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***1 ADMINISTRATIVE DETENTION IN ISRAEL AND ITS EMPLOYMENT AS A MEANS OF
COMBATting POLITICAL EXTREMISM**

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Introduction

On February 25, 1994, Dr. Baruch Goldstein, a Jewish settler and a close associate of the late Meir Kahane, [\[FN1\]](#) entered the Tomb of the Patriarchs [\[FN2\]](#) in Hebron and massacred twenty-nine Palestinians praying in the mosque inside the Tomb. Following this mass murder, the Israeli government decided to outlaw the two splinter groups associated with the Kahanist ideology, the 'Kach' [\[FN3\]](#) 'Kahane Chai' ('Kahane Is Alive') [\[FN4\]](#) movements, and to detain some of the leading activists of these movements.

This article examines the employment of and rationale for administrative detention (known also as preventive detention) in Israel. The legal grounds which support the resort to administrative detention are first discussed. A brief examination of how this measure has been utilized by Israeli authorities against Palestinians follows. The employment of administrative detention against Jews in the struggle against political extremism is then considered. As a matter of both law and principle, the employment of administrative detention is unacceptable in democracies, with the only exception being at times of grave threat to a nation's security. A distinction is made between latent emergency and real emergency. In accordance with the principle that human rights which are suspended for the duration of hostilities should not continue ***2** to be suspended long after wars have ended, [\[FN5\]](#) the author submits that administrative detentions are called for only in narrowly circumscribed situations, when the measures to be implemented have been determined after careful examination of the evidence gathered against designated individuals. In the absence of such safeguards, criminal proceedings should be opened against persons allegedly involved in seditious and/or violent activities.

I. Legal Grounds

Administrative detention is widely employed by many countries. [\[FN6\]](#) Israel made use of administrative detentions from its first days as an independent state. [\[FN7\]](#) This measure has been used both in the occupied territories [\[FN8\]](#) and in Israel within its Green Line borders. [\[FN9\]](#) While the military governs and adjudicates the detention procedures in the territories, the civilian executive and judicial authorities govern these procedures inside the Green Line and in East Jerusalem which was officially annexed to Israel. [\[FN10\]](#) This essay first reflects on the Emergency Powers (Detention) Law, 5739-1979 [\[FN11\]](#) and then proceeds to consider the parallel military command.

***3** The power to effect administrative detention was created at the time of the British Mandate [\[FN12\]](#) by the Defense (Emergency) Regulations, 1945. [\[FN13\]](#) When Israel declared its independence in 1948, a state of emergency was announced and the Defense Regulations became part of Israeli law. [\[FN14\]](#) After the Six Day War the issuance of military orders made the Defense Regulations applicable to the West Bank and Gaza Strip. From the first year of occupation Israel resorted to administrative detentions as a security measure against the Palestinian population. [\[FN15\]](#) As described *infra*, this measure was occasionally implemented against Jews engaged in espionage and other activities believed to endanger state security. In 1979 and 1980, the existing procedures relating to administrative detention in the Green Line borders and subsequently in the occupied territories were changed. The Defense Regulations were replaced with an Israeli law by the enactment of the Emergency Powers

(Detention) Law, 5739-1979. [\[FN16\]](#) Section 2 of this law provides: Where the Minister of Defense has reasonable cause to believe that reasons of state security or public security require that a particular person be detained, he may, by order under his hand, direct that such person be detained for a period, not exceeding six months, stated in the order. [\[FN17\]](#)

Sections 2(b) and 4 of the Emergency Powers (Detention) Law supplement the above section to the effect of allowing for the extension of the detention period with approval of the *4 court. [\[FN18\]](#) The Detention Law is applicable only to Israeli citizens living within Israel proper. [\[FN19\]](#) In the occupied territories, with the exception of Jerusalem, detention orders are issued under different provisions. [\[FN20\]](#) These empower an army commander to periodically extend detention orders, each time for a period not exceeding six months. [\[FN21\]](#) In early 1995, following a wave of terrorist incidents attributed to Hamas [\[FN22\]](#) and Islamic Jihad, [\[FN23\]](#) these provisions were changed to the effect of empowering a high ranking army official to order detentions for one year instead of six months. [\[FN24\]](#)

A significant innovation of the Detention Law was making detention orders subject to judicial review. [\[FN25\]](#) Under the Defense Regulations, detainees were permitted to appeal to an advisory committee which had only powers of recommendation. [\[FN26\]](#) Now a detention order proposed by the Minister of Defense must be brought for approval before the President of the District Court (a function akin to chief judge) within 48 hours of issuance. [\[FN27\]](#) The President's decision is, in turn, appealable to Israel's highest court, the High Court of Justice. [\[FN28\]](#)

*5 Pursuant to the new law, the order concerning security provisions in the Occupied Territories was amended in 1980. Israeli Defense Forces (IDF) commanders were empowered to order the detention of an individual for a period not exceeding six months, subject to periodic extension, each extension not to exceed six months. [\[FN29\]](#) Under the Order, the detainee must be brought before a Military Court Judge within 96 hours from the time of arrest. [\[FN30\]](#) That judge may uphold the detention order, strike it down or shorten the recommended period of detention. [\[FN31\]](#) In any case in which a detention order has been upheld by the judge, it must be submitted to periodic review by that judge no later than three months after being upheld. [\[FN32\]](#) In turn, the Order established the right to appeal all decisions by a military court judge to the Chief Judge of the Military Court. [\[FN33\]](#) Most significant is Article 87D of the Order which closely follows Article 6 of the Israeli law; it permits the military court judge to deviate from the regular rules of evidence [\[FN34\]](#) and to hear evidence in the absence of the detainee and his/her counsel if the judge is convinced that exposure of that evidence would be damaging to the security of the area or of the public. [\[FN35\]](#)

In his directives from 1982, Attorney General Itzhak Zamir clarified that in Judea, Samaria and the Gaza Strip the power of detention is vested by the Security Instructions Order in a military commander at the level of subdistrict commander. [\[FN36\]](#) Zamir maintained that in some cases where it is impossible to institute criminal proceedings, administrative detention may be used, particularly because of problems connected with evidence. [\[FN37\]](#) In essence, then, the opinion of a high-ranking military commander is thought to be an adequate substitute for the production of evidence. The author strongly takes issue with a policy which would restrain an individual's freedom based upon such considerations.

*6 II. Employment of Administrative Detention

The administrative detention procedure is commonly employed against Palestinians. [\[FN38\]](#) It proved to be a very effective measure for getting intifada [\[FN39\]](#) activists off the streets. To illustrate, from 1985 until the outbreak of the Palestinian uprising in December 1987, 317 persons were administratively detained. [\[FN40\]](#) According to B'tselem, the Israeli Information Center for Human Rights in the Occupied Territories, more than fourteen thousand Palestinians were placed behind bars through the implementation of administrative detention from the eruption of the intifada until October 1992. [\[FN41\]](#) In the first two years of the intifada there were 60,243 disturbances, an average of 110 per day; 2071 Molotov cocktails were thrown; 140 explosive charges were set; and there were 715 attempts to start fires. [\[FN42\]](#) Therefore, the period was a real emergency, arguably justifying the exercise of

administrative detention, provided that adequate intelligence material was gathered to pinpoint individuals engaged in terrorist activities before action was taken. However, the scale and intensity of this measure against the Palestinians was excessive, due to a panicked reaction on the part of the Israeli authorities. Arguably, the authorities *7 could have been more discretionary before issuing detention orders. Perhaps the motivation for the detention orders was punitive in nature, rather than preventive.

[\[FN43\]](#)

Employment of administrative detention against Jewish citizens has historically differed in scale. It was used more often during the first years of independence and became exceptional as years went by. Within weeks after Israel declared its statehood, a half-dozen members of the National Military Organization, 'Etzel,' [\[FN44\]](#) had been detained by the newly established government in order to head off an insurrection threatened with the arrival of the 'Altalena,' a ship loaded with weapons earmarked for the Etzel, rather than the Israel Defense Forces. [\[FN45\]](#) In the fall of 1948, following the murder of the U.N. mediator Count Folke Bernadotte, [\[FN46\]](#) administrative detentions were employed against hundreds of members of 'Lechi,' known also as the *8 Stern Gang. [\[FN47\]](#) During the next four years this measure was utilized twice against Jewish groups: first against an ultra-Orthodox religious organization that was allegedly plotting to plant a smoke bomb in the Knesset (Parliament), and later against leaders of an organization suspected of bombing two embassies. [\[FN48\]](#)

One of the first occasions in which administrative detention was utilized against Jews who had not been charged with espionage was in May 1980, when the Minister of Defense used his power to detain Meir Kahane and another 'Kach' member, Baruch Green (Ben-Yoseph), for a period of six months. [\[FN49\]](#) Detention was implemented after evidence was found to connect 'Kach' with a large arsenal of ammunition in the "Hacotel" Yeshiva (at the Wailing Wall). [\[FN50\]](#) The charge against Kahane and Green was that they had planned assaults against Palestinians and the bombing of the Temple Mount mosques. [\[FN51\]](#) Kahane and Green appealed the detention order to the High Court of Justice, arguing that specific details regarding their alleged activities had not been shown to justify detention. The detention order simply stated that "they planned to launch attacks on Arabs. [\[FN52\]](#) Evidence brought before the Court was not disclosed to the detainees or their attorneys. [\[FN53\]](#) The detainees were not summoned to give testimony, nor were they cross-examined regarding specific data allegedly mentioned in the detention order. [\[FN54\]](#) Defense counsel's request that the Minister of Defense be called to testify in the matter was denied. [\[FN55\]](#)

