

TERRORISM: ISRAEL'S LEGAL RESPONSES

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I. INTRODUCTION

Terrorism — politically motivated terrorism — is widely recognized today as one of the scourges of civilization. The frequency of terrorist acts, and the number of deaths and injuries that resulted have steadily increased during the past 20 years.¹ Terrorism poses three challenges to the modern nation state: a security challenge, a moral challenge and a legal challenge. This article seeks to address the issues raised by the legal challenge, and particularly the responses to that challenge by Israel, whose citizens have been unceasing victims.

Few subjects in recent years have captivated world attention as has the campaign to protect human rights. Terrorist groups have succeeded in placing the Government of Israel in a dilemma - can the State protect innocent human life without imposing repressive law enforcement countermeasures? Is Israel able to arrive at a reasonable balance between individual freedom and public order?

This article will emphasize the human rights issues which have been raised as a result of the legal measures Israel has taken against terrorism.

II. DEFINITION OF TERRORISM

As has been observed by one commentator, "to win the war against terrorism, free societies must first know what they are fighting."² The best definition of terrorism known to the author of

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1. Von Glahn cites the following statistics for terrorist attacks worldwide: 1968 - 111 attacks; 1976 - 413 attacks; 1978 - 1,511 attacks; 1979 - over 3,000 attacks. He notes that between the years 1968 and 1980 more than 3,700 fatalities and 6,700 injuries resulted from terrorist attacks. G. VON GLAHN, *LAW AMONG NATIONS* 297-98 (5th ed. 1986); see also OFFICE OF THE AMBASSADOR AT LARGE FOR COUNTER-TERRORISM, U.S. DEP'T OF STATE, *INTERNATIONAL TERRORIST INCIDENTS* (chart), reprinted in Carley, *Lifting the Lid: Their Secrets Revealed, Abu Nidal's Terrorists Are Becoming Targets*, Wall St. J., Oct. 15, 1987, at 1, 24, col. 1.

2. TERRORISM: HOW THE WEST CAN WIN 3 (B. Netanyahu ed. 1986).

this article was adopted by the delegates to the 1979 convention of the Jonathan Institute.³ "Terrorism is the *deliberate and systematic* murder, maiming and menacing of the innocent to inspire fear to political ends."⁴ I prefer this definition to others that have been advanced in international law,⁵ by the United States Congress⁶ and by legal⁷ and other commentators⁸ because it is succinct and not

3. The Jonathan Institute is a private research foundation concentrating on terrorism. It was named in memory of Lieutenant Colonel Jonathan Netanyahu of the Israel Defense Forces, who was killed leading the Entebbe hostage rescue mission.

4. *Id.* at 9 (emphasis added).

5. The League of Nations made one of the earliest attempts to arrive at a legal definition of terrorism in the 1937 Convention for the Prevention and Punishment of Terrorism. It defined terrorism as all "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." S. QURESHI, *POLITICAL VIOLENCE IN THE SOUTH ASIAN SUBCONTINENT* 152 (1976). It should be noted that this convention never entered into force due to insignificant ratifications. See M. HUDSON, 7 *INTERNATIONAL LEGISLATION* 862 (1941).

6. The Foreign Intelligence Surveillance Act of 1978, defines "international terrorism" as:

(c) "International terrorism" means activities that -

(1) involve violent acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or and State:

(2) appear to be intended -

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 1801(c) (1982); see also Act to Combat International Terrorism of 1984, Act of Oct. 19, 1984, Pub. L. No. 98-533, tit. I, 98 Stat. 2706 (1984).

7. The Committee on International Terrorism of the International Law Association has defined "international terrorism" to include, "atrocities, wanton killing, hostage taking, hijacking, extortion, or torture committed or threatened to be committed . . . for political purposes provided that an international element is involved." *INT'L LAW ASSOC., REPORT OF THE 61ST CONFERENCE, 1984*, at 13-14 (1985).

8. One interesting but incomplete definition posits:

International terrorism may be productively defined as the staging of a violent drama in a neutral setting to draw public attention to an otherwise lost or faltering cause. The victims are almost always innocent bystanders, chosen at random, either because of their symbolic importance (as in the case of the Israeli athletes at Munich) or their availability (as in a hijacking). The terrorists act throughout the drama as representatives of a clandestine group or faction, which characteristically takes credit for the entire production. The proximate objective is not to change the

overly narrow.

III. ISRAEL AS A VICTIM OF TERRORIST VIOLENCE

Political scientists, sociologists, psychologists and others theorize why terrorist acts are committed against Israeli targets. One popular theory is the "root cause."⁹ This thesis claims that were not for the frustration, deprivation, and misery of the Palestinian people, the Palestine Liberation Organization (PLO) would not commit acts of terrorism.¹⁰

A typical intellectual argument excusing PLO terror reasons: "Shying away from analyzing the motives for terror, or the political, economic, and historical environments that breed it, overlooks the often symbiotic relationship between a terrorist and the governments and policies he fights against."¹¹

Others go one step further and turn an explanation into a justification. Yassir Arafat, the Chairman of the PLO Executive Committee, argued: "The use of the pro-Israeli media of the word 'terrorism' does not intimidate us, especially when it is used by forces that have colonized peoples for hundreds of years, and accused freedom fighters of being 'terrorists' when they fought against occupation, terrorism and racial discrimination until they won their independence"¹²

Regrettably, this justification has gained considerable support at the United Nations.¹³ Benzion Netanyahu, the Israeli Ambassador to the United Nations, has written in response:

The typical stratagem at the United Nations, for example, has been to justify terrorism by calling it a struggle for national liberation. This is perverse enough in itself, because terrorism is always unjustifiable, regardless of professed or real goals. But it is perverse in another way. For the real goals of terrorists are in practice related to their methods. History has repeatedly given us advance warning. Those who deliberately butcher women and children do not have liberation in mind. It is not only that the ends of ter-

balance of power, or even win a tactical military victory: it is, get a message on the media.

