the same as proving that someone is a member of a regular army, because of the manner in which terrorist organizations work and the manner in which people joint their ranks. The court held in *Public Committee against Torture in Israel v. Government of Israel* that unlike lawful combatants, unlawful combatants do not as a rule carry any clear and unambiguous indication that they belong to a terrorist organization (see *Public Committee against Torture in Israel v. Government of Israel* at paragraph 24). Therefore proving that someone belongs to an organization as aforesaid is not always an easy task. Notwithstanding, the state is required to prove with sufficient administrative evidence the nature of the detainee's connection to the terrorist organization, and the degree or manner of his contribution to the broad cycle of hostilities or operations carried out by the organization.

It should also be noted that in its pleadings before us, the state discussed how the power of detention provided in the Internment of Unlawful Combatants Law was

intended to apply to members of terrorist organizations in a state of ongoing hostilities in an area that is not under 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 where there is a need 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 the one that is possible within the territory of the state or in an area subject to a belligerent occupation. In any case, it may be assumed that the reality under discussion may give rise to additional difficulties of assembling evidence with regard to whether those persons detained by the state during hostilities on the field of battle belong to a terrorist organization and how great a threat they are.

The probative presumptions provided in sections 7 and 8 of the law

24. As we have said, section 7 of the law provides a presumption according to which 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 hostilities against the State of Israel have not come to an end. This is a rebuttable presumption, and the burden of rebutting it rests with the detainee. We should emphasize what we said above, that the presumption provided in the aforesaid section 7 may be relevant only after the state has proved that the detainee satisfies the conditions of the definition of 'unlawful combatant.' In such circumstances it is presumed that the release of the detainee will harm state security as required by section 3(a) of the law.

As we said above, one of the appellants' main claims before us was that the aforesaid presumption makes it unnecessary to prove an individual threat from the detainee and that this is inconsistent with constitutional principles and international humanitarian law. The respondent opposed this argument but went on to declare before us that, as a rule, the state acts in order to present a broad and detailed basis in evidence with regard to the threat presented by detainees, and it has done this in the past with regard to everyone who has been detained under the law, including in the appellants' case. The significance of this claim is that *de facto* the state refrains from relying on the probative presumption provided in section 7 of the law and it proves the individual threat presented by detainees on an individual basis, without making use of the aforesaid presumption. It should be noted that this practice of the state is consistent with our finding that proving the conditions of the definition of 'unlawful combatant' in section 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 making use of the presumption provided in section 7 of the law, no question arises in this case as to whether the aforesaid presumption reduces the requirement of proving the individual threat needed for detention under the law, and whether this violates the constitutional right to liberty and the principles of international humanitarian law excessively. We can therefore leave these questions undecided, since as long as the state produces

prima facie evidence of the individual threat presented by the detainee 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 should be noted that if the state chooses to make use of the presumption provided in section 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 decide them concretely rather than theoretically (see CrimA 3660/03 *Abeid v. State of Israel* (unreported decision of 8 September 2005); HCJ 1853/02 *Navi v. Minister of Energy and National Infrastructures* (unreported decision of 8 October 2003); HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; [1998-9] IsrLR 635, at page 250; HCJ 4827/05 *Man, Nature and Law — Israel Environmental Protection Society v. Minister of Interior* (unreported decision of 20 July 2005), at paragraph 10; CA 7175/98 *National Insurance Institute v. Bar Finance Ltd (in liquidation)* (unreported decision of 17 December 2001)).

25. With regard to the probative presumption provided in section 8 of the law, this section states the following:

> 'Determination concerning hostilities
>
> 8. The determination of the Minister of Defence, in a certificate signed by him, that a certain force carries out hostilities against the State of Israel or that the hostilities of that force against the State of Israel have come to an end or have not yet come to an end shall serve as evidence in any legal proceeding, unless the contrary is proved.'

The appellants argued before us that the aforesaid probative presumption places the burden of proof on the detainee in a matter which he will never be able to refute, since it is a matter that is subject to the discretion of the Minister of Defence. In reply, the state argued that in all the proceedings under the law it has refrained from relying solely on the determination of the Minister of Defence, and it has seen fit to present the court and counsel for the detainees with an up to date and specific opinion with regard to the relevant organization to which the detainee belongs. This was also done in the case of the appellants, who are alleged to belong to the Hezbollah organization. In view of this, we are not required to decide the fundamental questions raised by the appellants with regard to the aforesaid section 8. In any case, it should be stated that in the situation that currently prevails in our area, in which the organizations that operate against the security of the State of Israel are well known to the military and security services, it may be assumed that there is no difficulty in proving the existence and nature of the activity of hostile forces by means of a specific and up to date opinion, in order to provide support for the determination of the Minister of Defence as stated in clause 8 of the law.

The constitutional scrutiny

26. Up to this point we have deal with the interpretation of the statutory definition of 'unlawful combatant' and the conditions required for proving the existence of a ground for detention under the law. This interpretation was made with reference to the language and purpose of the Internment of Unlawful Combatants Law, and in accordance with the presumption of constitutionality and the principles of international humanitarian law to which the purpose clause of the law expressly refers.

Now that we have discussed the scope of the law's application and the nature of the power of detention provided in it, let us turn to the arguments of the parties concerning the constitutionality of the arrangements provided in it. These arguments were raised in the District Court and before us during the hearing concerning the appellants' detention, within the framework of an indirect attack on the aforesaid law.

The violation of the constitutional right to personal liberty

27. Section 5 of the Basic Law: Human Dignity and Liberty provides the following:

> 'Personal liberty 5. A person's liberty shall not be denied or restricted by imprisonment, arrest, extradition or in any other way.'

There is no dispute between the parties before us that the Internment of Unlawful Combatants Law violates the constitutional right to personal liberty enshrined in the aforesaid section 5. This is a significant and serious violation, in view of the fact that the law allows the use of the extreme measure of administrative detention that deprives a person of his personal liberty. It should be clarified that the Internment of Unlawful Combatants Law was admittedly intended to apply to *foreign* parties who belong to a terrorist organization that operates against the security of the state (see paragraph 11 above). Notwithstanding, the detention of unlawful combatants is carried out in Israel by the government authorities that are obliged to uphold the rights enshrined in the Basic Law in every case (see sections 1 and 11 of the Basic Law). Consequently the violation of rights inherent in the arrangements of the Internment of Unlawful Combatants Law should be examined in accordance with the tests in the Basic Law.