Notwithstanding the apparent procedural unfairness, the defendants' appeal was denied. In its affirmation of the detention order, the Court admitted that "according to the provisions of the Detention Law, the decision to detain an individual is not for the court, but [rather] the detention order is issued by the Minister of Defense, and he decides whether it is advisable to deny the freedom of a person." [\[FN56\]](#) The Court stated that it would not replace the reasoning of *9 the Minister of Defense with its own. [\[FN57\]](#) This approach guides the Court in its review of administrative procedures in general. Justice Kahan maintained that administrative detention, "even if subject to judicial review, constitutes without doubt a serious infringement of a citizen's right to his freedom without proper legal process." [\[FN58\]](#) Nevertheless, the Court opined that the danger to state security was so severe in the Kahane case, that administrative detention represented the only means to avert it. [\[FN59\]](#) This pattern of accepting en masse the state's proffered evidence without further evaluation has been followed by the district courts. [\[FN60\]](#) Prosecutors request that the court accept all the material against the detainee under Section 6 of the Detention Law which allows deviation from the rules of evidence, and the court agrees to study the evidence in the absence of the detainees or their attorneys, tacitly accepting it as reliable. [\[FN61\]](#) By studying the material in the absence of a detainee's attorney, the court deprives the detainee of the ability to challenge the information used against him or her. [\[FN62\]](#)

Israel's security predicament created an extremely uncomfortable situation for its detainees, because until the late 1980s the prevailing view was that the court's only business was to check the application of any technical requirements of a given law or ordinance. [\[FN63\]](#) If the Defense Minister or army generals had decided to resort to administratively detaining an individual, there was sufficient reason to believe that

this act was necessary for the protection of public safety. This opinion was expressed, inter alia, in an eminent 1950 case, Al-Ayubi v. Minister *10 of Defense, [FN64] in which the Court explicitly held that it was not to scrutinize the reasons informing the issuance of a given order by the competent authority. [FN65]

Recently, the Court has tended to reflect more upon the discretion of the Defense Minister. The first High Court case where the change in the scope of judicial review was manifested was Baransa v. Commander of Central Front. [FN66] In that decision, Justice Shamgar asserted:

There is no doubt that regulation 110 [FN67] ... confers far-reaching authority which must be exercised with appropriate caution to ensure fulfillment of the pre-conditions that justify its exercise. For this reason, the court will examine scrupulously the exercise of this power, and hence this court no longer acts with the limitations and self-restraint characterizing the parallel English case law which examined the exercise of similar powers in England (Liversidge v. Anderson), [FN68] a case law which has also been echoed in H.C. 46/ 50 ... The criticism which has been directed in the past at the exercise of the aforesaid powers . . . has, at least partially, been dulled by virtue of *11 amendments to the Israeli legislation and changes in the scope of this court's judicial review. [FN69]

Having noted this change, it is clear that the opinion of the Defense Minister or of a high ranking commander is still conceived of as crucially important. In all administrative matters the burden is on the petitioner to prove that the governmental decision was flawed. [FN70] The burden of proof is much weightier when it comes to security matters, it would require substantial consideration to tip the scale and override the Defense Minister's decision, or the decision of a senior officer. [FN71] In order for the Court to overturn the decision of the Defense Minister, it must be convinced that the detention order is no longer necessary or that frequent extensions of the detention order cease to be justified. [FN72]

III. Security Considerations

The appropriateness of administrative detention must be perceived against the backdrop of Israel's security predicament, particularly in the Occupied Territories, which justifies deportations, the demolition of houses, controversial instructions pertaining to the opening of fire and questionable interrogation methods. [FN73] As a nation, Israel exhibits quite a liberal perspective on civil issues, [FN74] but endorses procedural methods in the name of national security which tend to be conservative. For example, patterns of 'militant Zionism' have been advocated, legalized, *12 implemented and justified by some in the legislature, the government and the court of justice. [FN75]

Two hypotheses might be offered in furtherance of understanding the High Court's approach to security matters. The first holds that the Court, otherwise liberal, mobilizes support for its decisions in other spheres via cooperation with legislative mandates on security matters. The public at large was (at least during the active phase of the intifada) in favor of enacting harsh measures against Palestinians in the occupied territories. [FN76] Thus, by closing its eyes to the violation of human rights in the territories, the High Court echoed the people's credo. The hypothesis maintains that the High Court might lose the wide public support it enjoys were the justices to uphold liberal values vis-a-vis security concerns. [FN77]

The other hypothesis holds that the Court serves the state and the government. Its justices want to give the government a free hand where state security is concerned. [FN78] The Court's passivity on security matters enables its activism in civil matters. Moreover, the Court would forfeit the respect of the legislature with any more proactive involvement in the security arena.

IV. Critical Evaluation of the Detention Procedure

Owing to the severity of its impact on detainees, administrative detention may be viewed as one of the most antidemocratic procedures that exist in Israel. Moreover, the employment of administrative detention in certain circumstances may be seen as contravening some of the most important documents in international law. The Universal Declaration of Human Rights states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." [FN79] Article 9(1) of the International

Convention on Civil and Political Rights reiterates that "no one shall be ***13** subjected to arbitrary arrest or detention." [FN80] The right to due process of law is protected in the Universal Declaration of Human Rights. [FN81] The recommendations of the International Commission of Jurists [FN82] are pertinent in this context. These are designed to prevent arbitrariness in issuing detention orders, insisting on due process of law. [FN83] The Commission held that detention orders should contain the grounds for detention and statements concerning the facts and circumstances justifying it. [FN84] It recommended that detention orders should be issued before arrest or at least within 24 hours of arrest, and that one copy be given to the detainee. [FN85]

As a matter of principle, only at times of real emergency as a last resort are democracies justified in implementing this measure, after exhausting all other measures and only as a preventive act, not a punitive one. [FN86] Section 1 of the Detention Law permits the use of administrative detention only during "a state of emergency" under section 9 of the Law and Administration Ordinance, 5708-1948. [FN87] However, it is debatable whether the periods in 1980 when Kahane and Green were placed under administrative detention and 1994 when this measure was employed against two extreme right-wing activists, Ben-Horn [FN88] and Ben-Yosef, [FN89] constituted such states of emergency. ***14** Arguably, both periods may be considered as periods of latent emergency, not of real emergency. [FN90] A state of real emergency refers to emergency that is actual or at least imminent. [FN91] Times of real emergency are times of momentous dangers. Even if the danger is limited in its scope, involving part of the population and/or taking place in part of the territory, the whole nation is affected by its consequences. In such times, extensive armed forces may be used to maintain law and order. [FN92] In this context, two international treaties are relevant. The International Covenant on Civil and Political Rights speaks of a "public emergency which threatens the life of the nation. [FN93] In turn, the European Convention on Human Rights refers to a "war or other public emergency threatening the life of the nation. [FN94] Accordingly, coup d'etat, acts of invasion, of rebellion and of uprising may constitute states of real emergency. [FN95] Thus, the intifada could have been considered a time of real emergency, justifying the use of administrative detentions after careful review of each and every case. The intifada posed a threat to the life of the Israeli nation. [FN96] Such a period of emergency should be discerned from periods of relative normalcy. The Israeli government maintains, however, that as long as the official state of war between Israel and its neighbors continues, it is justified in employing harsh measures, including administrative ***15** detentions. [FN97] When Israel ratified the International Covenant on Civil and Political Rights in August of 1991, Foreign Minister David Levy issued the following reservation:

[T]he state of emergency which was proclaimed in May 1948 has remained in force every since. This situation constitutes a public emergency within the meaning of Article 4(1) of the Covenant. [FN98] The Government of Israel has therefore found it necessary, in accordance with the said Article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defense of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with Article 9 of the Covenant, [FN99] Israel thereby derogates from its obligations under that provision. [FN100]

When the legality of administrative detention procedures are challenged by international law, Israel customarily refers to Article 78 [FN101] of the Fourth Geneva Convention. Administrative detention is regarded as the most severe security measure to which the detaining state may resort when other measures have proved inadequate. [FN102]

The Fourth Geneva Convention is designed to protect the basic rights of a civilian population under occupation rather than to protect the legal status of the occupied territories. [FN103] ***16** The goal of the Convention is to encourage the contracting powers to preserve humanitarian principles and to protect individual human rights. [FN104] Article 6 of the Fourth Geneva Convention states that, with the exception of the specified provisions, the provisions of the Convention in the case of occupied territories shall cease to apply "one year after the general close of military

operations." [\[FN105\]](#) Thus, it is clear from Article 78 of the Fourth Geneva Convention that administrative detention is justifiable only when it is necessary for imperative security reasons. This precludes its use either as a substitute for criminal proceedings or as a palliative for the public. [\[FN106\]](#)

Israel also justifies resorting to administrative detention by pointing to its use in other democracies. For example, Captain Uzi Amit-Kohn of the Deputy Military Advocate General Unit has cited *Lawless v. Ireland* [\[FN107\]](#) in which the European Court of Human Rights upheld the practice of administrative detention as a permissible derogation from the European Convention of Human Rights during the emergency which the Irish government claim existed. [\[FN108\]](#) The Court held that the existence of a public emergency threatening the life of the nation was reasonably deduced by the Irish government. [\[FN109\]](#) Relying on this case as well as on others, Captain Amit-Kohn has concluded that administrative detentions ought to be viewed, even within democratic societies, not as an aberration but as a norm, that is, as the normative response of democratic governments to perceived threats during times of national emergency. [\[FN110\]](#) The author submits, however, that a debate is still open as to whether or not Israel has been living in a continual state of national emergency since 1967. A quote from Judge Maridakis' opinion in *Lawless* illustrates that the term 'public emergency threatening the life of the nation' is understood to entail quite an exceptional situation which imperils or might imperil the normal operation of public policy. [\[FN111\]](#) Arguably, however, the State of Israel has, indeed, seen periods of relative normalcy which may be distinguished from times of exceptional danger in its existence.