Epstein, *Terrorism: What Should We Do*, 12 *THIS WORLD* 43 (1985).

9. This theory is critically analyzed in, Krauthammer, *Terror and Peace: the "Root Cause" Fallacy*, *TIME*, Sept. 22, 1986, at 97.

10. See generally *id.*

11. Davidson, *Terrorism in Context: The Case of the West Bank*, 15 *J. PALESTINE STUD.* 109, 111 (No. 3, 1986).

12. Arafat, *A Discussion With Yassir Arafat*, 11 *J. PALESTINE STUD.* 9, 13 (No. 2, 1982).

13. Sofaer, *Terrorism and the Law*, *FOREIGN AFF.* 901 (Summ. 1986).

rorists do not justify the means that they choose. It is that the choice of means indicates what the true ends are. Far from being fighters for freedom, the terrorists are the forerunners of a new tyranny. It is instructive to note that the French Resistance did not resort to the systematic killing of German women and children, well within reach in occupied France. A few years later, in Algeria, the FLN showed no such restraint against French occupation. France, of course, is today a democracy. Algeria is merely another of the despotisms where terrorists have come to power.¹⁴

Realistically, the "root cause" theory should be recognized as the "root cause fallacy."¹⁵ This is because, on a global basis, there is scant evidence to support any direct correlation between those who have suffered and those who commit acts of terrorism. Indeed on both an individual and group level, many of those who have suffered most scrupulously avoid such acts. The PLO, by contrast, purports to represent the Palestinian people, a group with options for non-violent political action and resources including wealth and education. Yet the PLO deliberately engages in terrorist acts while eschewing all other means of political redress.¹⁶ Any Arab leader showing the slightest inclination towards accomodation with Israel

14. Netanyahu, *supra* note 2, at 12-13. In the opinion of the author, authentic anti-colonialist revolutionary leaders such as George Washington, Simon Bolivar and Giuseppe Garibaldi would have been outraged at the thought of being grouped with the terrorists of today. These leaders had no difficulty directing their attacks at the governments they opposed, its army and its institutions. The terrorist follows a very different set of rules, one in which no code of law is honored and no civilians are spared.

15. See Krauthammer, *supra* note 9.

16. Johnson, *The Seven Deadly Sins of Terrorism*, in THE JONATHAN INST. JERUSALEM CONF. ON INT'L TERRORISM, INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE 12 (B. Netanyahu ed. 1981) [hereinafter INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE]. Mr. Johnson, a British writer and historian, explains:

The third [deadly sin of terrorism] following from the first two, is the rejection of politics as the normal means by which communities resolve conflicts. To terrorists, violence is not a political weapon, to be used *in extremis*; it is a substitute for the entire political process. The Arab terrorists, the IRA, the Baader-Meinhof gang in Germany, the Red Army in Japan and elsewhere, have never shown any desire to engage in the political process.

Id. at 17-18.

This is not to say that the PLO has never attacked a military target. The weight of historical evidence, however, supports the proposition that:

During most of its existence, the PLO and its individual component organizations have relied on terrorist attacks on innocent non-combatants as their primary means of waging war Whether in small terrorist attacks in Israel or around the world or in countervalue attacks by artillery and rockets on Israeli population centers, the PLO has made terrorism its normal form of conducting hostilities.

See O'Brien, *The PLO in International Law*, 2 B.U.J. INT'L L. 349, 412 (Summ. 1984).

has risked assassination.¹⁷ Thus, PLO terror should be recognized as a cause for, not the result of, Palestinian frustration, desperation and misery.

Whatever the origin of PLO terrorism, there can be no legal justification or excuse for terrorist acts; and the law of the State of Israel must combat this phenomenon.

In proportion to its population, Israel has been the target of the greatest number of terrorist attacks.¹⁸ The great majority of these attacks have been committed by members of the PLO¹⁹ which purports to be the sole representative of the Palestinian people.²⁰

Israel is a tiny country. Out of necessity, military bases are distributed throughout the land. Yet the PLO has rarely attacked any of these "natural" targets. Instead, the PLO has used bombs, Molotov cocktails and knives against civilians standing at bus stops, traveling on commercial airlines and walking through market places. Significantly, these targets are deliberately chosen.²¹

The Palestine National Covenant (PLO Covenant),²² the

17. See, e.g., R. HALABI, *THE WEST BANK STORY* 186-201 (1981).

18. According to a 1985 publication of the Israeli Ministry of Foreign Affairs, since 1969, the PLO had perpetrated some 8,000 acts of terror causing the deaths of over 650 Israelis and the wounding of thousands more. ISRAELI MINISTRY OF FOREIGN AFFAIRS, *THE THREAT OF PLO TERRORISM* 3 (1985) (mimeographed).

19. *Id.*

20. Article 26 of The Palestinian National Covenant, the PLO's charter, states: The Palestine Liberation Organization, representative of the Palestinian revolutionary forces, is responsible for the Palestinian Arab people's movement in its struggle - to retrieve its homeland, liberate and return to it and exercise the right to self-determination in it in all military, political and financial fields and also for whatever may be required by the Palestinian case on the inter-Arab and international levels. The Palestinian National Covenant, in *BASIC POLITICAL DOCUMENTS OF THE ARMED PALESTINIAN RESISTANCE MOVEMENT* 137-41 (L. Kadi ed. 1969) (translated by Israel Information Center) [hereinafter PLO Covenant].

Regarding the meaning of this passage, one authority has observed:

The Palestine National Covenant immediately became a categorical imperative for all who identified with the Palestinian cause. Occasionally, leading figures in the territories have spoken against the letter and the spirit of the covenant in private conversation. But anyone who challenged it publicly placed himself in great personal jeopardy and some have paid for their criticism with their lives. In 1978, three well known Palestinian moderates were murdered after they dared to express cautious reservations about the doctrine of the Palestine National peaceful settlement between the Palestinians and the State of Israel.