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

28. No one disputes that the right to liberty is a constitutional right with a central role in our legal system and it lies 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*, at paragraph 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' (*Tzemah v. Minister of Defence*, at page 251; see also HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [1997] IsrSC 51(5) 67; [1997] IsrLR 499, at page 81; CrimA 4596/05 *Rosenstein v. State of Israel* [2005] (2) IsrLR 232, at paragraph 53; CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529, at pages 539-540). Notwithstanding, like all protected human rights, the right to personal liberty is not absolute and a violation of the right is sometimes required in order to protect essential public interests. The balancing formula in this regard is provided in the limitations clause in section 8 of the Basic Law, which states:

> 'Violation of rights
>
> 8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.'

The question before us is whether the violation of the right to personal liberty caused by the Internment of Unlawful Combatants Law satisfies the conditions of the limitations clause. The arguments of the parties before us focused on the requirements of the proper purpose and proportionality, and we too will focus our deliberations on these.

29. At the outset and before we examine the provisions of the law from the perspective of the limitations clause, we should mention that the court will not be quick to intervene and set aside a provision of statute enacted by the legislature. The court should uphold the law as an expression of the will of the people (HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481, at pages 552-553; HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235, at pages 263-264; HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57, at pages 66-67). This is an expression of the principle of the separation of powers: the legislative authority determines the measures that should be taken in order to achieve public goals, whereas the judicial authority examines whether these measures violate basic rights in contravention of the conditions provided 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 discover to what extent it violates constitutional human rights (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior*, at paragraph 78 of the opinion of President A. Barak). It has therefore been held in the case law of this court that when we examine the legislation of the Knesset from the perspective of the limitations clause, the court will act 'with judicial restraint, caution and moderation' (*Menahem v. Minister of Transport*, at page 263). The court will not refrain from constitutional scrutiny of legislation, but it will act with care and exercise its constitutional scrutiny in order to protect human rights within the restrictions of the limitations 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 maintained.

The requirement of a proper purpose

30. According to the limitations 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 a proper one 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 *Menahem v. Minister of Transport*, at page 264; HCJ 6893/05 *Levy v. Government of Israel* [2005] IsrSC 59(2) 876, at pages 889-890; HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; [1997] IsrLR 149, at pages 52-53). It has also been held that not every purpose may justify a violation of constitutional basic rights, and that the essence of the violated right and the degree of the violation thereof may have ramifications for the purpose that is required to justify the violation.

In our remarks above we discussed how 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 because of their activity or their membership in terrorist organizations that carry out hostilities against the State of Israel from returning to the cycle of hostilities (see paragraph 6 above). This legislative purpose is a proper one. Protecting the security of the state is an urgent and even essential public need in the harsh reality of unceasing murderous terrorism that attacks 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 when there is 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 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*, at page 741).

(See also *Ajuri v. IDF Commander in West Bank*, at page 383; the remarks of Justice D. Dorner in HCJ 5627/02 *Saif v. Government Press Office* [2004] IsrSC 58(5) 70; [2004] IsrLR 191, at pages 76-77; EA 2/84 *Neiman v. Chairman of Central*

Elections Committee for Tenth Knesset [1985] IsrSC 39(2) 225; IsrSJ 8 83, at page 310).

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 go on 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 turn to examine this question.

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

31. The main issue that arises with regard to the constitutionality of the law under consideration before us concerns the proportionality of the arrangements provided in it. As a rule, it is customary to recognize three subtests that constitute fundamental criteria for determining the proportionality of an act of legislation that violates a constitutional human right: the first is the *rational connection test* that requires the legislative measure that violates the constitutional right to correspond to the purpose that the law is intended to realize; the second is the *least harmful measure test*, which requires the legislation to violate the constitutional right to the smallest degree possible while achieving 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 arising from it (see *Menahem v. Minister of Transport*, at page 279; *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior*, at paragraphs 65-75; *Beit Sourik Village Council v. Government of Israel*, at pages 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 allow 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, and therefore it would not be right to oblige the legislature to adopt the aforesaid measure. Consequently this court has recognized a 'margin of constitutional appreciation' which is also called the 'margin of proportionality.' The limits of the margin of constitutional appreciation are determined by the court in each case on its merits and according to its circumstances, with a view to the nature of the right that is being violated and the extent of the violation thereof, as compared with 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 lies within the margin of proportionality. The court will only intervene when the chosen measure significantly departs from the limits of the margin of constitutional appreciation and is clearly disproportionate (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221, at page 438; HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [1998] IsrSC 52(2)

433; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [2004] IsrSC 58(3) 782, at page 815; *Gaza Coast Local Council v. Knesset*, at pages 550-551).

In the circumstances of the case before us, the extent of the violation of the constitutional right to personal liberty is significant and even severe. Notwithstanding, 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 we ought to recognize that the legislature has a relatively broad margin of appreciation, in order to choose the proper 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 paragraph 21 above, for the purpose of detention under the aforesaid law, the state is required to prove with clear and convincing evidence that the detainee is an 'unlawful combatant' with the meaning that we have discussed. Consequently the state is required to prove the personal threat presented by the detainee that derives from his involvement in the organization. Administrative detention constitutes a suitable means of averting the security threat presented by the detainee, 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. For this reason the first subtest of proportionality — the rational connection test — is satisfied.

The main question concerning the proportionality of the law under discussion before us concerns the second subtest, namely the question whether there are alternative measures that violate the constitutional right to a lesser degree. In order to examine 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 that were provided in the law and examine whether they depart from the margin of proportionality. Finally we should examine the law in its entirety and examine whether the combination of arrangements that were provided in the law satisfies the test of proportionality in the narrow sense, namely 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 on the subject of proportionality was that there are alternative measures to administrative detention under the law under discussion and that these violate the right to liberty to a lesser degree. In this regard, 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, or alternatively use should be made of the measure of bringing the appellants to a criminal trial. *Second*, it was argued that even if there is a need for administrative detention in the appellants' case, this should be done under the Emergency Powers (Detentions) Law, 5739-1979, since they argue that this is a law that is less harmful than the Internment of Unlawful Combatants Law.

The first argument that the appellants should be declared prisoners of war should be rejected. In HCJ 2967/00 *Arad v. Knesset* [2000] IsrSC 54(2) 188, which considered the case of Lebanese detainees, a similar argument to the one raised in the appellants' case was rejected as follows:

> 'We agree with the position of Mr Nitzan that the Lebanese detainees should not be regarded as prisoners of war. It is sufficient that they do not satisfy the provisions of section 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 detainees 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*., at page 191).

