HCJ 3239/02

1. I Marab
2. A Dahdul
3. W Dahdul
4. Center for the Defense of the Individual founded by Dr. Lota Salzberger
5. B'tselem—The Israeli Information Center of Human Rights in the Occupied Territories
6. The Association for Human Rights in Israel
7. Physicians for Human Rights
8. Adalah—The Legal Center for Arab Minority Rights in Israel
9. Kanon—The Palestinian Organization for the Protection of Human and Environmental Rights
10. Public Committee Against Torture

v.

1. IDF Commander in the West Bank
2. Judea and Samaria Brigade Headquarters

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

For the petitioner —Lila Margalit
For the respondent —Anar Hellman

Judgment

President A. Barak

The Facts

1. Since September 2002, Palestinians have carried out many terrorist attacks against Israelis, both in Judea and Samaria as well as in Israel. The defense forces have been fighting this terrorism. To destroy the terrorist infrastructure, the Israeli government decided to carry out an extensive operation, Operation Defensive Wall. As part of this operation, which was initiated at the end of March 2002, the IDF forces entered various areas of Judea and Samaria. Their intention was to detain wanted persons as well as members of several terrorist organizations. As of May 5, 2002, about 7000 persons had been detained in the context of this operation. Among those detained were persons who were not associated with terrorism; some of these persons were released after a short period of time. Initial screening was done in temporary facilities which were set up at brigade headquarters. Those who were not released after this screening were moved to the detention facility in Ofer Camp. The investigation continued and many more were released. A number of the detainees were then moved to the detention facility in Kziot. As of May 15, 2002, of the 7000 persons who had been detained since the start of Operation Defensive Wall, about 1600 remained in detention.

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

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

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

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

> Notwithstanding sections 78(a)-78(d) of the Defense Regulations Order (Judea and Samaria) (Number 378)-1970 [hereinafter the Defense Regulations Order], an officer will have the authority to order, in writing, that a detainee be held in detention, for up to 18 days [hereinafter the detention period].

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

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

During the first 18 day period of detention, detainees have no option to be heard by a judge. This is due to the fact that under section 78(i) of Order 378, a judge's authority to order the release of detainees is limited to those detained who have been detainees in accordance with those specific sections. However, the detainees in question were not detained under these regulations, but rather under the terms of Order 1500, which explicitly grants authority to detain "[n]otwithstanding sections 78(a)-78(d)" of Order 378. In this specific regard, Order 1500 differs from Order 378 in two ways. First, an officer has the authority to order the detention of a detainee for a period of 18 days himself, and need not obtain a judicial order. Second, during that detention period, there is no judicial review of the detention order. Of course, an officer has the authority to release the detainee before the detention period has passed. *See* Order 1500, § 2(c).

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

Finally, Order 1500 adds that "a detainee shall be given the opportunity to raise claims opposing his detention within eight days." *See* Order 1500, § 2(b). As such, during the first eight days of his detention, a detainee may be held without being given the opportunity to

be heard. Order 1500, which was issued on April 5, 2002, was to be valid for two months.

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

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

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

5. Aside from Order 378, which is concerned with criminal detention, and Order 1500 (as amendment by Order 1502), which is concerned with detention during times of warfare, and which was specially issued within the context of Operation Defensive Wall, there also exists defense regulations which apply to the area and deal with administrative detention. The main order in this regard is the Administrative Detentions Order (Temporary Order) (Judea and Samaria) (Number 1226)-1988 [hereinafter Order 1226]. This order has undergone numerous amendments. After the issue and amendment of Order 1500, Order 1226 was amended accordingly. Issues concerning these orders do not stand before us.

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

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

Second, the period of detention without judicial review was shortened. The 18-day period set by Order 1500 was replaced with a 12-day detention period. Third, a detainee could only be prevented from meeting with his lawyer for a period of "four days from his detention." *See* Order 1500 4(a). Furthermore, it provided that if the investigators wished to prevent such a meeting after the four-day detention period, they must act in accordance with section 78C(c) of Order 378. Thus, the "head of the investigation" may first be appealed to. The head of the investigation, if he is of the opinion that such is necessary for the security of the area or for the benefit of the investigation, he may, in a written decision, order that the detainee be prevented from meeting with his lawyer for a period of up to 15 days from the day of his detention. After these periods have elapsed, such a meeting may be prevented for an additional 15 days.