R. HALABI, *supra* note 17, at 187, 197.

21. The intentional nature of the PLO's targeting of civilian targets is exhibited in that organization's documents which were captured by Israel in Lebanon. A revealing selection of 124 such documents have been published with English translations. R. ISRAELI, *PLO IN LEBANON: SELECTED DOCUMENTS* (1983); see also O'Brien, *supra* note 16, at 362-68.

22. PLO Covenant, *supra* note 20.

PLO's official charter, sets forth a blueprint for terrorist acts. It openly calls for "armed struggle."²³ Moreover, among the world's terror organizations, the PLO alone has as its declared objective the liquidation of a sovereign state. The PLO Covenant advocates the destruction of Israel,²⁴ and the expulsion of the overwhelming majority of its Jewish residents.²⁵

IV. THE PREVENTION OF TERRORISM ORDINANCE

Terrorism has been a bane to Israel from the time of its inception as a state. This was true even prior to the founding of the PLO in 1964, although the PLO has been the source of most of the anti-Israel terrorism since that time. It was clear that ordinary criminal procedures were inadequate to prevent terrorist acts, even though they are useful to apprehend, try and punish the perpetrators after the fact.

For this reason the Prevention of Terrorism Ordinance (Ordinance) was one of the first enactments by Israel's legislature.²⁶ The Ordinance defines "terrorist organization" as "a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or threats of such acts of violence."²⁷ Section 8 of the Ordinance enables the government to declare that a particular body of persons is a "terrorist organization" within the meaning of this law, by publishing a notice in the *Official Gazette*.

23. Article 9 of the Palestinian National Covenant states, *inter alia*, that: "[a]rmed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase." *Id.*

24. Article 15 of the Palestinian National Covenant states that "the elimination of Zionism" is a "national duty." Article 21 of this document states: "[t]he Arab Palestinian people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine." *Id.*

The leading commentator on the Covenant has observed:

The claim that Israel should not exist is implied in almost half of its [the Covenant's] thirty-three articles, including those formulated as definitions and axioms. The plethora of arguments in the Covenant as to why Israel should not exist may perhaps have a cumulative effect, impelling the PLO leaders and their public to believe that there is no atrocity that cannot be justified in order to bring about the liquidation of Israel.

Y. HARKABI, *THE PALESTINIAN COVENANT AND ITS MEANING* 11-12 (1979).

25. Article 6 of the Covenant states that: "[t]he Jews who had normally resided in Palestine until the beginning of the Zionist invasion [generally defined by PLO sources as having begun in 1917] will be considered Palestinians." PLO Covenant, *supra* note 20, at 137-41.

Presumably the others would be expelled, reducing the Jewish population to 5% of its present level. Y. HARKABI, *supra* note 24, at 13.

26. 1 Laws of the State of Israel 76 (1948).

27. *Id.* sec. 1, at 77.

Following such publication, a rebuttable presumption exists that the organization is in fact a terrorist organization.²⁸

This Ordinance criminalizes membership in and activities supporting a terrorist organization. It has been amended to also outlaw acts manifesting identification or sympathy with a terrorist organization in a public place²⁹ and knowingly maintaining contacts with officials or representatives of a terrorist organization.³⁰

In its amended form, this Ordinance is a primary weapon in the hands of the State in bringing to trial and punishing individuals active in terrorist organizations. For example, a person found guilty of membership in a terrorist organization is liable to imprisonment for up to five years.³¹ However, its greatest worth is in bringing to trial the leaders of terrorist organizations who organize but do not themselves participate in armed attacks. It is also valuable as a deterrent in discouraging persons from becoming members of the PLO.

The Ordinance assumes that each member of the PLO (and other terrorist groups listed in the *Official Gazette*) presents a threat to the public of Israel. This is borne out by the way in which the PLO operates. The PLO recruits individuals in various localities on the premise that they will perform services for the organization. Once recruited, a member has little freedom of choice in determining which actions he will undertake and which orders he will follow. A member of the PLO, Adnan Jaber, who led a group of terrorists in the massacre of Jewish worshippers in Hebron in 1980,³² explained: "As a fighter, when they give me an order, I have to carry it out."³³

Refusing to carry out an order can bring about unpleasant consequences.³⁴ Members who do not carry out orders are likely to

28. *Id.* sec. 8, at 78.

29. Prevention of Terrorism Ordinance (Amendment No. 1) Law, 34 Laws of the State of Israel, sec. 1, at 211 (1980).

30. Prevention of Terrorism Ordinance (Amendment No. 2) Law, — Laws of the State of Israel, sec. 1, at — (1986). This amendment is controversial in Israel and is likely to be challenged in the Supreme Court on the grounds that it is overly broad.

31. *Id.* sec. 3, at 77.

32. On May 2, 1980, six Israelis were killed and twenty-six were wounded when they were ambushed in Hebron by a group of PLO terrorists led by Adnan Jaber. The attack took place immediately after the victims had concluded their sabbath worship at a synagogue. See Shipler, *5 Are Killed in Palestinian Attack on Jewish Settlers in West Bank*. N.Y. Times, May 3, 1980, at 1, col. 1.

33. Shipler, *The Week in Review*, N.Y. Times, Dec. 1, 1985, sec. 4, at 1, col. 1.

34. This description process of recruitment to and assignment of tasks by the PLO is summarized from discussions of the author with officials of the General Security Service, the

be considered collaborators and threatened or even assassinated. The danger of PLO reprisal against the recalcitrant member extends to his family.³⁵

The PLO has, for these reasons, been declared an unlawful organization.³⁶ Membership in the PLO, activities on its behalf, public acts manifesting identification with it and intentional contact with its officials have been criminalized under the Ordinance.³⁷

V. THE DEFENCE (EMERGENCY) REGULATIONS AND SUBSEQUENT ADMINISTRATIVE MEASURES

Conventional criminal legislation³⁸ and the Prevention of Terrorism Ordinance are valuable tools in punishing perpetrators of armed attacks and members of terrorist organizations. Nevertheless, additional measures embodied in the Defence (Emergency) Regulations (Regulations)³⁹ have proven essential in attempting to root out, at the earliest possible stage, those responsible for terrorist acts.