(See also CrimApp 8780/06 *Sarur v. State of Israel* (unreported decision of 20 November 2006); HCJ 403/81 *Jabar v. Military Commander* [1981] IsrSC 35(4) 397; and also HCJ 102/82 *Tzemel v. Minister of Defence* [1983] IsrSC 37(3) 365, at pages 370-371).

Similar to what was said in *Arad v. Knesset*, in the circumstances of the case before us the appellants should also not be given a prisoner of war status, since they do not satisfy the conditions of article 4 of the Third Geneva Convention, and especially the condition concerning the observance of the laws of war.

The appellants' argument that a more proportionate measure would be to bring them to a criminal trial should also be rejected, in view of the fact that bringing a person to a criminal trial has a different character and purpose to the measure of administrative detention. Bringing someone to a criminal trial is intended to punish him for acts that were committed in the past, and this depends upon the existence of evidence that can be brought before a court in order to prove guilt beyond a

reasonable doubt. By contrast, administrative detention was not intended to punish but to prevent activity that is prohibited by law and that endangers the security of the state. The quality of evidence that is required for administrative detention is different from the quality of evidence that is required for a criminal trial. Moreover, as a rule the use of the extreme measure of administrative detention is justified in circumstances where other measures, including holding a criminal trial, are impossible, because of the absence of sufficient admissible evidence or the impossibility of revealing privileged sources, or when holding a criminal trial does not provide a satisfactory solution to averting the threat presented to the security of the state in circumstances where after serving the sentence the person concerned is likely to become a security danger once again (see, *inter alia*, ADA 4794/05 *Ufan v. Minister of Defence* (unreported decision of 12 June 2005); ADA 7/94 *Ben-Yosef v. State of Israel* (unreported decision of 1 September 1994); ADA 8788/03 *Federman v. Minister of Defence* [2004] IsrSC 58(1) 176, at pages 185-189; *Fahima v. State of Israel*, at pages 263-264). In view of all this, it cannot be said that holding 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 by virtue of 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 arrangements provided in the Internment of Unlawful Combatants Law. Thus, for example, it is argued that the Emergency Powers (Detentions) Law requires an individual threat as a ground for detention, without determining presumptions that place the burden of proof on the detainee as provided in the Internment of Unlawful Combatants Law. Moreover, the Emergency Powers (Detentions) Law requires judicial scrutiny to be held within 48 hours of the time of detention and a periodic review every three months, whereas the Internment of Unlawful Combatants Law allows a detainee to be brought before a judge as much as fourteen days from the time he is detained, and it requires the holding of a periodic review only once every half a year; the Emergency Powers (Detentions) Law makes the power of detention conditional upon the existence of a state of emergency in the state, whereas detention under the Internment of Unlawful Combatants does not make such a condition and it is even unlimited in time, apart from the stipulation that the detention will end by the time that the hostilities against the State of Israel have come to an end. 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 detention under the Internment of Unlawful Combatants is effected by an order of the chief of staff, who is competent to delegate his authority to an officer with the rank of general. In view of all this, the appellants' argument before us was 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 provided in the Emergency Powers (Detentions) Law violate the

right to personal liberty to a lesser degree than the Internment of Unlawful Combatants Law. Notwithstanding, we accept the state's argument in this regard 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 as a rule its purpose is to prevent threats to state security arising from *local* individuals (i.e., citizens and residents of the state). Consequently the law contains a power of administrative detention that is usually used with regard to isolated individuals who threaten state security and whose detention is intended to last for relatively short periods of time, apart from in exceptional cases. On the other hand, as we clarified in paragraph 11 above, the Internment of Unlawful Combatants Law is intended to apply to *foreign* individuals who operate within the framework of terrorist organizations against the security of the state. The law was intended to be of use at a time when there are organized and persistent hostilities 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 hostilities 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 provided 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 the use of 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 provide 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 ours, they are not alternatives to one another' (page 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 may be used to detain foreigners who are not residents or citizens of the State of Israel. Notwithstanding, 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 should be pointed out 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 appellants' administrative detention was carried out by virtue of 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 a belligerent occupation (see paragraph 11 above). One of the consequences accompanying the end of the Israeli military rule in the Gaza Strip was the cancellation of the security legislation that was in force there. In consequence of this, the chief of staff issued detention orders for the appellants under the Internment of Unlawful Combatants Law.

In view of the cancellation of the security legislation in the Gaza Strip, obviously no question arises with regard to inhabitants of the Gaza Strip as to whether administrative detention by virtue of security legislation may constitute a suitable and more proportionate measure than detention under the Internment of Unlawful Combatants Law. Notwithstanding, I think it right to point out 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 can be seen from what is stated in paragraph 11 above, I tend to the *prima facie* opinion that both under the international humanitarian law that governs the matter (article 78 of the Fourth Geneva Convention) and according to the test of proportionality, the 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. Notwithstanding, this issue does not arise in the circumstances of the case before us and therefore I think it right to leave it for the future.

Proportionality of the specific arrangements provided in the law

37. In view of all of the reasons set out above, we have reached the conclusion that the measures indicated by the appellants in their pleadings cannot constitute alternative measures to administrative detention under the law that we are considering. The appellants further argued that the specific arrangements provided 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 determined. Let us therefore turn to examine this argument with regard to the specific arrangements provided in the law.

(1) Entrusting the power of detention to military personnel

38. Section 3(a) of the law, which was cited in paragraph 15 above, provides that a detention order under the law will be issued by the chief of staff 'with his signature' and will include the reasons for the detention 'without harming the security needs of the state.' Section 11 of the law goes on to provide that 'the chief of staff may delegate any of his powers under this law to an officer with the rank of general that he may determine.' According to the appellants, entrusting the power of detention under the law to the chief of staff who may delegate it to an officer with the rank of general violates the detainees' right to personal liberty excessively. In this context, the appellants emphasized that the Emergency Powers (Detentions) Law entrusts the power of administrative detention to 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 entrusting the power of detention to the chief of staff or an officer with the rank of general falls within the margin of proportionality and we should not intervene in it. *First*, as we said above, the specific purposes of the Internment of Unlawful Combatants Law and the Emergency Powers (Detentions) Law are different, and therefore there is a difference in the arrangements provided 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 complete control of the State of Israel, there is logic in determining an arrangement that entrusts the power of detention to military personnel of the highest rank. *Second*, it should be made clear that the provisions of international law do not deny the power of detention to the military authority responsible for the security of a territory where there are protected civilians. This is capable of supporting the conclusion that entrusting the power of detention to the chief of staff or an officer with a rank of general does not, in itself, violates the right to personal liberty disproportionately.