***17** V. Analysis of Recent Detention Decisions

After the massacre at the Tomb of the Patriarchs in February 1994, the Israeli security authorities resorted to different preventive measures. [\[FN112\]](#) Some Israeli citizens were required to hand over weapons previously given to them by the IDF. [\[FN113\]](#) Orders were issued against others limiting their freedom of movement in the Occupied Territories. [\[FN114\]](#) Nine right-wing Jewish extremists were placed under administrative detention, [\[FN115\]](#) and the detention periods of five of the extremists were subsequently extended for an additional three months. Baruch Marsel, Noam Federman, spokesmen for 'Kach,' and the other detainees complained that they were not allowed to testify or to summon witnesses and that they were not familiar with the evidence which had brought about their arrest. They contended that non-disclosure of evidence had seriously prejudiced their ability to defend themselves against the approval of the detention. [\[FN116\]](#)

***18** An analysis of the Israeli courts' judgments on administrative detentions [\[FN117\]](#) reveals that the prima facie assumption is that this measure is justified in certain circumstances. [\[FN118\]](#) The courts have emphasized that administrative detention was not approved as a punitive measure for acts committed in the past but rather was designed to prevent dangerous behavior in the future. [\[FN119\]](#) The courts have stated that administrative detention was always a necessary preventive measure. [\[FN120\]](#) Though aware that admitting evidence in the absence of the detainees or their attorneys abridged their ability to defend themselves, the courts nevertheless allowed this inadequate procedure so as not to offend state security. It was said that administrative detention was an exceptional measure but sometimes it was nonetheless necessary. [\[FN121\]](#) The judges contended that after reviewing the confidential information upon which the detention was grounded they had reached the conclusion that it was impossible to disclose it and consequently to open criminal proceedings due to fear of exposing sources of information. [\[FN122\]](#) Balancing the need to disclose the information against the state's interest not to disclose it led the courts to maintain confidentiality. [\[FN123\]](#)

In *Matter of Baruch Green*, [\[FN124\]](#) the defense argued that if Green had committed an offense he should stand trial but not be administratively detained. The court agreed that had it been possible to charge a person through the usual channels without endangering the means and ***19** methods of gathering evidence, therefore administrative detention should not have been utilized. In this particular case, however, the court found that this possibility did not exist. [\[FN125\]](#) Judges in a few decisions have stressed that administrative detention should be

employed only on extraordinary occasions for security reasons and that it was the court's duty to carefully examine whether the facts were firmly grounded in reality. [\[FN126\]](#) Emphasis was placed on the high credibility of the evidence and on its "clear, unequivocal and convincing" meaning gathered from various sources of information. [\[FN127\]](#) The courts frequently spoke of "high probability of real danger to state security," to "the security of the area" or "the security of the people" as justifying the detentions. [\[FN128\]](#) For instance, in Baruch Green, the confidential material included concrete evidence showing that the defendant intended to harm individuals and property. The President of the Jerusalem District Court, Judge Zeiler, asserted that the real issue to be determined was whether the confidential evidence reflected real intention entailing probability to do harm. [\[FN129\]](#) After careful deliberation, President Zeiler concluded that the evidence was authentic.

A perplexing result was reached in State of Israel v. Michael Ben-Horin. [\[FN130\]](#) Judge Abramowitz, President of the District Court of Nazareth, stated that there was enough evidence to indicate the "existence of real danger of high and significant degree to state security" to support the detention order. [\[FN131\]](#) Yet, in the preceding portion of the opinion, Judge Abramowitz had written that it was impossible to put Ben-Horin to trial because, "at this stage we speak of acts . . . that cannot be regarded as consolidated actions for which a bill of indictment could be submitted." [\[FN132\]](#) Judge Abramowitz added that submitting a bill of indictment might have uncovered confidential sources of information. [\[FN133\]](#) An inherent inconsistency exists in the court's inference that the danger was real, thus justifying detention, when the entire body of evidence, was not "consolidated," meaning, presumably, not very significant or not giving rise to an apprehension of serious risk. It is submitted that perhaps Judge Abramowitz ordered that the period of detention be reduced from three to two months due to an arbitrary assumption on his part that two months would suffice to prevent the danger. [\[FN134\]](#)

The courts have rejected claims asserting that mere membership in extremist organizations should serve as a justification for ordering administrative detentions, stating that, at most, such *20 facts should be considered as supplementary to the decision. [\[FN135\]](#) On occasion, the courts have noted that they had contemplated other restrictions short of detention but had concluded that those measures were insufficient to prevent the likely danger, [\[FN136\]](#) ineffective, [\[FN137\]](#) or impossible to implement because of the grave costs involved. [\[FN138\]](#) The courts have also considered the possibility of prosecuting the detainees by instituting criminal proceedings against them, but have concluded that this would not be the preferred mode because of the concrete possibility that secret sources of information might thereby be revealed. [\[FN139\]](#)

In Avraham Shaar v. IDF Commander of Judea and Samaria [\[FN140\]](#) Justice Eliyahu Matza stated that ample evidence had been gathered by the security forces regarding Shaar's violent activities against Palestinians dating back to 1990. Shaar had thrown stones at Palestinian vehicles, participated in the beating of a Palestinian in the Tomb of the Patriarchs, fired in the direction of Palestinian residences and taken part in inciting demonstrations against Palestinians. [\[FN141\]](#) Furthermore, the Court noted that Shaar had previously stood trial for opening fire on a Palestinian car in Hebron and had received a conditional jail sentence. [\[FN142\]](#) In light of the above, the author questions the decision not to institute criminal proceedings against Shaar and/or demand that the conditional sentence be activated. The decision to detain Shaar may have been primarily supported by the Court's review of confidential intelligence information, concern that admitting this information at a subsequent trial might reveal secret operational procedures of the security services. The Court emphasized that the information had been gathered from a number of sources perceived by the security services as reliable. [\[FN143\]](#) It was stated that the information gathered by intelligence affirmed the suspicion that Shaar might take part in future violent activities directed at Palestinians. Moreover, the Court maintained that administrative detention was ordered only after other measures failed to deter Shaar's activities. [\[FN144\]](#) The Court concluded that the IDF Commander had adequately balanced the security needs of the state against the infringement of Shaar's liberty and that his decision was reasonable and correct. [\[FN145\]](#)

*21 Still unclear is why the court believed that Shaar was more dangerous in 1994

than he was in 1990. Shaar's attorneys contended that although he had been involved in violence against Palestinians since 1990, it was only after the massacre at the Tomb that security forces were spurred to place him under detention. [\[FN146\]](#) The Court itself noted that the security forces were apprehensive that the massacre might trigger similar acts on the part of like-minded activists. [\[FN147\]](#) In approving the detention, the Court spoke in general terms of "danger," without specifying how probable this danger might be, nor did the Court explain why house detention would not be a sufficient deterrent to prevent the "danger" that Shaar might pose to Palestinians. It is questioned why the Court asked the IDF commander whether it would be possible to reduce the detention period, when the Court was aware the commander did not intend to prolong Shaar's detention order. The Court accepted the commander's answer [\[FN148\]](#) that "it was important that the entire period of detention be exhausted. [\[FN149\]](#)

In Eyal Noked v. IDF Commander of Judea and Samaria [\[FN150\]](#) evidence had been gathered connecting Noked with the 'Kach' movement. Noked had been involved in illegal acts against Palestinians. [\[FN151\]](#) The court noted that in November of 1991, Noked had stood trial for wilfully damaging Palestinian property and for using firearms in a residential area. The sentence imposed was a mere 750 shekel fine. [\[FN152\]](#) Noked continued his violent operations and in March of 1993, he again stood trial for his involvement in a violent incident at Beit-Emrie village in Samaria. [\[FN153\]](#) This time, the charges against Noked were for wilful damage to Palestinian property and criminal trespass, and the penalty imposed was a 500 shekel fine and a six-month conditional sentence for three years. [\[FN154\]](#)

Reflecting upon the evidence presented against Noked, the Court contemplated whether the possibility of revealing some of the information and having Noked tried existed. It concluded against this alternative, as it would have been possible to accuse Noked only of part of the offenses revealed by the confidential evidence. [\[FN155\]](#) It would have been preferable to initiate criminal proceedings for part of the offenses and to grant Noked a just trial than to resort to administrative detention. Given the pendency of a six-month conditional sentence, the court would have been well advised to activate it. Moreover, the detention order for Noked would never have been issued if the courts were to conceive of administrative detention as truly exceptional. *22 Again, as in the Shaar case, it would seem that the general anxiety amongst the security forces prompted the decision to detain Noked.

In Federman and Gopstein v. Ilan Biran, IDF Commander of Judea and Samaria [\[FN156\]](#) the Court, in an opinion by Deputy President Aharon Barak, conducted a detailed review of the criminal histories of both petitioners. The non-classified evidence showed that Federman had been convicted in 1988 of setting fire to and damaging Palestinian and Jewish properties. [\[FN157\]](#) Gopstein, for his part, had been sentenced in September of 1989, to a period of six months in prison and to a twelve month conditional sentence for three years for participating in disturbances and for attacking a police officer on the Temple Mount. [\[FN158\]](#)

In addition, there was confidential evidence against the two activists. The Court concluded, however, that the need to disclose that evidence was outweighed by the state's interest in not revealing it. [\[FN159\]](#) Justice Barak maintained that a near probability of danger to the area's security had existed, and that this justified the employment of administrative detentions. [\[FN160\]](#) He asserted that this measure was severe and should be employed as a last resort, after balancing the value of the individual's liberty against essential security considerations "whilst ensuring all the judicial and jurisprudential means for a proper hearing and fair deliberation. [\[FN161\]](#) The author questions the Court's apparent belief that the detention procedure is a just procedure, in light of its manifest lack of opportunity for a proper hearing and due process of *23 law. Although Justice Barak made no mention of the above in Federman and Gopstein, the author notes that in Livny v. State of Israel [\[FN162\]](#) he spoke of the importance of adherence to the rules of evidence and due process of law in the judicial search for the truth. [\[FN163\]](#) The Livny Court recognized that a decision to protect the confidentiality of evidence against him deprives a defendant of the ability to adequately defend himself. [\[FN164\]](#) The Court asserted that "no security ground, however substantial, is weightier, on the relative scales of a given criminal proceeding, than the weight of the conviction of an innocent person. [\[FN165\]](#)

Nevertheless, the Court maintained that, at times, evidence should not be uncovered because revealing it might imperil state security. It reasoned that in a case in which the revealing of confidential material is not crucial to the defense and at the same time damage to state security could be substantial, it could not be said that the necessity of uncovering the evidence for the administration of justice takes precedence over security interests. [FN166] It is the author's view that, contrary to the Court's reasoning in Federman and Gopstein, it is impossible to conceal the facts and at the same time to ensure all the judicial and jurisprudential means for a proper hearing and fair deliberation.