Police work is considered successful if it uncovers, brings to trial, and helps to convict those responsible for crime. By contrast, given the dangers posed by the well-armed terrorist, the authorities responsible for preventing terrorism have to do their utmost to intercept the terrorist before he carries out even a single attack. The administrative measures which comprise the Regulations and subsequent Israeli legislation that build on these provisions are designed to accomplish this interception.

Promulgated by the British High Commissioner during the Mandate period,⁴⁰ the Regulations were absorbed into Israeli law following the creation of the State.⁴¹ Likewise they were adopted

Israel Defense Forces and the Prisons Service.

35. See R. HALABI, *supra* note 17.

36. The PLO appears on a list in the *Official Gazette*. *Official Gazette*, Oct. 23, 1980, at 195.

37. See *supra* notes 26-31 and accompanying text.

38. For example, the maximum penalty for murder is life imprisonment. Penal Law, Special Volume, Laws of the State of Israel, sec. 300, at 82 (1977). Israel's criminal law penalties are, of course, applicable to terrorist acts. These sanctions are not examined in this article because they are not controversial.

39. The Defense (Emergency) Regulations of 1945, in PALESTINE GAZETTE, No. 1442, at 1058-98 (Supp. No. 2, 1945).

40. In 1920, the League of Nations gave Great Britain a mandate, or trusteeship, over territory which is today known as Israel, Jordan and the Administered Areas. This Mandate ended with the withdrawal of British troops in 1948.

41. See, e.g., Bracha, *Restriction of Personal Freedom Without Due Process According to the Defense (Emergency) Regulations 1945*, 8 ISR. Y.B. HUM. RTS. 296 (1978).

by the kingdom of Jordan,⁴² and in the Gaza Strip,⁴³ both of which had been part of the British Mandate. For reasons of continuity and in compliance with the relevant international law,⁴⁴ Israel continued to apply the Regulations⁴⁵ in the Administered Areas⁴⁶ after capturing these territories from Jordan and Egypt in 1967.⁴⁷ The

42. On May 24, 1948, the Military Commander of Jordan's Arab Legion issued Proclamation No. 2, that all laws and regulations that had been effect upon the termination of the British Mandate would continue to apply as long as they were not inconsistent with Jordanian legislation. When the Administered Areas were annexed by Jordan it was declared that all existing enactments would remain in force. *Annexation of the West Bank Law*, 1 JORDANIAN OFFICIAL GAZETTE 52 (1950). The Jordanian Constitution of 1952 extended the authority of the Defense (Emergency) Regulations (and all other laws, regulations and enactments that had not been abolished or amended). JORDANIAN OFFICIAL GAZETTE No. 1093, § 128 (Jan. 8, 1952).

The issue of the continued applicability of the Defense (Emergency) Regulations in the Administered Areas was decided by the Israeli Supreme Court. Relying on the authorities mentioned in this footnote, the Court ruled that the Defense (Emergency) Regulations remained in force. *Abu Awad v. the Regional Commander of Judea and Samaria*, HCJ 97/79, 33(iii) P.D. 309 (1979).

43. E. COHEN, *HUMAN RIGHTS IN ISRAELI-OCCUPIED TERRITORIES: 1967-1982*, at 96 (1985).

44. Under international law, Israel was obligated to continue in force the legal framework it found in the Administered Areas. Hague Regulations of 1907, Annex to the Hague Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277, T.S. No. 539. International law also gives Israel the authority to amend existing laws or enact new provisions for its security or for the orderly maintenance of government in the territory. *Id.*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 64, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; see also COMMENTARY, IV GENEVA CONVENTION 337 (J. Pictet ed. 1958).

45. The Regulations were brought in compliance with the Fourth Geneva Convention with the issuance of the Order Concerning Security Provisions of 1970, as amended. Order Concerning Security Regulations of 1970, No. 378, in PROCLAMATIONS ORDERS AND APPOINTMENTS (JUDEA AND SAMARIA) No. 1, at 5 (periodically amended).

46. The Administered Areas are the territories captured by Israel during the 1967 Six-Day War. Some refer to these territories as the West Bank and Gaza Strip, while others refer to them as Judea, Samaria and the Gaza District. I have chosen the neutral terminology the "Administered Areas" that describes the territories without imparting a political coloration.

For the sake of simplicity, references to Israeli enactments will be made only to those orders applicable to Judea and Samaria. It should be noted that parallel enactments applicable to other parts of the Administered Areas, such as the Gaza District, also appear in PROCLAMATIONS, ORDERS AND APPOINTMENTS.

47. It is important to emphasize that the Administered Areas came under the control of Israel as a result of the war waged against Israel by Egypt, Jordan and Syria in June, 1967. See, e.g., Shapira, *The Six-Day War and the Right to Self-Defense*, 6 ISR. Y.B. HUM. RTS. 65 (1971). With the possible exception of the eastern part of the city of Jerusalem, which has always been regarded as an integral part of the State, Israel has not formally annexed any part of the Administered Areas. The eastern part of Jerusalem was technically incorporated into the State of Israel by the Law and Administration Ordinance and the Municipalities Ordinance. See The Law and Administration Ordinance (Amendment No.

broad powers derived from the Regulations include the power to temporarily detain an individual administratively⁴⁸ or to temporarily restrict his travel to within his town of residence.⁴⁹ Other Regulations, which apply only in the Administered Areas, authorize the deportation of individuals from the Administered Areas who threaten security⁵⁰ and the demolition or sealing-up of residences⁵¹

11) Law, 21 Laws of the State of Israel 75 (1967); The Municipalities Ordinance (Amendment No. 6) Law, 21 Laws of the State of Israel 75 (1967).