(2) The detainee's right to a hearing after a detention order is issued

39. Sections 3(b) and 3(c) of the law provide the following:

> 'Internment of unlawful combatant
>
> 3. (a) …
> (b) An internment order may be given without the person being held by the state authorities being present.
> (c) An internment order shall be brought to the attention of the internee at the earliest possible time, and he shall be given an opportunity to state his case with regard to the order before an officer with the rank of at least lieutenant-colonel who will be appointed by the chief of staff; the arguments of the internee shall be written down by the officer and shall be

> brought before the chief of staff; if the chief of staff, after he has studied the internee's arguments, finds that the conditions provided in sub-section (a) are not satisfied, he shall cancel the internment order.

It can be seen from the aforesaid section 3(b) that a detention order may be made by the chief of staff (or a general who is appointed by him) without the detainee being present. Section 3(c) of the law goes on to provide that the order shall be brought to the attention of the detainee 'at the earliest possible time' and that he shall be given a hearing before an army officer with the rank of at least lieutenant-colonel, in order to allow the detainee to state his case; the detainee's arguments shall be written down by the officer and brought before the chief of staff (or a general acting for him). According to the law, if after studying the detainee's arguments the chief of staff (or the general) is persuaded that the conditions for detention under the law are not satisfied, the internment order shall be cancelled.

The appellants' argument in this regard was that the aforesaid arrangement violates the right to personal liberty excessively in view of the fact that the detainee may state his case only after the event, i.e., after the detention order has been issued, and only before an officer with the rank of lieutenant-colonel, who will refer his arguments to the chief of staff (or a general) in order that they will consider their position once again. According to the appellants, the person who issues the order — the chief of staff or the general — should be obliged to hear the detainee's arguments, and this should occur before the order is made. These arguments should be rejected, for several reasons: *first*, it has been established in case law that the person who makes the decision does not need to conduct the hearing personally, and that it is also permissible to hold 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 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 Interior* [1996] IsrSC 50(1) 397, at page 403; HCJ 2159/97 *Ashkelon Coast Regional Council v. Minister of the Interior* [1998] IsrSC 52(1) 75, at pages 81-82). *Second*, from a practical viewpoint, providing a duty to hold hearings *ab initio* and before the chief of staff or the general personally at times of combat and in circumstances where many detentions may take place in the combat zone may give rise to significant practical problems. Moreover, holding a hearing in the manner proposed by the appellants is contrary to the purpose of the law, which is to allow an immediate removal of the 'unlawful combatants' from the cycle of hostilities in an effective manner. It should be emphasized that the hearing under section 3(c) of the law is an initial procedure whose main purpose is to prevent mistakes of identity. As we shall explain below, in addition to the initial hearing, the law requires a judicial review to take place before a District Court judge no later than 14 days from the date of issuing the internment order, which reduces the violation argued by the appellants. In view of all of the aforesaid, it cannot be said that the

arrangement provided in the law with regard to the hearing falls outside the margin of proportionality.

(3) The judicial review of detention under the law

40. Section 5 of the law, which is entitled 'Judicial review,' provides in subsections (a) to (d) the following arrangement:

> 'Judicial review
>
> 5. (a) An internee shall be brought before a judge of the District Court no later than 14 days from the date of issuing the internment order; if a District Court judge finds that the conditions provided in section 3(a) are not satisfied, he shall cancel the internment order.
>
> (b) If the internee is not brought before the District Court and the hearing before it is not begun within 14 days of the date of issuing the internment order, the internee shall be released unless there is another ground for his detention under the law.
>
> (c) Once every six months from the date of issuing the order under section 3(a) the internee shall be brought before a judge of the District Court; if the court finds that his release will not harm state security or that there are special reasons that justify his release, it shall cancel the internment order.
>
> (d) A decision of the District Court under this section may be appealed within thirty days to the Supreme Court which shall hear the appeal with one judge; the Supreme Court shall have all the powers given to the District Court under this law.
>
> (e) …
>
> (f) …'

The appellants argued before us that the judicial review proceeding provided in the aforesaid section 5 violates the right to personal liberty excessively, for two main reasons: *first*, under section 5(a) of the law the detainee should be brought before a District Court judge no later than 14 days from the date of his detention. According to the appellants, this is a long period of time that excessively violates the right to personal liberty and the detainee's right of access to the courts. In this respect 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 detainee should be brought to a judicial review 'without delay.' *Second*, it was argued that the period of time provided in

section 5(c) of the law for carrying out a periodic judicial review of the detention — every six months — is too long and is therefore disproportionate. By way of comparison, the appellants pointed out that the Emergency Powers (Detentions) Law provides 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 provided in section 5 are proportionate and they are consistent with the provisions of international law.

41. Section 5 of the law is based on the premise that judicial review constitutes an integral part of the administrative detention procedure. In this respect it has been held in the past that:

> 'Judicial involvement with regard to detention orders is essential… Judicial involvement 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 upheld' (*per* President A. Barak in *Marab v. IDF Commander in Judaea and Samaria*, at page 368).

The main dispute with regard to the constitutionality of section 5 of the law concerns the question of the proportionality of the periods of time provided in it.

With regard to the periods of time between the detention of the detainee and the initial judicial review of the detention 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 discretion whose price is likely to be a person's loss of liberty without just cause, the administrative detainee 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* [1988] IsrSC 42(3) 801, at pages 819-820). It should be noted that this case law ruling is consistent with the arrangements prevailing in international law. International law does not stipulate the number of days during which it is permitted to detain a person without judicial involvement, but it determines 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 detention decision should be brought before a judge or another person with judicial authority 'promptly' (see in this regard the provisions of article 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*, at pages 369-370). A similar principle is provided in sections 43 and 78 of the Fourth Geneva Convention according to which the judicial (or administrative) review of a detention decision should be made 'as soon as possible' (in the wording of article 43 of the convention) or 'with the least possible delay' (in the wording of article 78 of the convention). Naturally the question as to what is the earliest possible time for bringing a detainee before a judge depends upon the circumstances of the case.