In Ben-Horin, [FN167] after considering the data presented before him, Justice Dov Levin stated that it might have been possible to employ a measure short of administrative detention although it was obvious that the appellant might proceed with his dangerous activities. [FN168] Nevertheless, the Court did not order an end to the detention for two reasons: first, because the period of the detention was about to expire; [FN169] and, second, because the Court thought it *24 advisable to give the Minister of Defense and the defense forces an opportunity to consider implementation of a more moderate measure. [FN170]

The author finds the Court's reasoning in Ben-Horin to be erroneous. If the Court sensed that administrative detention was an excessive measure in that particular case, it should have ordered the detention canceled immediately. The fact that a detention period is about to expire does not, arguably, make an inadequate measure adequate. Moreover, the author submits that if it was "too late" to release Ben-Horin from jail, the Court should not have assumed that the security forces would be prompt in considering alternative measures.

Similarly perplexing is the Court's reasoning in Ben-Yoseph v. State of Israel. [FN171]

The appellant, Baruch Ben-Yoseph, had been detained for a period of three months, after which it was decided to prolong the administrative detention for an additional period of six months. [FN172] Justice Levin, writing for the Court, stated persuasive answers were not offered as to why, after three months of detention, the detention period was extended for a period of time that was double its original length. [FN173] Moreover, it was maintained that no reasonable explanation had been given by the appellee for not having resorted to a milder sanction, e.g., restrictions on Ben-Yoseph's freedom of movement or deportation to another part of the country.

[FN174] Nevertheless, the Court asserted that the same fears that spurred the issuance of the first detention order still existed. [FN175] Notably, the Court did not resort to the familiar terminology regarding "high probability of real danger to state security" justifying implementation of detention in other instances. It spoke merely of "fears" and "risks" justifying preventive sanctions. The Court stated, ironically, that "we are dealing with an acute infringement of a person's liberty, with an extraordinary procedure that cannot be reconciled with . . . values . . . that are fundamental to the establishment of our state as an enlightened democratic state. [FN176] With this in mind, the Court stated, "we should be extremely careful in issuing detention orders. [FN177]

Notwithstanding the above considerations, the Court did not rule against extending the detention order. Instead, it approved the extension, not for another six months as the IDF Commander *25 had ordered, but for another three months. The author submits that this result was unexpected; the Court, after all, had not found that restrictions short of detention were insufficient to prevent the likely danger, ineffective, or impossible to implement because of the grave costs involved. Strangely, the Court opined that, in the future, it would be appropriate to resort to a less extreme sanction. [FN178]

Conclusion

Administrative detention is manifestly unjust and contrary to the democratic spirit which proscribes arbitrary arrests. It is submitted that this measure is commonplace in authoritarian regimes which recognize no obligation to proceed according to rules of evidence and to disclose information to individuals under arrest. Given the fact that in democracies it is required that these legal safeguards be exhausted before incarcerating individuals, and that the administrative detention procedures described above fail to provide for these safeguards, it follows that administrative detention is

inconsistent with the principles of democratic justice.

If a detainee has committed criminal offenses he should stand trial, and it should be for the prosecution to show why he should be removed from society. Moreover, if there is not sufficient evidence to prosecute, or if the prosecution is unable to produce relevant material, the defendant should arguably retain his freedom. The author submits that the existence of a procedure which effectively overrides the administration of justice is worrisome. While acknowledging the fact that democratic states are entitled, and obliged, to protect themselves against forces that aim to destroy them, they should refrain from employing brute means in the form of administrative detention to this end. [\[FN179\]](#)

[\[FN1\]](#). Faculty of Law, University of Haifa. The author thanks B'tselem, al-Haq, the IDF Military Advocate General's Office, the IDF Spokesman's Unit, the Association for Civil Rights in Israel and the Attorney General's Office for helping him in the gathering of material. He is also grateful to Adam Roberts, Mordechai Kremnitzer, and Eyal Benvenisti for their illuminating comments. A shorter version of this essay was presented at the IVR World Congress at Bologna, Italy (June 1995).

[\[FN1\]](#). Rabbi Meir Kahane is the individual most closely identified with popularizing the expulsion of Arabs as a solution to Israel's demographic and political problems. Kahane demanded that every Arab in the country either leave or sign a form renouncing all claims to citizenship or any other form of national or political rights. See IAN S. LUSTICK, UNSETTLED STATES, DISPUTED LANDS: BRITAIN AND IRELAND, FRANCE AND ALGERIA, ISRAEL AND THE WEST BANK-GAZA 403-04 (1993). In 1990, Kahane was murdered in New York. For further discussion on the man, his ideology and political program, see Raphael Cohen-Almagor, Vigilant Jewish Fundamentalism: From the JDL to Kach (or 'Shalom Jews, Shalom Dogs'), 4 TERRORISM AND POLITICAL VIOLENCE 44 (1992).

[\[FN2\]](#). Thought to be the burial place of Abraham, Isaac, and Jacob, the site is holy to both the Jewish and the Muslim faiths. See Barton Gellman, Hebron Reopens With Prayers, Rage, THE WASHINGTON POST, November 8, 1994, at A12. Jews call the tomb the Cave of Machpelah, the name it has in Genesis, which records that Abraham bought the site for 400 shekels of silver. Muslims call it the Ibrahimi Mosque and say it has been a mosque in continuous use since the 13th century. Id.

[\[FN3\]](#). Rabbi Meir Kahane founded 'Kach' in 1971. See generally Cohen-Almagor, supra note 1.

[\[FN4\]](#). Meir Kahane's son, Benjamin Zeev, resigned from 'Kach' after failing to succeed his father in the leadership position. He founded 'Kahane Chai' in 1990 as an alternative to 'Kach.' See Cohen-Almagor, supra note 1. The group is dedicated to carrying on the militant nationalism of the late Rabbi. See Lisa Anderson, As Peace Nears, the Spirit of Kahane Rears, CHICAGO TRIBUNE, March 6, 1994, at 6. Kahane Chai's objectives include "the establishment of a theocracy in the biblical land of Israel and the violent expulsion of Arabs from that land." See Israel Outlaws Pair of Anti-Arab Groups, CHICAGO TRIBUNE, March 14, 1994, at 4 (detailing Israeli government's branding of two radical Jewish groups as terrorist organizations).

[\[FN5\]](#). See Yoram Dinstein, The International Law of Inter-State Wars and Human Rights, 7 ISR. Y.B. OF HUMAN RIGHTS 139, 148 (1977). Notably, however, some human rights cannot be suspended at any time, not even in war or emergency. Id. Dinstein opines that war produces new human rights, which are applicable in wartime. These rights come within the compass of the Hague Convention or other laws of war. Id. But see Gregory H. Fox & Georg Nolte, [Intolerant Democracies](#), 36 HARV. INT'L L.J. 1 (1995) (concluding that both national and international practice favor a substantive model of democracy, which holds that the long term survival of democratic institutions outweighs short-term deprivation of political rights to anti-democratic actors).

[FN6]. According to the International Commission of Jurists, at least 85 countries have legislation permitting this practice. Newsletter, International Commission of Jurists, No. 24 (Jan/March 1985), at 53. For information on administrative detention in the United States, United Kingdom, Ireland and Canada see ISRAEL, THE 'INTIFADA' AND THE RULE OF LAW 112-117 (David Yahav et al., eds., 1993) [hereinafter Yahav].

[FN7]. See infra notes 44-46 and accompanying text.

[FN8]. See infra notes 40-41 and accompanying text.

[FN9]. See infra note 49 and accompanying text. In June 1967, simmering tension and hostilities between Israel and her neighboring Arab states broke into war. At the end of a war lasting only six days, the Gaza Strip and the West Bank, including East Jerusalem, had fallen under Israeli occupation, hence known as the occupied territories. See ARIEL SHARON & DAVID CHANOFF, WARRIOR: AN AUTOBIOGRAPHY 355 (1989). Since Israel's victory in the 1967 war, Israeli territory and West Bank territory were both completely contiguous and open to each other. The Israeli side of the old border became known as the "Green Line." Id. at 356.

[FN10]. In Judea, Samaria, and the Gaza region, held by the IDF (Israel Defense Forces), administrative detentions were effected in the past by virtue of section 87 of the Security Instructions Order, 5730-1070, issued by the commanders of the IDF in the said areas and not by virtue of the Defense Regulations, even though the latter are valid, as part of the local law, in both Judea and Samaria and in Gaza. See Itzhak Zamir, Administrative Detention: Directive of the Attorney General on the Matter of Administrative Detention Under the Emergency Powers (Detention) Law, 5739-1979, 18 ISR. L. REV. 150, 157-08 (1983) [hereinafter Directives].

[FN11]. 33 L.S.I. 89 (1979) [hereinafter Detention Law].