The Administered Areas remain under Israeli administration pending the final settlement of the conflicting claims of sovereignty in a final peace treaty. *See generally* E. COHEN, *supra* note 43, at 38-43.

48. Individuals under administrative detention are held in custody for the duration of their order. The period of the order may not exceed six months, although orders may be renewed where security necessitates such action. The legislative authority for detention orders in Israel differs from that in the Administered Areas.

Regulations 111-112(B), which had been original authority for detention orders in Israel, were replaced by the Emergency Powers (Detention) Law. Emergency Powers (Detention) Law, 33 Laws of the State of Israel 89 (1979). This new statute was enacted to subject administrative detention to additional procedural safeguards including strict, automatic and frequent judicial review. *See* Administrative Detention as a Preventive Measure, Memorandum of Israeli Attorney General Itzhak Zamir (Jan. 26, 1986) [hereinafter Detention Memorandum].

Administrative detention orders in the Administered Areas are issued pursuant to § 87 of the Order Concerning Security Regulations, which was issued in 1970 by the Area Military Commander. Order Concerning Security Regulations of 1970, No. 378, art. 87, in PROCLAMATIONS ORDERS AND APPOINTMENTS (JUDEA AND SAMARIA) No. 21, at 733. This order was subsequently amended in 1980 to incorporate most of the improvements of the Emergency Powers (Detention) Law, 1979. *Id.* No. 815, §§ 87-87(H) (Amendment No. 18, Jan. 13, 1980). This order is in full conformity with Article 78 of the Fourth Geneva Convention. E. COHEN, *supra* note 43, at 129.

49. Such orders provide that the affected individual not leave the city, town or village where he resides without receiving permission from the military commander. Based on the author's experience, it can be stated that these orders are utilized to cope with similar, but less dangerous threats, than are dealt with by administrative detention.

The legislative authorization for travel restriction orders in Israel appears in Regulation 110 of the Regulations. In the Administered Areas authority is found in Article 86 of the Order Concerning Security Regulations. Order Concerning Security Regulations of 1970, No. 378, art. 86, in PROCLAMATIONS ORDERS AND APPOINTMENTS (JUDEA AND SAMARIA) No. 21, at 733. The use of travel restriction orders in the Administered Areas is in full compliance with Article 78 of the Fourth Geneva Convention of 1949. *See* E. COHEN, *supra* note 43, at 119.

50. The recipient of a deportation order typically has a long history as an incorrigible leader of a terrorist organization. The alternative to releasing him to freedom abroad would be long term imprisonment in Israel. Moreover, he is expelled to the country of his citizenship (or other country of his choice). The recipient of a deportation order may appeal to an Advisory Committee, and if unsuccessful, to the Israeli Supreme Court. *See* Deportation Orders in the Administered Areas, Memorandum of Israeli Attorney General Itzhak Zamir (Feb. 15, 1986) [hereinafter Deportation Memorandum]. Deported individuals may subsequently request readmission to the Administered Areas, and some requests have been granted. *See* E. COHEN, *supra* note 43, at 107.

The legal basis for deportation orders is Regulation 112. The Israeli Supreme Court has held that deportation under the Regulations is not violative of Article 49 of the Fourth

which are used as the base for a terrorist attack.

These Regulations, while far-reaching and controversial, comply with the leading instrument of international law dealing with belligerent occupation, the Fourth Geneva Convention of 1949.⁵² The Regulations have been amended in some instances⁵³ to offer greater safeguards for administrative review and judicial appeal.⁵⁴ In addition, the use of these measures had been limited to instances where the factual justification was manifest.⁵⁵

Geneva Convention of 1949. *Abu Awad v. Regional Commander of Judea and Samaria*, HCJ 97/79, 33(iii) P.D. 309 (1979); see also Stone, *Behind the Cease-Fire Lines: Israel's Administration in Gaza and the West Bank*, in TEL AVIV UNIVERSITY FACULTY OF LAW, OF LAW AND MAN 79-107 (1971).

51. This Regulation is a preventative measure intended to discourage local residents from harboring terrorists or storing armaments. Defence (Emergency) Regulation 118, in PALESTINE GAZETTE No. 1442, at 1058 (Supp. No. 2, 1945). It is also effective in encouraging the use of parental authority to dissuade teenagers from becoming active in the PLO. This measure has generally been employed only where the house was used by terrorists as a base to prepare explosives, store ammunition, or launch an attack which resulted in bloodshed. A residence is sealed, rather than demolished, where destroying it would structurally damage an innocent neighbor's residence. This Regulation has been upheld by the Israeli Supreme Court. *Sahwil and Uthman v. Regional Commander*, 34(i) P.D. 464 (1980); see ISRAEL NAT'L SEC. OF THE INT'L COMM'N OF JURISTS, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 69-71 (1981) [hereinafter RULE OF LAW IN ADMINISTERED AREAS]. This policy is in compliance with the "military necessity" provision in Article 53 of the Fourth Geneva Convention. See, e.g., J. STONE, NO PEACE - NO WAR IN THE MIDDLE EAST 15 (1969).

52. See Fourth Geneva Convention, *supra* note 44; see also *supra* note 48. Israel maintains that its presence in the territories is not *de jure* bound by the Fourth Geneva Convention. It has nevertheless announced that it will *de facto* comply with the humanitarian provisions of the Convention. Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 266 (1970). But see Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106 (1979).