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

Petitioners' Arguments

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

9. We received additional briefs from the petitioners after the issue of Order 1502. In these briefs, petitioners argued that Order 1500 and Order 1502 are unlawful, as they are in conflict with international humanitarian law and human rights law. In this regard, the petitioners rely upon the Covenant on Civil and Political Rights-1966 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949. The petitioners claim that international law recognizes only two types of detentions: regular "criminal" detention and preventive detention (internment). According to the petitioners, Order 1500 creates a third type of detention: prolonged mass detention for the purpose of screening the detainees. This third type is not recognized by international law and is unlawful. Lawful detention, whether "regular,"

"preventive," or "administrative," must be based on individual reasons related to a specific person. Order 1500 and Order 1502, petitioners argue, allow for collective detention. In summarizing their arguments, the petitioners note that "Order 1500 severely violates fundamental basic human rights. It allows for arbitrary detention, precludes judicial review over decisions regarding detention and isolates those detained under the order from the outside world for a prolonged period of time."

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

The State's Response

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

12. Regarding Order 1500, the state asserted in its response that due to the large number of detainees and limited resources, the initial process of investigation and screening under Order 1500 could last up to 18 days. Occasionally, the process could last for over 18 days. Order 1502 was issued to provide a legal framework for this situation. Respondents further claimed that Order 1500, as well as Order 1502, accord with the international laws of warfare and detention, specifically article 43 of the Hague Convention Regarding the Laws and Customs of War on Land-1907 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War-1949.

In addition, the state claimed that the temporary prevention of meetings with a lawyer is lawful. The state argues that while military activities continue—especially while IDF forces find themselves in hostile territory, in an attempt to uproot the terrorist infrastructure—it is unthinkable that their lives should be endangered due to the possibility that messages may be passed from the detention facilities to the outside world. This is especially true when the screening processes are

unfinished and it is unclear which of the detainees will remain in detention, whether criminal or administrative, when the screening is concluded. Finally, the respondents assert that regardless of whether the Basic Law: Human Dignity and Liberty applies to the orders in question, Order 150, as well as Order 1502, are in accordance with the limitations clause of the Basic Law. *See* Basic Law: Human Dignity and Liberty, § 8.

13. On June 11, 2002, in additional briefs, the respondents drew attention to Order 1505, which was issued on April 6, 2002. This order limited the detention period from 18 to 12 days. The period during which meetings with a lawyer could be prevented was shortened from 18 days to 4 days. The respondents assert that these changes became possible due to the easing of military activities in the area. Nevertheless, the respondents are of the opinion that due to the current state of affairs in the area, such as the war against terrorism—which places an unprecedented and prolonged burden on the security and investigatory authorities—and the large number of detainees being held, which is substantially higher than the amount of persons detained before Operation Defensive Wall, it is practically impossible to be satisfied with the standard detention framework of Order 378.

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

14. In the additional oral pleadings which were conducted on July 28, 2002—during which Order 1505 was already effective—the respondents reiterated their claim that Order 1500, as well as Order 1505, do not create a third type of detention. According to respondents, they provide for a regular form of criminal detention, in accordance with the special circumstances of warfare.

15. In approaching the task of writing our judgment, it became clear that no *order nisi* had been issued under this petition. We asked the

parties whether they would be willing to continue as if such an order had been issued. Petitioners, of course, agreed; respondents objected. Under these circumstances, we issued an *order nisi* on December 15, 2002, ordering the respondents to submit their final response within 10 days. The petitioners were given ten additional days to respond to the respondents' response. We added that the judicial panel would decide whether additional oral pleadings would be necessary.

16. After a number of continuances, we received an affidavit in response from respondent no. 1 on January 13, 2002. In this affidavit, the respondent explained the reason behind the issuance of Order 1512, *see supra* par. 7. He informed us that terrorist activities persist and the IDF is responding with military operations. For example, between September and the end of December 2002, approximately 1,600 terrorist attacks were carried out. During this period, 84 citizens and residents were killed. Over 400 citizens and residents were wounded. About 2,050 persons suspected of terrorist activity were detained in Judea and Samaria. Consequently, respondent 1 decided to extend Order 1500—as it had been extended in Order 1505—for an additional period of time in Order: Detention in Time of Warfare (Temporary Order) (Amendment Number 4) (Judea and Samaria) (Number 1518)-2003 [hereinafter Order 1518], after concluding that security reasons demanded such an extension. The extension is valid until April 5, 2003.