[FN12]. For most of the modern era (1517 - 1917), Israel (formerly known as Palestine) was ruled by the Turks as a remote part of the Ottoman Empire. It was conquered by British troops in 1917, and granted to England by the League of Nations as a Mandatory Territory for the purpose of establishing a "national home for the Jewish People." That purpose was achieved in 1948 upon termination of the British Mandate and the establishment of the State of Israel. See INTRODUCTION TO THE LAW OF ISRAEL 2, 4-5 (Amos Shapira & Keren C. DeWitt-Arar, eds. 1995).

[FN13]. Britain's Defense Regulations were created to govern what would become Israel and the Territories. The Regulations, which still govern many security-related matters, confer broad authority on the executive, primarily through its Defense Ministry and/or military. Regulations 108 - 112, now largely replaced in Israel proper by the Detention Law, are the most severe. Mara Rudman & Mazen Qupty, The Emergency Powers (Detention) Law: Israel's Courts Have a Mission -- Should They Choose to Accept It?, 21 COLM. HUM. RTS. L. REV. 469, 472 (1990). The Defense Regulations, initially promulgated in 1937, were directed at the Jewish underground operating against the British. Golda Meir, Moshe Dayan, and a former President of the Israeli Supreme Court, Meir Shamgar, were all detained between 1937 and 1948. See Alan Dershowitz, Preventive Detention of Citizens During a National Emergency -- A Comparison Between Israel and the United States, 1971 ISR. Y.B. HUM. RTS. 295, 296.

[FN14]. Rudman and Qupty, supra note 13, at 473.

[FN15]. See generally Allegra A. Pacheco, Occupying an Uprising: The Geneva Law and Israeli Administrative Detention Policy During the First Year of the Palestinian General Uprising, 21 COLUM. HUM. RTS. L. REV. 515, 517 (1990).

[FN16]. Detention Law, supra note 11.

[FN17]. *Id.* Compare to the British Detention of Terrorists (Northern Ireland) Order 1972. Article 4 (1) of the Order empowers to detain any person "suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organization or training of persons for the purpose of terrorism" for a period of twenty-eight days. At the end of that period the detainee had to be released or could be further detained if the Chief Constable had referred his/her case to a judicially qualified commissioner appointed by the Secretary of State. For further discussion, see ANTONIO VERCHER, *TERRORISM IN EUROPE* 18, 28 (1992).

[FN18]. Detention Law, *supra* note 11, §§ 2(b), 14.

[FN19]. See Pacheco, *supra* note 15, at 517.

[FN20]. These are, *inter alia*, Chapter E(1) of Security Ordinance, No. 378, 1970; Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 18, No. 815), 1980; Administrative Detention Order (Temporary Provision, Judea and Samaria, No. 1229), 1988; Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 2, No. 1254), 1988; Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 5, No. 1283), 1989; Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 8, No. 1331), 1991; and Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 9, No. 1361), 1991. In the Gaza Strip Area the relevant orders are Administrative Detention Order (Temporary Provision, Gaza Strip Area, No. 941), 1988; Administrative Detention Order (Temporary Provision, Gaza Strip Area, Amendment 10, No. 1066), 1991. See LEGISLATION OF JUDEA AND SAMARIA (Zvi Preisler, ed., 1987) and SUPPLEMENT TO LEGISLATION OF JUDEA AND SAMARIA (Zvi Preisler, ed., 1991) (both in Hebrew).

[FN21]. See Rudman & Qupty, *supra* note 13, at 479-80.

[FN22]. ' Hamas' is an Arabic acronym meaning "zeal" or "fervor." See Justus R. Weiner, [Israel's Expulsion of Islamic Militants to Southern Lebanon](#), 26 *COLUM. HUM. RTS. L. REV.* 357, 402 n.1 (1995). Hamas combines the most extreme Islamic fundamentalism with absolute opposition to any arrangement with Israel or recognition of it and preaches the destruction of the State of Israel. *Id.* at 380. Hamas formed as an offshoot of the Muslim Brotherhood. The Hamas Covenant, published in August 1988, calls for the liberation of Palestine in its entirety "from the sea [Mediterranean] to the river [Jordan]." Its ultimate goal is a great Islamic state throughout the Middle East, without any national boundaries. In pursuit of this goal, Hamas rejects the Israel-PLO agreement for autonomy for the Palestinian residents of the Occupied Territories, as well as the entire peace process. *Id.*

[FN23]. Although it is much smaller than Hamas, Islamic Jihad is one of the most complex and dangerous of the Palestinian terrorist organizations. It has many groups in various Middle Eastern countries, and some in Europe as well. Islamic Jihad, like Hamas, is strongly opposed to the peace process, and maintains the view that war against Israel and Jews in general is an essential prerequisite toward accomplishing the goals of Islam. See Weiner, *supra* note 22, at 384-85.

[FN24]. Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 8, No. 1424), 1995, and Administrative Detention Order (Temporary Provision, Gaza Strip Area, Amendment 6, No. 1115), 1995.

[FN25]. See Directives, *supra* note 10, at 153.

[FN26]. See Rudman & Qupty, *supra* note 13, at 475.

[FN27]. See *id.* at 476.

[\[FN28\]](#). See Directives, *supra* note 10, at 153.

[\[FN29\]](#). Administrative Detention Order (Temporary Provision, Judea and Samaria, Amendment 18, No. 815) 1980, art. 87(a), (b).

[\[FN30\]](#). *Id.* art. 87B(a).

[\[FN31\]](#). *Id.*

[\[FN32\]](#). *Id.* art. 87C.

[\[FN33\]](#). *Id.* art. 87E.

[\[FN34\]](#). For an overview of the Israeli laws of evidence, including rules pertaining to privileged and illegally obtained evidence, see generally Shapira & DeWitt-Arar, *supra* note 12, at 311-25; see also Rudman & Qupty, *supra* note 13, at 488-90 (discussing the exception which permits deviation from the rules of evidence).

[\[FN35\]](#). See Yahav, *supra* note 6, at 121-22.

[\[FN36\]](#). Directives, *supra* note 10, at 157.

[\[FN37\]](#). *Id.* at 159, Itzhak Zamir, it seems, later changed his position. In Human Rights and National Security, 23 ISR. L. REV. 375 (1989), Zamir spoke of problems connected with evidence with more caution. He warned against the risky combination of power and secrecy that might bring about fatal consequences. Zamir wrote: "A fundamental tenet of the legal system is that the best way for a court to get at the truth is to confront the other party with the facts, in order for him to be able to conduct a cross-examination and bring evidence to the contrary. But when the secret evidence is disclosed in the court in the presence of only one of the parties, this most important method of uncovering the truth is rendered null and void." *Id.* at 399-400.

[\[FN38\]](#). A year and a half into the intifada (for further discussion, see *infra* note 39), more than 5,000 Palestinians were held in Israeli detention centers with no charges made against them and no trials conducted, according to a published report by Amnesty International. Most of the detainees were subject to six-month terms, but many had been detained repeatedly. See Israel Criticized on Palestinian Detentions, S.F. CHRON., June 1, 1989, at A23. See also Pacheco, *supra* note 15, at 517.

[\[FN39\]](#). The term "intifada" derives from the Arabic verb "to shake loose." For one view of the roots of the December 1987 demonstrations that erupted in Gaza and spread to the West Bank, eventually developing into a full-scale Palestinian uprising, see Richard A. Falk & Burns H. Weston, The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES (Emma Playfair, ed., 1992).

[\[FN40\]](#). See generally Pacheco, *supra* note 15, at 518.

[\[FN41\]](#). See DAPHNA GOLAN, DETAINED WITHOUT TRIAL: ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES SINCE THE BEGINNING OF THE INTIFADA 7 (1992). According to B'tselem data, in May 1993, 312 persons (most, if not all, Palestinians) were under administrative detention. In August 1994, the figure decreased to 163. The author thanks Shirley Eran for this information.

[\[FN42\]](#). See Raphael Cohen-Almagor, The Intifada: Causes, Consequences, and Future Trends, 2 SMALL WARS & INSURGENCIES 12-40 (1991).

[\[FN43\]](#). Military Advocate General, Colonel Zvi Hadar contends that unlike other states which employed administrative detention indiscriminately against masses of people in times of war or external threat to their security, Israel has used this

measure in a restrictive and controlled manner. Zvi Hadar, *Administrative Detentions Employed by Israel*, ISRAEL YEARBOOK OF H.R. (1971), 283-89. The intifada definitely posed a threat to Israel's security conceived grave enough to abandon all inhibitions. To put fourteen thousand Palestinians under administrative detentions exhibits a loss of control. Soon enough being an Ansar graduate (or a graduate of any detention camp) became a badge of courage and pride for the Palestinians. If we add to that number the number of those jailed, killed or injured, we receive a picture of the scale of the intifada. From the outbreak of the uprising until December 8, 1993, more than one hundred thousand Palestinians were imprisoned; 1,095 Palestinians were killed. See HUMAN RIGHTS VIOLATIONS IN THE TERRITORIES 1992/93 (B'Tselem publications, Jerusalem, 1994) 9, 20 (Hebrew). More than 55,000 were wounded. This figure is according to the Palestinian Human Rights Organization al-Haq. The author wishes to thank Khaled Batrawi of al-Haq for his assistance. The official numbers as published by the IDF Spokesman's Unit, Information Branch, are quite different. According to its report between December 9, 1987, until November 2, 1994, 1,067 Palestinians were killed by IDF soldiers and 17,987 were injured. Cf. HOSTILE TERRORIST ACTIVITIES IN JUDEA, SAMARIA, AND THE GAZA STRIP AREA -- DATA, December 1987 - October 1994, 16 (Hebrew). This means that in almost every household at least one of its members was either detained, jailed, injured or dead.