53. See *supra* note 48.

54. Regulations 111-112B, pertaining to administrative detention, were replaced by the Emergency Powers (Detention) Law. Emergency Powers (Detention) Law, 33 Laws of the State of Israel 89 (1979). The new legislation offers greater safeguards against misuse. It establishes a procedure for mandatory and frequent judicial review. In Israel a person against whom an administrative detention order is issued must be brought before the President of the District Court within 48 hours of his arrest, or be released. The court may confirm or set aside the detention order, or reduce the period of detention. The detention order is thereafter automatically reviewed by the court every three months, whether or not the affected individual exercises his right to petition to the Advisory Committee or the Supreme Court. See Detention Memorandum, *supra* note 48.

55. One typical case was that of Jamal al-Shati. Al-Shati was issued an administrative detention order during 1986. Israeli Attorney General Joseph Harish provided the following factual background:

Al-Shati is one of the leaders of the al-Fatah faction of the PLO terrorist organization. In this context he has participated in public disturbances and incited others to undermine security . . . Al-Shati harassed and threatened persons he suspected are cooperating with the authorities . . . He had previously also served three-and-a-half years in prison following his admission that he had recruited others to al-Fatah,

The administrative measures embodied in the Regulations are not utilized to punish individuals for offenses they have committed, but rather to prevent the perpetration of illegal acts by the individual in question.⁵⁶ These orders are normally only invoked in special circumstances where there is corroborating evidence from two or more independent and reliable sources that an individual is engaged in illegal acts that involve direct danger to state security and to the lives of innocent people.⁵⁷ Moreover, these measures are resorted to only in those circumstances when regular criminal judicial procedures cannot be employed because of the danger to the lives of witnesses or because secret sources of information cannot

had built a stone barrier blocking a road and that he planned to use explosives in a terrorist attack. After his release from prison, he continued and intensified his terrorist activities in spite of the restriction orders issued against him. These are only some of the activities that prompted the I.D.F. Regional Commander to issue an administrative detention order against Al-Shati as a preventative measure. Other evidence, of a classified nature was shown to the judge who conducted Al-Shati's hearing *in camera*.

Letter from Joseph Harish (Attorney General, State of Israel) 3 (Oct. 25, 1986) (answering inquiry concerning individuals under administrative detention); *see also* Dershowitz, *Preventive Detention of Citizens During a National Emergency - A Comparison Between Israel and the United States*, 1 ISR. Y.B. HUM. RTS. 295-96, 310, 316-17, 320-21 (1971).

56. The Israeli Supreme Court explained this distinction in an opinion upholding an administrative detention order under Regulation 110. It stated:

[T]he power defined in Regulation 110 cannot be used to punish a person for past acts or serve as a substitute for criminal proceedings. The power is preventative, that is to say it is directed towards the future and may only be used in order to avert an anticipated danger. It is of course possible that the evaluation of a situation with regard to the future is based on acts done in the past; it could hardly be otherwise, for a logical conclusion drawn by the holder of power must be based on facts, and no facts, whether they concern acts that were brought to completion or whether they point to preparation for the commission of acts endangering public safety or the defence of the state.

Baranseh v. O.C. Central Command, HCJ 242/81, 36(iv) P.D. 249-50 (1981); *see also* Detention Memorandum, *supra* note 48; Letter from Itzhak Zamir (Attorney General, State of Israel) to Thomas Hammerberg (Secretary General of Amnesty International) (June 14, 1983).

57. *See, e.g.*, Detention Memorandum, *supra* note 48. Former Israeli State Attorney Gabriel Bach explained the evidentiary prerequisites for an administrative detention order:

First of all, every such case is examined according to its circumstances. This is not someone's arbitrary decision. Never - and this I can say after being acquainted with dozens of such files - is just one source relied upon. It must always be two or three separate and distinct sources of information which come together and confirm one another. This is material which convinces any reasonable person who reads it and sees it, that this person constitutes a serious, acute, immediate danger to the State of Israel.

Interview with G. Bach, State Attorney, Israeli Ministry of Justice (Interview over Israeli radio *Kol Yisrael*) (Jan. 13, 1979), *reprinted in* E. COHEN, *supra* note 43, at 121.

be revealed in open court.⁵⁸ Where an individual can be brought to trial, even if the charges will be of a reduced nature, the government will not resort to administrative measures.⁵⁹

These administrative orders have been most useful in curtailing the activities of leaders and members of terrorist organizations. For example, placing a terrorist cell leader under administrative detention is likely to render non-functional or at least reduce the effectiveness of his cell. Deporting an experienced terrorist recruiter will pay both short term and long term security dividends.

Israel's restricted use of administrative measures should be viewed in its proper historical perspective. For example, during the Second World War, the United States detained 109,650 United States citizens of Japanese origin.⁶⁰ England imposed the same fate on some 27,000 aliens of German, Austrian and Italian origin.⁶¹ Included in this number were many thousands of Jewish refugees from Nazi persecution⁶² who posed no conceivable threat to the Allied war effort. At one point during the British Mandate in Palestine approximately 4000 Jews were held in detention, out of a total Jewish population of 600,000.⁶³ More recently, England,⁶⁴

58. Shetreet, *A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law*, 14 ISR. Y.B. HUM. RTS. 182, 197 (1984). Professor Shetreet explains that he "prefers the maintenance of administrative detention which is subject to meaningful judicial supervision, for to do away with it and create exceptions in the ordinary criminal process results in the heavy price of bringing the ordinary courts into disrepute." *Id.* at 199.

59. *Id.*

60. See *Yakus v. United States*, 321 U.S. 414 (1944); see also *Korematsu v. United States*, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945). Justice Black's majority opinion in *Korematsu* found that exclusion of all individuals of Japanese origin had to be subjected to the "most rigid scrutiny" since it involved curtailing the civil rights of a racial group. *Id.* at 216. Nevertheless, the Supreme Court upheld this mass detention which the military authorities, concerned about the risks posed by an unascertained number of disloyal members of the group, viewed as a military imperative. *Id.* at 223-24. Although *Korematsu's* own conviction was subsequently vacated, the Supreme Court has not reversed its 1943 ruling allowing mass detention based on racial criteria where the government's action satisfies the "most rigid scrutiny" test. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Ca. 1984).