In the case before us, the Internment of Unlawful Combatants Law provides that the date for holding the initial judicial review is 'no later than 14 days from the date of issuing the internment order.' The question that arises in this context is whether the aforesaid period of time excessively violates the right to personal liberty. The answer to this question lies in the purpose of the law and the special circumstances of the detention thereunder, 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 parties who belong to terrorist organizations and who conduct persistent hostilities against the State of Israel. As we have said, the law was intended to apply, *inter alia*, in circumstances where hostilities are taking place in a 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 see fit to hold that the maximum period of time of fourteen days for holding an initial judicial review of the detention order departs from the margin of proportionality in such a way that it justifies our intervention by shortening the maximum period provides in the law. At the same time, it should be emphasized that the period of time provided in the law is a maximum period and it does not exempt the state from making an effort to bring the detainee to an initial judicial review as soon as possible in view of all the circumstances of the case. In other words, whereas we do not see fit to intervene in the proportionality of the maximum period provided in the law, exercising the power of detention in each specific case should be done proportionately, and there should not be a delay of 14 whole days before holding an initial judicial review where it is possible to hold a judicial review earlier (see and cf. ADA 334/04 *Darkua v. Minister of Interior* [2004] IsrSC 58(3) 254, at page 371, where it was held that even though under the Entry into Israel Law, 5712-1952, a person taken into custody should 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 section 3(c) of the law, whose wording was cited above, provides that 'An internment order shall be brought to the attention of the internee *at the earliest possible time*, and he shall be given an opportunity to state his case with regard to the order before an officer with the rank of at least lieutenant-colonel who will be appointed by the chief of staff…' (emphasis supplied). Thus we see that although section 5(a) of the law provides a maximum period of fourteen days for an initial *judicial* review, section 3(c) of the law provides a duty to hold a hearing for the detainee before a military officer at the earliest possible time after issuing the order. Certainly the aforesaid hearing is not a substitute for a review before a judge of the District Court, which is an independent and objective judicial instance, but the holding of an early hearing on a date as soon after the issuing of the order as possible is capable of reducing to some degree the concern of 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 detention under the law. According to section 5(c) of the law, the detainee should 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 detainee will not harm state security or that there are special reasons that justify his release, the court shall cancel the internment order.

The appellants' argument before us was that the frequency of once every six months is insufficient and disproportionately violates the right to personal liberty. With regard to this argument, we should point out that the holding of a periodic review of the necessity of continuing the administrative detention once every six months is consistent with the requirements of international humanitarian law. Thus article 43 of the Fourth Geneva Convention provides that:

> '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.'

From the aforesaid article 43 it can be seen that holding a 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 provided in section 5(c) of the law. Moreover, whereas section 43 of the Fourth Geneva Convention is satisfied with the holding of an administrative review that is carried out by an administrative body, the Internment of Unlawful Combatants provides that a District Court judge is the person who should carry out a judicial review of the detention orders under the aforesaid law, and his decision may be appealed to the Supreme Court which shall hear the appeal with one judge (section 5(d) of the law). In view of all this, it cannot be said that the arrangement provided 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. Section 5(e) of the law provides the following:

> 'Judicial review 5. …
>
> (e) In proceedings under this law it is permitted to depart from the rules of evidence, for reasons that will be recorded; the court may admit evidence, even without the internee or his

> counsel being present or without disclosing it to them, if, after it has seen the evidence or heard argument, even without the internee or his counsel being present, it is persuaded that disclosure of the evidence to the detainee or his counsel is likely to harm the security of the state or the security of the public; this provision does not derogate from any right not to produce evidence under chapter 3 of the Evidence Ordinance [New Version], 5731-1971.
>
> …'

The appellants' argument before us was that the arrangement provided in the aforesaid section 5(e) disproportionately violates the right to personal liberty, since it allows the holding of a judicial review of a detention order under the law to depart from the rules of evidence and it allows evidence to be heard *ex parte* without the detainee and his counsel being present and without disclosing it 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 use to be made of evidence that does not satisfy the admissibility tests of the rules of evidence and that therefore may not be brought in a normal criminal trial. Obviously the confidentiality of the sources of the information is important, and therefore it is often not possible to disclose all of the intelligence material that is used to prove the ground for detention. Reliance on inadmissible administrative evidence and on privileged material for reasons of state security lies at the heart of administrative detention, since had there been sufficient admissible evidence that could have been shown to the detainee and brought before the court, in general the measure of holding a criminal trial should be chosen (see *Federman v. Minister of Defence*, at pages 185-186). There is no doubt that a proceeding that is held *ex parte* for the sake of presenting privileged evidence to the court has many deficiencies. But the security position in which we find ourselves in view of the persistent hostilities against the security of the State of Israel requires the use of tools of this kind when making 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, the judicial system has over the years developed a tool for control and scrutiny of intelligence material, in so far as this is possible in a proceeding of the kind that takes place in judicial review of administrative detention. In 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* [1998] IsrSC 52(5) 337, at page 346, *per* Justice T. Or:

> 'The basic right of every human being as such to liberty is not a slogan devoid of content. The protection of this basic value requires that we give significant content to the proceeding of judicial review for administrative detention. In this framework, I am of the opinion that the professional judge can and should consider not only the question whether *prima facie* the competent authority was entitled to decide what it decided on the basis of the material that was before it, but the judge should also consider the question of the credibility of the material that was submitted as a part of its assessment of the weight of the material. Indeed, that fact that certain "material" is valid administrative evidence does not exempt the judge from examining its degree of credibility against a background of the other evidence and all of the circumstances of the case. As such, the "administrative evidence" label does not exempt the judge from the need to demand and receive explanations from the authorities that are capable of providing them. In other words, its significance is to weaken considerably the process of judicial review, and to allow the loss of liberty for prolonged periods on the basis of scanty 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 carries out a judicial review of an administrative detention is required to act with caution and great care when examining the material that is brought before it for its inspection alone. In such circumstances, the court has a duty to act with great caution and to examine the privileged material brought before it from the viewpoint of the detainee, 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 detainee where he has not seen the material against him and cannot defend himself' (HCJ 11006/04 *Kadri v. IDF Commander in Judaea and Samaria* (unreported decision of 13 December 2004), in paragraph 6; see also CrimApp 3514/97 *A v. State of Israel* (unreported decision of 22 June 1997)).

Thus we see that in view of the reliance on administrative evidence and the admission of privileged evidence *ex parte*, the court carrying out a judicial review under the Internment of Unlawful Combatants Law is required to act with caution and care 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 the judge for his inspection, as opposed to the activity attributed to the detainee that gives rise to the allegation that he represents a threat to state security. In a similar context it has been held that:

> 'Information relating to several incidents cannot be compared to information concerning an isolated incident; information from one source cannot be compared to information from several sources; and information that is entirely based on the statements of agents and informers only cannot be compared to 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* (unreported decision of 27 July 2003), at paragraph 6).