[FN44]. 'Etzel,' the acronym for 'Irgun Zvai Leumi' ('National Military Organization'), was an extreme Jewish underground movement in British-controlled Palestine. See Lankin Obituary, THE TIMES OF LONDON, August 17, 1994. Etzel fought the British for independence in the 1940s under the leadership of Menachem Begin. It carried out dozens of attacks on British army, government and police targets. See Levy Obituary, WASHINGTON POST, November 5, 1990. Etzel was one of two extreme underground movements which rejected the mainly defensive character of the Hagana, the Jewish underground organization led by David Ben-Gurion, favoring a more militant approach, particularly in retaliation against Arab attacks. Id.

[FN45]. Among the detainees were two eminent Etzel leaders, Hillel Cook and Yaacov Venirsky (Meridor). See generally Dershowitz, *supra* note 13. In 1948, the Altalena, a ship purchased in America by the Etzel, was headed for Israel, loaded with arms purchased in France. It reached the Israeli coast in June 1948, a week after Menachem Begin had assured Prime Minister David Ben-Gurion's government that he would dissolve the Etzel and incorporate its men and arms into Israel's new armed forces. However, when the Altalena approached the shore of Tel Aviv, Begin retreated from the agreement and refused to accede to Ben-Gurion's demands to place all the arms at the disposal of the IDF. Ben-Gurion then gave an order to stop the Altalena 'at any cost.' The Altalena was shelled from the shore and eventually went down. See Obituary of Rear-Admiral Paul Shulman, THE DAILY TELEGRAPH (London), June 27, 1994.

[FN46]. Yitzhak Shamir, a recent Prime Minister of Israel, was personally and directly involved in the 1948 assassination of Count Folke Bernadotte, the Swedish diplomat serving as U.N. mediator in the Middle East. Shamir deemed Bernadotte too pro-Arab. See Thomas Eagleton, *From Terrorism to Statesmanship*, ST. LOUIS POST-DISPATCH, February 13, 1994; see also Lynwood Abram, *Life and Death of Folke Bernadotte, An Unlikely Peacemaker*, HOUSTON CHRONICLE, April 5, 1992.

[FN47]. Within two days of Bernadotte's assassination, Ben-Gurion's provisional government published regulations calling for heavy punishment, not only for active terrorists, but for all members of terrorist organizations. The Lechi and the National Front were outlawed. In the very midst of these difficult days of war, Ben-Gurion diverted large numbers of troops to the task of crushing Jewish terror. Some 200 people were arrested immediately. The leaders of Lechi were arrested and made to stand trial. See Hizbollah in a Skullcap Leaves Peace Bleeding, THE OBSERVER, February 27, 1994, at 26. The Stern Gang, known in Hebrew as Lechi, an acronym for Israel Freedom Fighters, was the most militant of the pre-state underground groups. Lechi carried out the 1944 assassination of Lord Moyne, the British minister for the

Middle East, and was blamed for the 1948 assassination of Count Bernadotte. See Eliahu Amikam Obituary, THE WASHINGTON POST, August 16, 1995.

[FN48]. See Dershowitz, *supra* note 13, at 300-01.

[FN49]. See Baruch Bracha, [Judicial Review of Security Powers in Israel: A New Policy of the Courts](#), 28 *STAN. J. INT'L L.* 39 (detailing the first appeal to the Supreme Court under the Detention Law by Rabbi Meir Kahane).

[FN50]. See A.D.A. [Administrative Detention Appeal] 1/80 Kahane and Green v. Minister of Defense, 35(2) P.D. 253 (1981).

[FN51]. *Id.*

[FN52]. 1/80 Kahane and Green v. Minister of Defense, 35(2) P.D. 253 at 257.

[FN53]. *Id.*

[FN54]. *Id.*

[FN55]. *Id.*

[FN56]. 1/80 Kahane and Green v. Minister of Defense, 35(2) P.D. 253, at 257 (emphasis added).

[FN57]. *Id.* at 258. This narrow view concerning the scope of judicial review in the detention procedure was later rejected by Justice Bejski in *Anonymous v. Minister of Defense*, A.D.A. 2/86, 41(2) P.D. 508. Justice Bejski asserted that, in his opinion, the power of the President of the District Court as described in the provisions of the statute is greater than what Justice Kahan had in mind. *Id.* at 515.

[FN58]. Kahane and Green, 35(2) P.D. at 259; see also Justice Shamgar's reasoning in *A.D.A. 2/82 Yoel Lerner v. Minister of Defense*, 42(3) P.D. 529.

[FN59]. Kahane and Green, 35(2) P.D. at 261.

[FN60]. See Rudman & Qupty, *supra* note 13, at 489.

[FN61]. *Id.*

[FN62]. *Id.* at 489-90.

[FN63]. *Id.* at 477-78.

[FN64]. H.C. [High Court] 46/50, 4 P.D. 222 (per Agranat J.); see also H.C. 241/60 Kardosh v. Registrar of Companies, 15 P.D. 1151 (1961); F.H. [Further Hearing] 16/61 Registrar of Companies v. Kardosh, 16 P.D. 1209 (1962), where the Court ruled that judicial review did not apply to security authorities exercising emergency powers.

[FN65]. *Al-Ayubi v. Minister of Defense*, H.C. [High Court] 46/50, 4 P.D. at 227-28. Agranat wrote:

The jurisdiction of this Court to review the competent authority's exercise of its power which emanates from the Defense (Emergency) Regulations, 1945, is of very limited character. When a given regulation confers upon the competent authority the discretion to act against an individual in any case in which "it is of the opinion" or "it seems to it" that conditions warranting this, then that same authority is the final arbiter in determining the existence of these conditions. In such situations the Court's function is limited to examining whether the authority exceeded its power under the law by virtue of which it was empowered to act, whether the said authority paid

attention to the factors stated in the same law and whether the authority acted in good faith. Since it is restricted to such limited jurisdiction, this Court is not to scrutinize the reasons encouraging the competent authority to issue any given Order. Id.

[FN66]. H.C. 554/81, 36(4) P.D. 247 (1982).

[FN67]. Regulation 110 empowers a military commander to place any person under supervision for any period not exceeding one year. See Weiner, *supra* note 22, at 362 n.26.

[FN68]. 3 All. E.R. 338 (1941). In *Liversidge*, the majority of the court held that the discretion of the Secretary of State was absolute and that the courts would not intervene in his consideration unless he had not acted in good faith. Id. While the majority of the House of Lords held that the Minister's discretion to detain was not open to question in the courts, the members of the House of Lords were doubtlessly influenced by the events of the time. The safety of the realm was by no means assured on November 3, 1941, the day the judgment was delivered. Only a few months had gone by since the German invasion of Russia; only a few weeks remained before Pearl Harbor. See David G.T. Williams, *Law and Administrative Discretion*, 2 IND. J. OF GLOBAL LEGAL STUD. 191, 200-01 (1994). Many years later, Lord Diplock judicially recognized "that the majority of this House in *Liversidge v. Anderson*, was expediently and at the time, perhaps, excusably wrong and the dissenting speech of Lord Atkin, was right." Id.

[FN69]. H.C. 554/81, 36(4) P.D. 247, 251-52; see also Justice Bejski's reasoning in *Anonymous v. Minister of Defense*, A.D.A. 2/86, 41(2) P.D. 508, 513-16. For further discussion, see generally Bracha, *supra* note 49.

[FN70]. There is a presumption that every administrative act has been carried out lawfully. This is a rebuttable presumption, but anyone seeking to rebut it must argue, and prove, that in the particular case, the presumption is rebutted by the facts. See Bracha, *supra* note 49, at 69 n.142.

[FN71]. H.C. 302/72, 306/72 *Abu Hilu v. State of Israel* 27(2) P.D. 169, 177. The Court held that "the degree of intervention of the court in activities of the military authorities having to do with security will necessarily be very limited." Id.; see also H.C. 17/71 *Marar v. Minister of Defence* 25(1) P.D. 141, 142-47; H.C. 89/71 *El Asmar v. Commander of the Central Region* 25(2) P.D. 197, 199-200; H.C. 606/78, 610/78 *Ayub v. Minister of Defence* 33(2) P.D. 113, 126-27; H.C. 258/79 *Amirah v. Minister of Defence*, 34(1) P.D. 90, 92-93; H.C. 198/85 *Chamdan v. IDF Commander in Judea and Samaria*, 40(2) P.D. 614, 615-16. Justice Barak, however, endorses a different perspective. See H.C. 910/86 *Ressler v. Minister of Defence* 42(2) P.D. 441, 486 (1988); H.C. 680/88 *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617, 639 (1988).

[FN72]. See, e.g., A.D.A. 2/94 *Baruch Ben-Yoseph v. Minister of Defense* (per J. Bach of the Supreme Court, March 25, 1994) which reiterates the concept that the President of the District Court shall cancel the detention order if it is proven that the reasons for the issuance of the order were not relevant to national security or public security, or if it is found that the order was not issued with sincerity or based on relevant considerations. Id. at par. 2.

[FN73]. For a critical account of the utilization of some of these measures see GEOFFREY BINDMAN & BILL BOWRING, *HUMAN RIGHTS IN A PERIOD OF TRANSITION* (1994).

[FN74]. See MARTIN EDELMAN, *COURTS, POLITICS AND CULTURE IN ISRAEL* 111 (1994) (stating that the Israel civil courts have an admirable record of protecting the integrity of the person).

[FN75]. Pnina Lahav speaks of a variant of Zionism which she terms 'catastrophe Zionism.' Its major goal is defense. Those who adhere to catastrophe Zionism adopt a world view which is permeated by anxiety. This anxiety is said to justify vesting more power in the state for the purpose of combatting the enemy. Catastrophe Zionism, argues Lahav, leads its proponents to view dissent, criticism, freedom of association, and due process as unaffordable luxuries. Pnina Lahav, *Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy*, 24 *ISR. L. REV.* 211, 216-23 (1990).