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

conclusion, respondent requested that, if the information offered does not suffice to reject this petition, we hear, *ex parte*, from the General Security Service itself, a detailed description of the objective constraints which required the issuance of Order 1500. These restraints also required that the amended order be extended for an additional period. The respondents assert that Order 1500 cannot be deemed illegal before we hear this classified data.

The Issues Raised

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

The Authority to Detain for the Purpose of Investigation

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

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

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

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

Moreover, it must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty Detention is the exception. The general rule is one of freedom. Confinement is an exception. *See* Crim.App. 2316/95 *Ganimat v. State of Israel*, at 649. There is no authority to detain arbitrarily. There is no need, in the context of this petition, to decide to what extent these principles apply to internal Israeli law regarding detention in the area. It suffices to state that we are convinced that internal Israeli law corresponds to international law in this matter. Furthermore, the fundamental principles of Israeli administrative law apply to the commander in the area. *See* HCJ *Jamit Askhan Al-Maalmon v. IDF Commander in Judea and Samaria*. The fundamental principles which are most important to the matter at hand are those regarding the duty of each public authority to act reasonably and proportionately, while properly balancing between individual liberty and public necessity.

21. International law adopts a similar approach concerning occupation in times of war. On the one hand, the liberty of each resident of occupied territory is, of course, recognized. On the other hand, international law also recognizes the duty and power of the occupying state, acting through the military commander, to preserve public peace

and safety; *see* Article 43 of the Annex to the Hague Convention Regulations Respecting The Laws and Customs of War on Land-1907 [hereinafter Hague Regulations]. In this framework, the military commander has the authority to promulgate security legislation intended to allow the occupying state to fulfill its function of preserving the peace, protecting the security of the occupying state, and the security of its soldiers. *See* Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter the Fourth Geneva Convention]. Consequently, the military commander has the authority to detain any person suspect of committing criminal offences, and any person he considers harmful to the security of the area. He may also set regulations concerning detention for investigative purposes—as in the matter at hand—or administrative detention—which is not our interest in this petition. Vice-President M. Shamgar, in HCJ 102/82 *Tzemel v. Minister of Defense*, at 369, stated in this regard:

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

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

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity… However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

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

arbitrary detention is unacceptable. Orders such as Orders 378 and 1226 were issued with this in mind.

22. The petitioners argued that Order 1500, as well as Orders 1502, 1505, 1512, and 1518, establish a new type of detention, aside from standard criminal detention and administrative detention. Petitioners assert that his new type of detention allows for detention without cause, and should thus be nullified. Indeed, we accept that the law which applies to the area recognizes only two types of detention: detention for the purpose of criminal investigation, as in Order 378, and administrative detention, as in Order 1226. There exists no authority to carry out detentions without "cause for detention." In *Tzemel*, Vice-President Shamgar expressed as much after quoting the provisions of Article 78 of the Fourth Geneva Convention:

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

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

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

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

A similar provision exists in Order 1505:

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

From these provisions, we find that under Order 1500 as well as Order 1505—and similarly under Orders 1512 and 1518—detention may only be carried out where there is a "cause for detention." The cause

required is that the circumstances of the detention raise the suspicion that the detainee endangers or may be a danger to security. Thus, a person should not be detained merely because he has been detained during warfare; a person should not be detained merely because he is located in a house or village wherein other detainees are located. The circumstances of his detention must be such that they raise the suspicion that he—he individually and no one else—presents a danger to security. Such a suspicion may be raised because he was detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he is suspect of being involved in warfare or terrorism.