In view of all of the aforesaid reasons, we are drawn to the conclusion that reliance on inadmissible evidence and privileged evidence is part and parcel of administrative detention. In view of the fact that there is a judicial review of the quality and quantity of the administrative evidence that supports the ground of detention, and in view of the care with which the court is required to examine the privileged material brought before it *ex parte*, it cannot be said that the arrangement provided in section 5(e) of the law in itself violates the rights of detainees disproportionately.

(5) Detainee's meeting with his lawyer

44. Section 6 of the law, which is entitled 'Right of internee to meet with lawyer' provides the following:

> 'Right of internee to meet with lawyer
>
> 6. (a) The internee may meet with a lawyer at the earliest opportunity when it is possible to hold the meeting without prejudicing the needs of state security, but no later than seven days before he is brought before a judge of the District Court in accordance with the provisions of section 5(a).
>
> (b) The Minister of Justice may in an order restrict the right of representation in proceedings under this law to someone who has been given unconditional approval to act as defence counsel in the military tribunals under the provisions of section 318(c) of the Military Jurisdiction Law, 5715-1955.'

In their arguments before us the appellants raised two main arguments against the proportionality of the arrangements that were provided in the aforesaid section 6: *first*, it was argued that under section 6(a) of the law, it is possible to prevent a meeting of a detainee with his lawyer for a period of up to seven days, during which a hearing is supposed to be held for the detainee under section 3(c) of the law. It is argued that holding a hearing without giving the detainee a possibility of first consulting a lawyer is likely to make the hearing meaningless in such a way that it

violates the right to personal liberty excessively. *Second*, it was argued that section 6(b) of the law, which makes representation dependent upon an unconditional approval for a lawyer to act as defence counsel, also violates the rights of the detainee disproportionately.

With regard to the appellants' first argument, no one disputes that the right of the detainee 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* [2006] (1) IsrLR 320, at paragraph 14, and the references cited there). Both according to the basic principles of Israeli law and the principles of international law, the rule is that a detainee 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*, at pages 380-381). For this reason section 6(a) of the law provides that a detainee should be allowed to meet with his lawyer 'at the earliest opportunity.' Notwithstanding, it should be remembered that like all human rights the right to legal counsel is also 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* [1993] IsrSC 47(2) 843, at page 849; HCJ 6302/92 *Rumhiah v. Israel Police* [1993] IsrSC 47(1) 209, at pages 212-213). Section 6(a) of the law therefore provides that it is possible to postpone the meeting of the detainee with his lawyer for security reasons, but no more than seven days before he is brought before a District Court judge under the provisions of section 5(a) of the law. Since under the aforementioned section 5(a) a detainee should be brought before a District Court judge no later than 14 days from the date on which the internment order is made, this means that a meeting between a detainee and his lawyer may not be prevented for more than seven days from the time the detention order is made against him.

In view of 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 detainee with a lawyer may be prevented when security needs so require falls outside the margin of proportionality (see and cf. *Marab v. IDF Commander in Judaea and Samaria*, where it was held that 'As long as the hostilities continue, there is no basis for allowing a detainee to meet with a lawyer,' at page 381; see also HCJ 2901/02 *Centre for Defence of the Individual v. IDF Commander in West Bank* [2002] IsrSC 56(3) 19).

In addition to the aforesaid, two further points should be made: *first*, even though the detainee may present his arguments in the course of the hearing under section 3(c) of the law without consulting a lawyer previously, section 6(a) of the law provides that the state should allow the detainee to meet with his defence counsel 'no later than seven days before he is brought before a judge of the District Court.' It follows from this that as a rule the detainee is represented in the judicial review proceedings concerning the making of the detention order under the law. I think that

this reduces the intensity of the violation of the right to consult a lawyer as a part of the right to personal liberty. *Second*, it should be emphasized that the maximum period of seven days does not exempt the state from its duty to allow the detainee to meet with his lawyer at the earliest possible opportunity, in circumstances where security needs allow this. Therefore the question of the proportionality of the period during which a meeting between the detainee 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*, at page 381).

45. The appellants' second argument concerning section 6(b) of the law should also be rejected. Making representation dependent upon an unconditional approval of the lawyer to act as defence counsel under the provisions of section 318(c) of the Military Jurisdiction Law, 5715-1955, is required for security reasons in view of the security sensitivity of administrative detention proceedings. The appellants did not argue that the need for an unconditional approval 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 provided in section 6 of the law should be rejected.

(6) The length of the detention under the law

46. From the provisions of sections 3, 7 and 8 of the Internment of Unlawful Combatants Law it can be seen that a detention order under the law need not include a defined date for the end of the detention. The law itself does not provide a maximum period of time for the detention imposed thereunder, apart from the determination that the detention should not continue after the hostilities of the force to which the detainee belongs against the State of Israel 'have ended' (see sections 7 and 8 of the law). According to the appellants, this is an improper detention without any time limit, which disproportionately violates the constitutional right to personal liberty. In reply, the state argues that the length of the detention 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 detainee belongs.

It should immediately be said that making a detention 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 'hostilities' 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 end. In this reality, detainees under the Internment of Unlawful Combatants Law may remain in detention for prolonged periods of time. Notwithstanding, 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 made without a defined date for their termination does not depart from the margin of proportionality, especially in view of the judicial review arrangements that are provided in the law.

As we have said, the purpose of the Internment of Unlawful Combatants Law is to prevent 'unlawful combatants' as defined in section 2 of the law from returning to the cycle of hostilities, as long as the hostilities are continuing and threatening the security of the citizens and residents of the State of Israel. For similar reasons the Third Geneva Convention allows prisoners of war to be interned until the hostilities have ended, in order to prevent them returning to the cycle of hostilities as long as the fighting continues. Even where we are concerned with civilians who are detained during an armed conflict, international humanitarian law provides that the rule is that they should be released from detention immediately after the specific ground for the detention has elapsed and no later than the date when the hostilities end (see J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (vol. 1, 2005), at page 451; also see and 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).