[FN76]. Israeli public opinion polls showed at the outset of the intifada that a majority of the public wanted a stern suppression of the uprising and felt the government was not doing enough. See David Hoffman, *There's No Black and White: Intifada Reshapes Views of Israeli Soldiers*, *THE WASHINGTON POST*, December 8, 1992, at A1. However, as of 1992, Israeli pollsters noticed a mellowing of this view over five years, and a change in the iron-fist sentiment as the uprising abated. *Id.* The Israel Institute for Military Studies found that the right-wing elements of Israeli society who once thought Israel could control the territories for years and years were coming to the conclusion that this was impossible. *Id.*

[FN77]. Israeli surveys indicate that the civil courts are second only to the Israel Defense Forces in public support. See EDELMAN, *supra* note 74, at 45.

[FN78]. See, e.g., SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 464 (1994) (stating that Israel's Supreme Court has been criticized for not doing enough to protect civil rights in the face of security considerations and against the exercise of the wide emergency powers enjoyed by the authority).

[FN79]. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, art. 9, 3rd Sess. at 73, U.N. Doc. A/810 (1948).

[FN80]. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *Covenant*].

[FN81]. Universal Declaration of Human Rights, *supra* note 79, art. 10. Article 10 states as follows: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Id.* The concept of due process of law is derived from English common law probably during the reigns of Henry I (1100-1135) and Henry II (1154-1189). Chapter 39 of the Magna Carta of 1215 declares: "No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed, nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers or by the law of the land." See BOYD C. BARRINGTON, *THE MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND* 239 (1993). For further discussion, see THEODORE MERON, *HUMAN RIGHTS IN INTERNATIONAL STRIFE: THEIR INTERNATIONAL PROTECTION* 18-22 (1987).

[FN82]. The International Commission of Jurists (ICJ) is an organization of human rights lawyers based in Geneva. It functions as a world legal aid society and is funded by government and private foundations. The ICJ has protected individuals through quiet diplomacy, observers, fact-finding missions, and interventions with international organizations and national foreign policy makers. See generally HOWARD B. TOLLEY, *THE INTERNATIONAL COMMISSION OF JURISTS: GLOBAL ADVOCATES FOR HUMAN RIGHTS* (1994).

[FN83]. See JAIME ORAA, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW* 30 (1992).

[FN84]. *Id.*

[FN85]. Id. at 109

[FN86]. For a different perspective endorsing a consequentialist reasoning, see Dershowitz, *supra* note 13, at 295-321.

[FN87]. Detention Law, *supra* note 11.

[FN88]. Ben-Horin, who is known as 'the president of the state of Judea,' was ordered to serve two months administrative detention in line with a government crackdown on extremists after the Hebron massacre. The court ruled that he was planning violent activities to sabotage future government decisions. See Ben-Horin Given Two Months Administrative Detention, THE JERUSALEM POST, March 21, 1994, at 2.

[FN89]. See Detention of Another Kach Activist Approved, THE JERUSALEM POST, March 17, 1994, at 2 (stating that BenYosef was considered a threat to the public order).

[FN90]. Israel has been under official state of emergency since the day of its establishment.

[FN91]. From the jurisprudence of the international bodies, which were involved in drafting the international documents referred to *supra*, the main characteristics of the type of emergency warranting derogation from the treaties can be summarized: the emergency must be actual or at least imminent; therefore an emergency of 'a preventive nature' is not lawful; the emergency should be of such a magnitude as to affect the whole of the nation, and not just a part of it; the threat must be to the very existence of the nation, this being understood as a threat to the physical integrity of the population, to the territorial integrity, or to the functioning of the organs of the state.

See ORAA, *supra* note 83, at 32-33.

[FN92]. International law recognizes that force may be used in the self-defense of national sovereignty against acts or threats of terrorism. See Abraham D. Sofaer, [The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, The Law, And The National Defense](#), 126 MIL. L. REV. 89, 90 (1989).

[FN93]. Covenant, *supra* note 80, art. 4.

[FN94]. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, signed Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

[FN95]. The circumstances which can provoke the proclamation of a state of emergency and derogations of human rights are numerous. According to one report by the UN Commission on Human Rights the following are also relevant: international conflict; defense or security of the State or parts of the country; insurrection; subversion or harmful activities of counter-revolutionary elements; natural or public calamity or disaster; danger to the economic life of the country or parts of it; maintenance of essential supplies and services for the community. See John Quigley, [Israel's Forty-Five Year Emergency: Are There Time Limits To Derogations From Human Rights Obligations?](#), 15 MICH. J. INT'L L. 491, 499 (1994). For further discussion on the major constituents of states of emergency see ORAA, *supra* note 83, at 12-13, 27-33.

[FN96]. See, e.g., David Richardson, A Crisis In Confidence, THE JERUSALEM POST, May 26, 1989 (stating that frustration with the intifada began spilling over into one of the more sacrosanct areas of Israeli public life, the army. A change in public perceptions of the army and its elite officer class is described as a delegitimization on a large scale); see also Greer Fay Cashman, Looking For A Way Out of Israel's Tourism Dead End, THE JERUSALEM POST, November 24, 1989 (describing the

negative effect of the intifada on one of Israel's most profitable industries).

[FN97]. See Rudman & Qupty, *supra* note 13, at 477 n.12.

[FN98]. Article 4(1) proclaims: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin." Covenant, *supra* note 80.

[FN99]. Article 9(1) states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

Id. Article 9 (2) states:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Id.

[FN100]. Statement of David Levy, Minister of Foreign Affairs (Sept. 4, 1991), in FIFTH BOOK OF PROTOCOL, at No. 1750.

[FN101]. Geneva Convention For Protection Of Civilian Persons In Time Of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Article 78 provides: "If the occupying power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment." *Id.*

[FN102]. "Should the Power in whose hands protected persons may be consider the measure of control mentioned in the present Convention to be inadequate, it may have recourse to any other measure of control more severe than that of assigned residence or internment." *Id.* art. 41.

[FN103]. See generally DAVID WEISBRODT, AN INTRODUCTION TO THE SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW (1989).

[FN104]. A protected person detained by the Occupying Power shall "be treated with humanity, and . . . shall not be deprived of the rights of fair and regular trial prescribed by the present Convention." Fourth Geneva Convention, *supra* note 101, art. 5.

[FN105]. *Id.*

[FN106]. See Adam Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 25, 36-39 (Emma Playfair ed., 1992).

[FN107]. 1 E.H.R.R. 15 (1961).

[FN108]. *Id.* at 34. "[T]he detention without trial provided for by the 1940 Act....appears to be a measure strictly required by the exigencies of the situation within the meaning of Article 15 of the Convention." *Id.*

[FN109]. The European Court found a valid emergency in Ireland during 1956- 57 because of Irish Republican Army activities during a nine-month period. *Id.*

[FN110]. See Yahav, *supra* note 6, at 116-17.

[FN111]. *Lawless v. Ireland*, 1 E.H.R.R. at 38.

[FN112]. Justice Matza of the Israeli Supreme Court discussed this trend in the Court's affirmance of a detention appeal in H.C. 2612/94 *Avraham Shaar v. IDF Commander of Judea and Samaria* (June 7, 1994).

[FN113]. *Id.* at par. 8.

[FN114]. *Id.*

[FN115]. These are Baruch Marsel, Noam Federman, Ben-Zion Gopstein, Baruch Ben-Yoseph, Eyal Noked, Shmuel Ben-Yishai, Shmuel Ben-Yaakov, Avraham Shaar, and Michael Ben-Horin. See *infra* note 117.

[FN116]. H.C. 2029/94 *Federman and Others v. Prime Minister Rabin and Others* (April 13, 1994). The Court, per J. Barak, Zamir, and Tal, denied the detainees' request that they be released from detention in honor of Israel's Independence Day. It noted also their contention that they had not had an opportunity to defend themselves properly against the detention orders, due to the classified nature of the evidence against them. *Id.*

Enabling this procedure are § 1(b) of the Administrative Detention Order (Temporary Provision, Judea and Samaria, No. 1229, 1988), and § 6 of the Emergency Powers (Detention) Law, which were utilized against Meir Kahane and Baruch Green in 1980. These sections provide grounds for deviating from the rules of evidence in administrative proceedings if the President of the District Court is satisfied that this will be conducive to the discovery of truth and the just handling of the case. Those sections also authorize the President of the District Court to accept evidence outside the presence of the detainees and/or their attorneys without disclosing it to them if, after considering the evidence or hearing submission, he is convinced that disclosure of the evidence to either of them might impair state security or public security. See Directives, *supra* note 10, at 155.

[FN117]. See H.C. 1271/94 *Ben-Yishai v. Danny Yatom, IDF Commander of Judea and Samaria* (March 3, 1994); D.R. [Different Requests] 161/94 *State of Israel v. Michael Ben-Horin* (District Court of Nazareth, March 20, 1994); A.D.A. 2/94 *Baruch Ben-Yoseph v. Minister of Defense* (Supreme Court, March 25, 1994); A.D.A. 2/94 *Federman v. IDF Commander of Judea and Samaria* (Military Court, March 28, 1994); A.D.A. 4/94 *Noked v. IDF Commander of Judea and Samaria* (Military Court, April 4, 1994); H.C. 1627/94 *Ben-Yishai v. IDF Commander of Judea and Samaria* (April 11, 1994); A.D.A. 5/94 *In the Matter of Shmuel Ben-Yaacov* (April 12, 1994); H.C. 2029/94 *Federman and Others v. Prime-Minister Rabin and Others* (April 13, 1994); H.C. 2186/94 *Noked and Others v. State Attorney and Others* (May 3, 1994); A.D.A. 4/94 *Ben-Horin v. State of Israel* (Supreme Court, May 5, 1994); H.C. 2662/94 *Federman and Others v. Prime-Minister Rabin and Others* (May 13, 1994); A.D. [Administrative Detention] 1/94 *In the Matter of Baruch Green* (District Court of Jerusalem, May 18, 1994); H.C. 2902/94 *Ben-Yoseph and Shaar v. Minister of Defense Rabin and Others* (May 29, 1994); H.C. 2612/94 *Avraham Shaar v. IDF Commander of Judea and Samaria* (June 7, 1994); H.C. 3280/94 *Federman and Gopstein v. Ilan Biran, IDF Commander of Judea and Samaria* (June 16, 1994); A.D.A. 5/94 *Ben-Yoseph v. State of Israel* (Supreme Court, June 22, 1994); A.D.A. 7/94 *Ben-Yoseph v. State of Israel* (Supreme Court, September 1, 1994).