Of course, the evidentiary basis for the establishment of this suspicion varies from one matter to another. When shots are fired at the defense forces from a house, any person located in the house with the ability to shoot may be suspect of endangering security. This basis may be established against a single person or a group of persons. However, this does not mean that Orders 1500, 1505, 1512 or 1518 allow for "mass detentions," just as detaining a group of demonstrators for the purpose of investigation, when one of the demonstrators has shot at police officers, does not constitute mass detention. The only detention authority set in these orders is the authority to detain where there exists an individual cause for detention against a specific detainee. It is insignificant whether that cause applies to an isolated individual or if it exists with regard to that individual as part of a large group. The size of the group has no bearing. Rather, what matters is the existence of circumstances which raise the suspicion that the individual detainee presents a danger to security. Thus, for example, petitioner 1 was detained, as there is information that he is active in the Popular Front for the Liberation of Palestine, a terrorist organization. He recruited people for the terrorist organization. Petitioner 2 was detained because he is active in the *Tanzim*. Petitioner 3 was detained because he is a member of the *Tanzim* military. Thus, an individual cause for detention existed with regard to each of the individual petitioners.

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

Detention Without Judicial Intervention

25. Petitioners' second claim relates to the detention period. The claim does not concentrate on the length of the period *per se*, since the

length of the period is determined by the needs of the investigation. The claim focuses on the period between the detention and the first instance of judicial intervention. Under Order 1500, this period lasts 18 days; the petitioners claim that this period is excessive. Moreover, they claim that there are a number of detainees who have yet to be brought before a judge despite the fact that the 18-day period has passed. In order to rectify this situation Order 1502 was issued, under which such detainee are to be brought before a judge as soon as possible and no later than 10.5.2002, *see supra*, para. 12. The petitioners claim that, under the authority of this latter order, some detainees were held for a period of 42 days without judicial intervention. The petitioners also assert that Order 1505, under which the detention order may prevent judicial intervention for a period of 12 days, is also illegal, as the period specified there is also excessive. This period remains valid unders Order 1512 and Order 1518.

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

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

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

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

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

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

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

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

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

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

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

> Everyone arrested or detained in accordance with the provisions of paragraph 1(C) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

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

> The degree of flexibility attaching to the notion "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very

> essence of the right guaranteed by Article 5(3), that is the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

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

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

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

The Fourth Geneva Convention does not include provisions which specify set detention periods or occasions for judicial intervention with regard to detention. It only includes provisions concerning administrative detention (internment). The first provision, Article 43, which applies to detentions carried out by the occupying state, provides:

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

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

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

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

29. Finally, there is security legislation relating to "regular" criminal detention and administrative detention, in the area. With regard to "regular" criminal detention, Order 378 provides that a police officer, who has reasonable reason to believe that a crime has been committed, has the authority to issues a detention order for a period of up to 18 days, *see* section 78(3). Following the recommendations of the *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity* (*Landau Commission*), Order 378 was amended, and the detention period without judicial intervention was reduced to 8 days. In a petition submitted in this matter, the Court held that "at this time, there is no room for this Court to intervene to reduce the maximum period of detention permitted before bringing persons detained in the territories before a military judge." HCJ 2307/00 *Natsha v. IDF Commander in the West Bank* (unreported case case).

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

30. Against this normative background, which demands prompt judicial review of detention orders, the question again arises whether the arrangement established in Order 1500—under which a person may be detained for a period of 18 days without having been brought before a judge—is legal. Similarly, is the arrangement established in Order 1505 legal? This arrangement—which was unaffected by Order 1512 or Order 1518—provided that a person may be detained for a period of 12 days without having being brought before a judge. In answering these questions, the special circumstances of the detention must be taken into account. "Regular" police detention is not the same as detention carried out "during warfare in the area," Order 1500, or "during anti-terrorism operations" Order 1505. It should not be demanded that the initial investigation be performed under conditions of warfare, nor should it be demanded that a judge accompany the fighting forces. We accept that there is room to postpone the beginning of the investigation, and

naturally also the judicial intervention. These may be postponed until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly. Thus, the issue at hand rests upon the question: where a detainee is in a detention facility which allows for carrying out the initial investigation, what is the timeframe available to investigators for carrying out the initial investigation without judicial intervention?