It should be emphasized that Israel has never utilized administrative detention indiscriminately against any ethnic or religious group. Each case is examined individually. Indeed, the first person issued a detention order under the Emergency Powers (Detention) Law of 1979, was Rabbi Meir Kahane, an extreme right-wing politician who was planning assaults against Arabs. See *Rabbi Kahane v. Minister of Defence*, A.A.D. 1/80, 35(ii) P.D. 253 (1980).

61. N. STAMMERS, *CIVIL LIBERTIES IN BRITAIN DURING THE WORLD WAR* 34 (1983).

62. See *id.* at 35-36, 52.

63. Letter from Itzhak Zamir (Attorney General, State of Israel) to Martin Ennals (Secretary General, Amnesty International) 1 (Apr. 24, 1979) (discussing Amnesty International Report 1978).

64. Legislation providing for detention in England was enacted in 1974, under the

Northern Ireland,⁶⁵ Italy⁶⁶ and Canada,⁶⁷ all democratic countries, have utilized administrative detention. They have done so in recognition of the fact that ordinary procedures of criminal law are not adequate in combating terrorism and large-scale threats to the lives and security of their civilian population. In the United States preventative detention is currently employed against dangerous individuals accused of conventional crimes.⁶⁸ Against this history of the use of administrative detention in the democratic world, and

name of the Prevention of Terrorism (Temporary Provisions) Act. 44 HALSBURY'S STATUTES OF ENGLAND 164 (3d ed. 1974). Parliament enacted this far-reaching legislation in response to a series of bombings in England by the Provisional Irish Republican Army. See C. WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 22-23 (1986). This legislation, *inter alia*, banned the Provisional Irish Republican Army, forbade solicitation on its behalf and permitted the expulsion (or exclusion) from England of any person suspected of acting on its behalf. Enforcement of the act (and its renewals) resulted in the expulsion of 140 persons from Britain to Northern Ireland, 29 persons from Britain to the Irish Republic during the period from February 1974 until June 1979. See Moxon-Browne, *Water and the Fish: Public Opinion and the Provisional I.R.A.*, in *BRITISH PERSPECTIVES ON TERRORISM* 41, 56 (P. Wilkinson ed. 1981).

In addition, during this period 4,146 persons were detained for questioning regarding terrorism of whom only about ten percent of them were ever charged. *Id.* Current English anti-terrorism legislation is embodied in the Prevention of Terrorism (Temporary Provisions) Act 1984 (Continuance) Order 1987.

65. Northern Ireland's anti-terrorism legislation provides for imprisonment without trial (Northern Ireland (Emergency Provisions) Act of 1973, as amended, 43 HALSBURY'S STATUTES OF ENGLAND 1235 (3d ed. 1973), makes illegal certain organizations connected with terrorism prohibits fundraising for proscribed organizations and prohibits recruiting to certain organizations and carrying out tasks for such organizations Prevention of Terrorism (Temporary Provisions) Act of 1974, as amended, 44 HALSBURY'S STATUTES OF ENGLAND 164 (3d ed. 1974); The Northern Ireland (Emergency Provisions) Act of 1978, 48 HALSBURY'S STATUTES OF ENGLAND 972 (3d ed. 1978). *Cf.* Detention of Terrorists (Northern Ireland) Order 1972, S.I. 1972 No. 1632 (N.I.).

66. A 1974 Amendment to the Article 272 of the Italian Criminal Procedure Code provides for preventive custody for durations up to two years. *Provvedimenti urgenti sulla giustizia penale*, *Gazzetta Ufficiale della Repubblica Italiana* [Gaz. Uff.] 12 aprile 1974, n. 97; *Legislazione Italiana* (Giuffrè) I [Leg. Ital. I] § 219, at 594 (1974).

67. In 1970, the War Measures Act was proclaimed by the Federal Government of Canada to cope with the armed attacks by the Quebec Liberation Front. Pursuant to this authority, the government promulgated the Public Order Regulations. Under these regulations the Quebec Liberation Front was deemed illegal organization and 497 people were detained. See P. HOGG, *CONSTITUTIONAL LAW IN CANADA* 388 (2d ed. 1985); see also Friedland, *Adhering to the Rules of Criminal Procedure in Cases of Terrorism*, in *THE JERUSALEM CONFERENCE ON PEACE V. VIOLENCE* 152, 155 (J. Davidson ed. 1979).

68. In the United States, Congress has recently enacted the Bail Reform Act of 1984, which allows a judge to consider the dangerousness of the accused when determining whether to grant bail. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1985 (codified at 18 U.S.C. §§ 1341-1356 (Supp. 1985)). Thus, peacetime preventative detention of uncertain duration is now available throughout the United States. Note, *As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055 (1987); see *Bell v. Wolfish*, 441 U.S. 520 (1979).

taking into consideration Israel's difficult security situation, and the availability of judicial review, the limited and careful use of administrative detention is reasonable and in compliance with local and international law.

VI. ISRAELI PROTECTIONS FOR HUMAN RIGHTS

Israel has chosen to compromise security precautions in order to safeguard human rights. In this section I will examine some⁶⁹ of the facts that substantiate this statement.

A. THE ISRAELI HIGH COURT OF JUSTICE

All Israeli citizens have the right to petition the Supreme Court of Israel sitting as the High Court of Justice⁷⁰ for redress of any claim against the government, its agencies or employees. The Court's jurisdiction is laid down in section 15 of the Judicature law, which provides, *inter alia*:

The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.⁷¹

The particular function of the High Court of Justice is to protect the preeminence of the rule of law in Israel by judicial review of the actions of public authorities. The High Court is especially effective in protecting the public from the abuse of power by individuals acting under color of official authority.