[FN118]. See generally H.C. 2612/94, *Avraham Shaar*; H.C. 1271/94, *Ben-Yishai*; D.R. 161/94, *Michael Ben-Horin*; A.D.A. 2/94, *Baruch Ben-Yoseph*; H.C. 1627/94, *Ben-Yishai*; A.D.A. 5/94, *Shmuel Ben-Yaacov*; H.C. 2029/94, *Federman*.

[FN119]. See, e.g., H.C. 2612/94, *Avraham Shaar*.

[FN120]. See, e.g., President Abramowitz's judgment in D.R. 161/94, *Michael Ben-Horin*; Justice Dov Levin's judgment in A.D.A. 4/94, *Ben-Horin*; Deputy President

Barak's judgment in H.C. 3280/94, Federman and Gopstein.

[FN121]. D.R. 161/94, Ben-Horin; A.D.A. 2/94, Ben-Yoseph; A.D.A. 2/94, Federman; A.D.A. 4/94, Noked; A.D.A. 5/94, Ben-Yaacov; A.D.A. 4/94, Ben-Horin; A.D. 1/94, Baruch Green; A.D.A. 7/94, Ben-Yoseph.

[FN122]. Id.

[FN123]. A.D.A. 5/94, Ben-Yaacov; H.C. 3280/94, Federman and Gopstein.

[FN124]. A.D. [Administrative Detention] 1/94 In the Matter of Baruch Green (District Court of Jerusalem, May 18, 1994).

[FN125]. Id.

[FN126]. A.D.A. 2/94 Ben-Yoseph; A.D.A. 4/94, Noked; A.D.A. 4/94, Ben-Horin; see also President Zeiler's judgment in A.D. 1/94, Baruch Green.

[FN127]. See A.D.A. 2/94, Ben-Yoseph; A.D.A. 4/94, Noked; A.D.A. 5/94 Ben-Yaacov.

[FN128]. See, e.g., D.R. 161/94 [Ben-Horin]; A.D.A. 2/94 [Ben-Yoseph]; A. D.A. 2/94 [Federman]; and A.D.A. 5/94 [Ben-Yaacov].

[FN129]. See A.D. 1/94, Baruch Green.

[FN130]. D.R. [Different Requests] 161/94 State of Israel v. Michael Ben-Horin (District Court of Nazareth, March 20, 1994).

[FN131]. Id. at par. 5.

[FN132]. Id. at par. 4.

[FN133]. Id.

[FN134]. See id.

[FN135]. D.R. [Different Requests] 161/94 State of Israel v. Michael Ben-Horin (District Court of Nazareth, March 20, 1994).

[FN136]. Id.

[FN137]. A.D.A. 2/94 Federman v. IDF Commander of Judea and Samaria (Military Court, March 28, 1994); A.D.A. 4/94 Noked v. IDF Commander of Judea and Samaria (Military Court, April 4, 1994).

[FN138]. A.D. [Administrative Detention] 1/94 In the Matter of Baruch Green (District Court of Jerusalem, May 18, 1994).

[FN139]. A.D.A. 2/94 Federman; D.R. 161/94 State of Israel v. Michael Ben-Horin (District Court of Nazareth, March 20, 1994).

[FN140]. See H.C. 2612/94 Avraham Shaar.

[FN141]. Id. at par. 9.

[FN142]. Id.

[FN143]. Id.

[FN144]. First, the IDF Commander of Judea and Samaria prohibited Shaar from

entering the town of Hebron (on February 28, 1994). When Shaar ignored this order, the IDF Commander ordered that Shaar's gun be seized (on March 14, 1994). H.C. 2612/94 Avraham Shaar v. IDF Commander of Judea and Samaria (June 7, 1994).

[FN145]. Justices Yaacov Kedmi and Itzhak Zamir concurred without explanation. Id.

[FN146]. H.C. 2612/94 Avraham Shaar v. IDF Commander of Judea and Samaria, at par. 8.

[FN147]. The Court referred to the "imitation syndrome." Id.

[FN148]. Id.

[FN149]. Id. at par. 9.

[FN150]. A.D.A. 4/94 Noked v. IDF Commander of Judea and Samaria (Military Court, April 4, 1994).

[FN151]. These included shooting at them, damaging their property, and provocatively visiting their towns. Id.

[FN152]. Id. The Israeli shekel at the time had been trading at about 3.04 to the U.S. dollar. Bank Leumi, Israeli Money Markets, JERUSALEM POST, September 19, 1994, at 9 (listing shekel foreign exchange rates).

[FN153]. Id.

[FN154]. Id.

[FN155]. Id.

[FN156]. H.C. 3280/94 Federman and Gopstein v. Ilan Biran, IDF Commander of Judea and Samaria (June 16, 1994).

[FN157]. Federman was accordingly imprisoned for twenty months and received an additional twenty-month conditional sentence. Id. at par. 5. In July of 1992, Federman broke into a building in the Jericho area and was forcefully removed by IDF soldiers. One month later, while trying to prevent the demolition of an illegally constructed building, he took part in a violent clash with soldiers in Kiryat Arba. In mid-1993, Federman and others beat a Palestinian and damaged windows in the Old City of Jerusalem. In July of 1993, he participated in a violent attack on B'TSELEM activists in Jerusalem. One month later, he and others beat Palestinians in the Casbah of Hebron, and, after the massacre at the Tomb of the Patriarchs, Federman drafted an obituary stating that 'Kach' "bitterly mourns the death of Dr. Goldstein who died in Kiddush Ha'shem (sanctification of the Holy Name)." Id. Justice Barak failed to mention in this opinion that Federman had been convicted in 1992 of causing disturbances near the Prime Minister's office and that he had received a penalty of a twelve-month conditional sentence and a 3,000 shekel fine.

[FN158]. H.C. 3280/94 Federman and Gopstein v. Ilan Biran, IDF Commander of Judea and Samaria (June 16, 1994). On November 8, 1990, he was apprehended by the police after being involved in disturbances during Meir Kahane's funeral. A day later he was detained by the police following the killing of two Palestinians in the village of Loven Sharkiyah, but was dismissed for lack of evidence. In June of 1992, Gopstein took part in disturbances and in the sabotage of Palestinian vehicles in Hebron. One month later he was involved in another uproar and in clashes with IDF soldiers in Hebron. On May 19, 1993 (Jerusalem Day), Gopstein participated in the beating of Palestinians and in overturning their business stands in the Old City of Jerusalem. In the course of this incident Gopstein also beat Jews who tried to prevent him from carrying out his violent conduct. During the same month, Gopstein was

involved in an onslaught on Palestinians at the Tomb of the Patriarchs during which he damaged their personal belongings. *Id.* at par. 5.

[\[FN159\]](#). *Id.*

[\[FN160\]](#). *Id.*

[\[FN161\]](#). H.C. 3280/94 Federman and Gopstein v. Ilan Biran, IDF Commander of Judea and Samaria (June 16, 1994), at par. 5.

[\[FN162\]](#). D.R. [Different Requests] 838/84 Livny v. State of Israel, 38(3) P.D. 729. In Livny, the defendants were charged, inter alia, with various counts for their participation and/or membership in a terrorist organization, and appealed to the Supreme Court to lift the confidentiality order that then Defense Minister Moshe Arens had issued with respect to evidence gathered against them by Israeli intelligence. *Id.* at 732. The confidentiality order covered general work methods of the security forces, and the names of (and personal information about) security operatives who had taken part in the investigation of the defendants' activities. *Id.*

[\[FN163\]](#). Justice Barak quoted the opinion in [United States v. Nixon \(418 U.S. 683, 708-09, 1974\)](#), in which Chief Justice Burger asserted:
[T]he twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer . . . We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.
Id.

[\[FN164\]](#). *Id.* at 734.

[\[FN165\]](#). D.R. 838/84, Livny, 38(3) P.D. at 738.

[\[FN166\]](#). *Id.* at 741-42.

[\[FN167\]](#). D.R. [Different Requests] 161/94 State of Israel v. Michael Ben-Horin (District Court of Nazareth, March 20, 1994).

[\[FN168\]](#). *Id.* at par. 16.

[\[FN169\]](#). *Id.*

[\[FN170\]](#). *Id.*

[\[FN171\]](#). A.D.A. 7/94 Ben-Yoseph v. State of Israel (Supreme Court, September 1, 1994).

[\[FN172\]](#). *Id.* Ben-Yoseph appealed first to the Jerusalem District Court, which denied his appeal, effectively affirming the extension of the detention period. Ben-Yoseph then submitted a plea to the High Court. *Id.* at par. 1.

[\[FN173\]](#). *Id.* at par. 3.

[\[FN174\]](#). *Id.* at par. 4.

[\[FN175\]](#). A.D.A. 7/94 Ben-Yoseph v. State of Israel (Supreme Court, September 1, 1994) at par. 4.

[\[FN176\]](#). Id. at par. 3.

[\[FN177\]](#). Id.

[\[FN178\]](#). Id. at par. 5.

[\[FN179\]](#). See RAPHAEL COHEN-ALMAGOR, *THE BOUNDARIES OF LIBERTY AND TOLERANCE: THE STRUGGLE AGAINST KAHANISM IN ISRAEL* (1994), which specifically addresses the problem of how democracies should defend themselves against antidemocratic elements which aim to exploit the inherent deficiencies of democracies in order to destroy them.
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