31. In this regard, the respondents claim before us that it was necessary to allow the investigating officials 18 days—and after Order 1505, 12 days—to carry out "initial screening activities, before the detainee's case is brought before the examination of a judge." This was due to the large number of persons being investigated, and constraints on the number of professional investigators. In their response, the respondents emphasized that "during the warfare operations, thousands of people were apprehended by the IDF forces, under circumstances which raised the suspicion that they were involved in terrorist activities and warfare. The object of Order 1500 was to allow the "screening" and identification of unlawful combatants who were involved in terrorist activities. This activity was necessary due to the fact that the terrorists had been carrying out their activities in Palestinian populations centers, without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violation of the laws of warfare." *See* para. 51 of the response brief from May 15, 2002. The respondents added that it is pointless to bring detainees before a judge, when they have not yet been identified, and the investigative material against them has not yet undergone the necessary processing. This initial investigation, performed prior to bringing the detainee before the judge, is difficult and often demands considerable time. This is due, among other reasons, to "the lack of cooperation on the part of those being investigated and their attempts to hide their identities, their hostility towards the investigating authorities due to nationalistic and ideological views, the inability to predetermine the time and place of the detentions, the fact that most of the investigations are based on confidential intelligence information which cannot be revealed to the person being investigated, and the difficulty of reaching potential witnesses." *See* para. 62 of the response brief from June 11, 2002.

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

In our opinion, this approach is in conflict with the fundamentals of both international and Israeli law. This approach is not based on the presumption that investigating authorities should be provided with the minimal time necessary for the completion of the investigation, and that

only when such time has passed is there room for judicial review. The accepted approach is that judicial review is an integral part of the detention process. Judicial review is not "external" to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not "appeal" his detention before a judge. Appearing before a judge is an "internal" part of the dentition process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.

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

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

> "Reasonable suspicion" will exist even if it is not supported by "prima facie evidence for proving guilt," where there is

> evidence which connects the suspect to the crime at hand to a reasonable extent that justifies, in the balancing of the interests on each side, allowing the police the opportunity to continue and complete the investigation.

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

Indeed, the judge may often learn of the existence of reasonable suspicion from the circumstances of the detention themselves, which raise the suspicion that the individual detainee presents a danger to the security of the area, *see* the definition of detainee in Orders 1500 and 1505. The judge will review the circumstances and examine whether they raise reasonable suspicion that the crime has been committed. He will, of course, consider additional materials submitted to him. He will inquire into the intended course of investigation and the difficulties of the investigation—whether they be the lack of manpower or difficulties in the investigation itself—in order to be convinced that the investigators are truly in need of additional time for their investigation. All these will ensure that the decision regarding the continuation of the detention, even if it is only based upon initial investigative materials, will not be made by the investigating authority, but rather by a judicial official. This is the object which lays at the base of both the international and Israeli regulation of detention for investigative purposes.

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

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

Of course, this does not mean that the judicial review should be superficial. On the contrary, "it is highly significant that a judge thoroughly examine the material, and ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect either quality or the extent of the judicial examination." President Shamgar in *Sajadia*, at 820. In exercising his discretion, in each and every case, the judge will balance security needs, on the one hand, and individual liberty, on the other. He will keep in mind President Shamgar's words in *Sajadia*, at 821, which were said with reference to administrative detention, but apply to our case as well:

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

34. With this in mind, we are of the opinion that detention periods of 18 days, under Order 1500, and 12 days, under Orders 1505, 1512 and 1518, exceed appropriate limits. This detention period was intended to allow for initial investigation. However, that is not its proper function. According to the normative framework, soon after the authorized officer carries out the initial detention, the case should be transferred to the track of judicial intervention. The case should not wait for the completion of the initial or other investigation before it is brought before a judge. The need to complete the initial investigation will be presented before the judge himself, and he will decide whether there exists reasonable suspicion of the detainee's involvement to justify the continuation of his detention. Thus, Order 1500, as well as Orders 1505, 1512, and 1518, unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect.