In view of the aforesaid, we are drawn to the conclusion that the fundamental arrangement that allows a detention order to be made under the law without a defined termination date, except for the determination that the detention will not continue after the hostilities against the State of Israel have ended, does not depart from the margin of constitutional appreciation. Notwithstanding, it should be emphasized that the question of the proportionality of the duration of detention under the law should be examine in each case on its merits and according to its specific circumstances. As we have said, the Internment of Unlawful Combatants Law provides a duty to hold a periodic judicial review once every six months. The purpose of the judicial review is to examine whether the threat presented by the detainee to the security of the state justifies the continuation of the detention, or whether the internment order should be cancelled in circumstances where the release of the detainee will not harm the security of the state or where there are special reasons justifying the release (see section 5(c) of the law). When examining the need to extend the detention, the court should take into account *inter alia* the period of time that has passed since the order was made. What was held in *A v. Minister of Defence* concerning detention under the Emergency Powers (Detentions) Law, *per* President A. Barak, is also true in our case:

> '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 burdensome to such an extent that it ceases to be proportionate' (*ibid*., at page 744).

Similarly it was held in *A v. IDF Commander* with regard to administrative detention under the security legislation in the territories 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 detainee. It depends upon the credibility of the evidence itself and how up to date it is. The longer the duration of the administrative detention, the greater the burden imposed on the military commander to show the threat presented by the administrative detainee' (*ibid*., at paragraph 7 of the judgment).

Indeed, unlike in the arrangements provided in the Emergency Powers (Detentions) Law, a court that is trying a case under the Internment of Unlawful Combatants Law does not exercise judicial review with regard to the *duration* of the detention order but examines the question whether there is a justification for cancelling an existing order, for the reasons listed in section 5(c) of the law. Notwithstanding, even a detention order under the Internment of Unlawful Combatants Law cannot continue indefinitely. The period of time that has elapsed since the order was made constitutes a relevant and important consideration in the periodic judicial review for determining whether the continuation of the detention 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 detainee's right to his personal liberty in its balance against considerations of public interest, and therefore the greater the burden 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 detainee's case may be required, and it is possible that the original evidence that led to his original detention will be insufficient' (*Kadri v. IDF Commander in Judaea and Samaria*, at paragraph 6).

In view of all of the aforesaid, a court that exercises judicial review of detention under the Internment of Unlawful Combatants Law may restrict and shorten the period of detention in view of the nature and weight of the evidence brought before it with regard to the security threat presented by the detainee as an 'unlawful combatant' and in view of the time that has passed since the detention order was made. By means of judicial review it is possible to ensure that the absence of a specific date on which the detention order under the law ends will not violate the right to personal liberty excessively and that detainees under the law will not be held in detention for a period greater than what is required by significant security considerations.

(7) The possibility of conducting criminal proceedings in addition to a detention proceeding under the law

47. Section 9 of the law, which is entitled 'Criminal proceedings,' provides the following:

> 'Criminal proceedings
>
> 9. (a) It is permitted to conduct a criminal proceeding against an unlawful combatant under any law.
>
> (b) The chief of staff may make an order for the detention of an unlawful combatant under section 3, even if a criminal proceeding is being conducted against him under any law.'

According to the appellants, the aforesaid section 9 violates the right to personal liberty disproportionately since it makes it possible to detain someone under the Internment of Unlawful Combatants Law even though there are already criminal proceedings against him, and *vice versa*. The argument is that by conducting both sets of proceedings it is possible to continue to inter a person even after he has finished serving the sentence handed down to him in the criminal proceeding in a manner that it is argued amounts to cruel punishment. In reply the state said that this is a proper and proportionate arrangement in view of the fact that it is intended to apply in circumstances where 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, so that his release may harm state security.

With regard to these arguments we should reiterate what we said earlier in our remarks (at paragraph 33 above), that bringing someone to a criminal trial is different in its nature and purpose to the measure of administrative detention. In general it is desirable and even preferable to make use of criminal proceedings where this is possible. The use of the extreme measure of administrative detention is justified in circumstances where other measures, including the holding of a criminal trial, are not possible, because of a lack of sufficient admissible evidence or because it is impossible to disclose privileged sources. Notwithstanding, 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 bring him to a criminal trial. There may be other cases in which a person was brought to a criminal trial and was convicted and served his sentence, but this does not provide a satisfactory solution to preventing the threat that he presents to state security in circumstances where after serving the sentence he may once again become a security threat. Since bringing someone to a criminal trial and administrative detention are proceedings that are different from one another in their character and purpose, one cannot rule out the other, even though in my opinion substantial and particularly weighty security considerations are required to justify the use of both types of proceeding with regard to the same person. In any case, the fundamental 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 hitherto with regard to the requirement of proportionality has led to the following conclusions: *first*, the measure chosen by the legislator, namely administrative detention that prevents the 'unlawful combatant' 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 supposed to realize. *Second*, the measures indicated by the appellants in their arguments before us, namely 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 fitting alternative measure to detention in accordance with the law under discussion. *Third*, the specific arrangements provided in the law do not, in themselves and irrespective of the manner in which they are implemented, violate the right to personal liberty excessively, and they fall within the margin of constitutional appreciation given to the legislature. In view of all this, the question that remains to be examined is whether the combination of the arrangements provided 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 turn to examine this question.

Proportionality in the narrow sense — is the violation of the constitutional right reasonably commensurate with the public benefit arising from it

49. The Internment of Unlawful Combatants Law was enacted against a background of a harsh reality. The citizens and residents of the State of Israel have been threatened unceasingly by murderous terrorism that has attacked them indiscriminately for many years. In view of this, we held that the law's security purpose — removing '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. In view of all this, we were of the opinion that we should recognize that the legislature has a relatively broad margin of appreciation in order to choose the proper measure for realizing the legislative purpose (see paragraph 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 provided in the law. There is no doubt that this is a harmful measure that should be employed as little as possible. Notwithstanding, a look at the total combination of the aforesaid arrangements, in view of the interpretation that we have 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 (paragraph 11 above), 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 paragraph 11 above).

Second, the interpretation of the definition of 'unlawful combatant' in section 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 detention under the Internment of Unlawful Combatants Law the state is required to prove with administrative evidence that the detainee directly or indirectly played a real part — which is not negligible or marginal — in the hostilities against the State of Israel; or that the detainee belonged to an organization that is carrying out hostilities, in view of his connection and the extent of the detainee's 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 aforesaid sense includes proof of a personal threat that arises from the manner in which the detainee 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 of the detainees under the law specifically, and it has refrained from relying on the probative presumptions provided in sections 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 paragraphs 24 and 25 above).

Third, 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, with clear and convincing evidence, that the conditions of the definition of 'unlawful combatant' are satisfied and that the continuation of the detention is essential. This needs to 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 detainee and to the extent that the relevant intelligence information against him is up to date (see paragraphs 22 and 23 above).