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

> What are the practical implications of what has been said? If there are a large number of detainees, it will be necessary to increase the number of judges. Difficulty in organizing such an arrangement, which will increase the number of judges who are called to service in order that a detainee's appeal be heard promptly and effectively, cannot justify the length of the period during which the detainee is held before his case has been judicially reviewed. The current emergency conditions undoubtedly demanded large-scale deployment of forces to deal with the riots occurring in Judea, Samaria and the Gaza

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

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

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

Preventing Meetings with a Lawyer

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

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

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

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

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

39. Order 1505 modified this arrangement. It included two new provisions. First, the original period of preventing the meeting with a lawyer was shortened to four days, *see* section 4 (a). Second, at the end of those four days, the head of the investigation may order that the detainee not be allowed to meet with his lawyer for an additional period of up to 15 days, if the head of the investigation is of the opinion that such is necessary for the security of the area or the benefit of the investigation. Afterwards, returning to the regular track, an approving authority may order that the detainee not be allowed to meet with a lawyer for an additional period of up to 15 days. Thus, the arrangement set in Order 1500, which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 33 days inclusive—18 days on the authority of the Order itself and an additional 15 days on the authority of the decision of an approving authority—was substituted by a new arrangement which allowed for the prevention of a meeting between a detainee and a lawyer for a period of 34 days inclusive—4 days on the authority of the Order itself, 15 days on the authority of the decision of the head of the investigation and an additional 15 days on the authority of the decision of an approving authority.

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

41. Are the arrangements set out in Orders 1500, 1505 or 1518 in accord with international law? Upon inspecting international law, one finds that the International Covenant on Civil and Political Rights-1966 does not include an explicit provision referring to this matter. The provision which most closely relates to this matter may be found in Article 14.3 of the Covenant, which applies to any person who has been criminally charged. It provides, in this regard, that the accused must be guaranteed a facility in which he can prepare his defense with an attorney, *see* sub-section (b), and that in court, he will be defended by an attorney, sub-section (d). A more explicit provision may be found in the Principles of Protection from Detention or Imprisonment. Principle 18.1 provides that:

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

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

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

42. The Fourth Geneva Convention does not include any explicit provision regarding meetings with a lawyer. There is, of course, the general provision in Article 27 of the Convention, quoted above in para. 28, which protects the dignity and liberty of the residents of the territory, but which, at the same time, provides that the hostile state may take necessary security measures. Aside from this general provision, the provision most closely related to this matter may be found in Article 113 of the Convention:

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

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

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

See J. S. Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 471-472. In summarizing this issue, Vice-President Shamgar, in *Tzemel*, at 377, noted:

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

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

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

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

> The right to meet with a lawyer, like other fundamental rights, is not an absolute right, but rather a relative right, and it should be balanced against other rights and interests.

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

> Preventing a meeting between a detainee and his lawyer is a serious injury to the detainee's right. Such an injury is tolerable only when it is demanded by security and essential for the benefit of the investigation. Regarding the benefit of the investigation—which is the respondents' claim in the matter before us—it is essential to find that allowing the meeting between the detainee and the lawyer will frustrate the

> investigation. It was correctly noted stated that "it is insufficient that it would be more comfortable, beneficial or desirable"; HCJ 128/84, at 27. It must be shown that such is necessary and essential to the investigation.

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

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

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

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

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

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

45. Our answer is that the standard rule in this situation should be that the fundamental right of meeting with a lawyer should be realized. However, significant security considerations may prevent this. Thus, for example, the respondent noted in his response that a meeting with a lawyer may be prevented where there is suspicion that "the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility." *See* para. 54 of the response brief from 5.5.2002. We are in agreement with this. There is also room to prevent a meeting when it may damage or disrupt the investigation. It should be emphasized, however, that advancing the investigation is not a sufficient reason to prevent the meeting. "The focus is on the damage that may be caused to national security if the meeting with the lawyer is not prevented." HCJ 4965/94 *Kahalani v. Minister of Police* (unreported case) (Goldberg, J.).

Thus, "it is insufficient that it is comfortable, beneficial or desirable to prevent a meeting with a layer. The expression 'is required' indicates that there must be an element of necessity which connects the decision to the reasons it is based upon." HCJ 128/84 *Hazan v. Meir*, at 27 (Shamgar, P.) With this in mind, we are of the opinion that there are no flaws in the arrangements set in Orders 1500, 1505, and Order 1518 regarding the prevention of meetings with lawyers.

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

Detention Without Investigation

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

48.

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

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

officials have limited capabilities, and they are not equipped to deal with such a large number of detainees in a more compact schedule.

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

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

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

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

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

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

under Order 1505, 1512, and 1518, to be illegal. Now, the detainee's own appeal to a judge will require that the investigation be carried out sooner.

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

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

Justice D. Dorner

I agree.

Justice I. Englard

I agree.

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