Fourth, we saw fit to attribute significant weight to the fact that detention orders under the Internment of Unlawful Combatants Law are subject to an initial and periodic judicial reviews before a District Court judge, whose decisions may be appealed to the Supreme Court, which will hear the case with one judge. Within the framework of the aforesaid 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 care when examining the material brought before him. We also held that a court that exercises judicial review of detention under the law may restrict and shorten the period of detention in view of the nature and weight of the evidence brought before him with regard to the security threat presented by the detainee as an 'unlawful combatant,' and in view of the time that has passed since the detention order was made. For this reason we said that it is possible, by means of the judicial review, to ensure that the lack of a specific date for the termination of the detention order under the law does not excessively violate the right to personal liberty, and that detainees under the law will not be held in detention for a longer period than what is required by significant security considerations (paragraph 46 above).

Finally, although the arrangements that were provided in the law for the purpose of exercising the power of detention therein are not the only possible ones, we reached the conclusion that the statutory arrangements that we considered do not depart from the margin of proportionality to an extent that required our intervention. In our remarks above we emphasized that the periods of time that were determined in the law with regard to holding an initial judicial review after the detention order has been made, and with regard to preventing a meeting between the detainee 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, in so far as this is possible in view of the security constraints and all of the circumstances of the case. We also held that detention 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 specific circumstances.

In view of all of the aforesaid considerations, and in view of the existence of a relatively broad margin of constitutional appreciation 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, namely that the violation of the constitutional right to personal liberty is reasonably commensurate with the benefit accruing to the public from the aforesaid legislation. This conclusion of ours is based on the fact that according to the interpretation that we discussed above, the law does not allow the detention of innocent persons who have no real connection with the cycle of hostilities of the terror organizations, and it provides mechanisms whose purpose is to reduce the violation of the detainees' rights, including a ground for detention that is based on a threat to state security and the holding of a hearing and initial and periodic judicial reviews of detention 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 caused by the law, although it is a significant and severe violation, is not excessive. Our conclusion is therefore that the Internment of Unlawful Combatants Law satisfies the conditions of the limitations clause and there is no constitutional ground for our intervention.

From general principles to the specific case

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 a belligerent occupation. At that time, the administrative detention of the appellants was effected by virtue of the 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 cancellation of the security legislation in force there, on 20 September 2005 the chief of staff issued detention 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 held four periodic judicial reviews of the appellants' continuing detention. 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* (unreported decision of 14 March 2006). Before us are the appeals on three additional periodic decisions of the District Court not to order the cancellation of the appellants' detention orders.

51. In their pleadings before us, the appellants raised two main arguments with regard to their specific 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. *Second*, it was argued that even if the Internment of Unlawful Combatants Law is constitutional, no ground of detention thereunder has been proved with regard 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 oblige Israel to release automatically all the detainees held by it who are inhabitants of the Gaza Strip, as long as the personal threat that the detainees represented continued against the background of the continued hostilities against the State of Israel. This conclusion is clearly implied by the arrangements set out in articles 132-133 of the Fourth Geneva Convention. Section 132 of the aforesaid convention provides the general principle that the date for the release of detainees is when the grounds of detention that originally led to their detention no longer exist. The first part of article 133 of the convention, which relates to a specific case that is included within the scope of the aforesaid general principle, goes on to provide that the detention will end as soon as possible after the hostilities have ended. Article 134 of the convention, which concerns the question of the place where the detainees should be released, also relates to the date on which hostilities end as the date on which detainees should be released from detention. Unfortunately, the hostilities of the terrorist organizations against the State of Israel have not yet ended, and they lead

almost on a daily basis to physical injuries and mortalities. In such circumstances, the laws of armed conflict continue to apply. Consequently it cannot be said that international law requires Israel to release the detainees that were held by it when the military rule in the Gaza Strip came to an end, when it is possible to prove the continued individual threat presented by the detainees against the background of the continued hostilities against the security of the state.

53. With regard to the specific internment orders against the appellants under 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 have also studied the material that was brought before us during the hearing of the appeal. The material shows clearly the close links of the appellants to the Hezbollah organization and their role in the organization's ranks, including involvement in hostilities against Israeli civilian targets. In view of this, we have been persuaded that the individual threat of the appellants to state security has been proved, even without resorting to the probative presumption provided in section 7 of the law (see and cf. the remarks of Justice E. Rubinstein in *Iyyad v. State of Israel*, at paragraph 8(k) of his opinion). In view of the aforesaid, we cannot accept the appellants' claim 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 evidence. As we have said, the change in the form of detention was required by the end of the military rule in the Gaza Strip, and that was why it was done when it was done. 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 appropriate to the circumstances of the appellants' cases.

The appellants further argued that their release does not represent any threat to state security since their family members who were involved in terrorist activities have been arrested or killed by the security forces in such a way that the terrorist infrastructure that existed before they were detained no longer exists. They also argued that the passage of time since the appellants were arrested reduces the risk that they represent. With regard to these arguments it should be said that after we inspected the material brought before us, we have been persuaded that the arrest or death of some of the appellants' family members in itself does not remove the security threat that would be represented by the appellants, were they released from detention. We were also persuaded 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 threat anticipated to state security, if the internees 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 internees will return to 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 improved and the threats to the security of the state and its citizens will be increased. 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 contending with them…
> It would therefore be a serious and irresponsible act to release these two persons, especially at this time, when their return to terrorism can be anticipated and will increase the activity in this field…
> I cannot say, therefore, that the passage of time has reduced the threat presented by the two internees who are senior figures in the terrorist infrastructure, despite the differences between them. The passage of time has also not reduced the threat that they represent to an extent that will allow their release.'

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

> 'The privileged evidence brought before me shows 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 the aforesaid reasons, and after we have studied the material that was brought before us and have been persuaded that there is sufficient evidence to show 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 there is naturally increasing significance to the passage of time when we are dealing with administrative detention. Notwithstanding, at the present time we have found 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 reasoning that the trial court included in its decision, with regard 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 detainee and his counsel. The question of the probative significance of a detainee'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.

President

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, and especially those in writing, 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 in so far 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 I would have preferred to refrain from arriving at any conclusions, even in passing, with regard to the provisions of sections 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. In so far 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*, it would be preferable if the legislature took the initiative and addressed the matter.

Justice

Justice A. Procaccia:

I agree with the profound opinion of my colleague, President Beinisch.

Justice

Case decided as stated in the opinion of President D. Beinisch.

Given today, 8 Sivan 5768 (11 June 2008).

President Justice Justice