Upon the payment of a nominal fee,⁷² any person who considers that he has been prejudiced by an act over which the High Court of Justice has authority may petition the Court for an order *nisi*.⁷³ A single judge of the Court will hear the petition, usually *ex parte*, within a day or two of when the petition is filed. If the petitioner presents a *prima facie* case, the judge will grant an order

69. For an examination of other Israeli protections for human rights (e.g., legislative oversight, the internal regulations of the governmental agencies such as the Israel Defence Forces, and the open and democratic nature of Israeli society), see E. COHEN, *supra* note 43, at 76-80.

70. In addition to its role as a court of equity, when it sits as the High Court of Justice, the Supreme court also functions as an appellate court in civil and criminal matters. Review of decisions of the District Courts is thus had in the Supreme Court.

71. Basic Law: Judicature, Laws of the State of Israel, sec. 15(b) (1984).

72. The filing fee is approximately five dollars. E. COHEN, *supra* note 43, at 85.

73. RULE OF LAW IN ADMINISTERED AREAS, *supra* note 51, at 36. An order *nisi* is a temporary injunction.

nisi requiring the governmental authority named as respondent to appear in Court and defend its position.⁷⁴ The normal period granted to the respondent to file its reply is thirty days.⁷⁵

Following the respondent's reply, a full hearing will be held before the Court sitting in bank.⁷⁶ After hearing both sides and reviewing the written submissions, the High Court of Justice will either annul the order or make it final.⁷⁷

Among the remedies available to the Court are a writ of *habeas corpus*,⁷⁸ a writ of *mandamus*,⁷⁹ an order of *certiorari* and prohibition,⁸⁰ an order of *quo warranto*,⁸¹ and a declaratory order.⁸²

Beginning in 1967, residents of the Administered Areas who were not citizens of Israel were granted access to Israeli courts in order to bring claims against the government and its agencies including the Israel Defence Forces.⁸³ The High Court of Justice considers petitions by residents of the Areas in an identical manner as it deals with petitions filed by citizens of Israel. Allowing residents of the Administered Areas access to Israeli courts, and in particular to the Supreme Court sitting as the High Court of Justice, is unprecedented in the history of international law.⁸⁴

In practice, the residents of the Administered Areas have increasingly taken advantage of the willingness of the High Court of Justice to hear their petitions.⁸⁵

In recent years approximately twenty percent⁸⁶ of all petitions for review by the Court have been brought by residents of the Ar-

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 36-37. A writ of *habeas corpus* orders the release of a person illegally detained.

79. *Id.* A writ of *mandamus* orders a governmental authority to carry out its duty.

80. *Id.* An order of *certiorari* and prohibition prohibits a lower court from exceeding its jurisdiction or invalidating a judgment of a lower court.

81. *Id.* An order of *quo warranto* forbids a person from exercising the powers of an office to which he has not been lawfully appointed.

82. *Id.* A declaratory order declares a certain act to be unlawful.

83. Access to Israeli courts for those residents of the Administered Areas who are not citizens of Israel was made possible by the government's decision not to raise a jurisdictional challenge in such cases. See Shamgar, *supra* note 52, at 262, 273.

84. E. COHEN, *supra* note 43, at 80.

85. *Id.* at 86.

86. Interview with Uzi Hasson, Deputy State's Attorney, Israel Ministry of Justice (June, 1987) (statement that the percentage of filings from residents of the administered areas had risen to twenty percent of the total).

eas. The Court has delivered a number of widely publicized decisions against the Israeli governmental agency named as respondent.⁸⁷

The authority and accessibility of the Court, its commitment to one standard of justice for all who appear before it, and the speed with which it resolves controversies have made the Court a useful tool for aggrieved individuals on both sides of the green line.⁸⁸ Merely the threat of a petition to the High Court of Justice can cause the government to reconsider its position and, if the facts merit, decide for or arrive at a compromise with the claimant.⁸⁹ A governmental body that oversteps its bounds and infringes the human rights of any individual is liable to be quickly reprimanded by the Supreme Court.

Perhaps more than any other single feature, the unprecedented expansive jurisdiction of the High Court of Justice preserves human rights for all residents of Israel and the Administered Areas.

87. See, e.g., *Dweikat v. Government of Israel*, HCJ 390/79, 34(i) P.D. 1 (1980). In *Dweikat*, the Supreme Court annulled a land requisition order issued by the Israeli Defence Forces for a parcel of privately owned Arab land. The order stipulated that the land was needed for an Israeli settlement. The Court found that political rather than security considerations were the primary motivation for the requisition and ruled that the seizure order was invalid. The judgment ordered the removal of the Israeli settlers and returned possession of the land to its Arab owners.

See also *Jerusalem District Electricity Ltd. v. Minister of Energy and Infrastructure and the Regional Commander of Judea and Samaria*, HCJ 351/80, 35(ii) P.D. 673 (1981). In *Jerusalem District Electricity*, the Israel Electric Company issued notice to the Arab-owned East Jerusalem Electric Company of the former's intention to acquire the latter's concession. The notice of acquisition was based on the terms of the concession itself, which enables the government to acquire it. This concession provides service to some residents of Israel as well as residents of the Administered Areas. The target of the acquisition petitioned the Supreme Court to remain independent. The Court ruled in favor of the petitioner. See generally Drori, *An Analysis of the Supreme Court Decision on Bet El and Eilon Moreh in Law and Legislation in Israel: A Periodic Summary and Analysis* (1981) (study prepared for the Commission of International Affairs of the American Jewish Congress, New York, mimeographed); Dinstein, *Eilon Moreh: The Question of Legality*, Ha'artez, June 12, 1979, at 2, col. 3.

88. See E. COHEN, *supra* note 43, at 86-92. The "green line" refers to the 1949 Armistice boundaries of Israel. These boundaries, which were never intended as permanent international frontiers, remained as Israel's *de facto* borders until the 1967 Six-Day War. They owe their name to the fact that they were indicated on a map with in green ink. The green line marked the front line between Israel and the various Arab states at the cease fire that ended the fighting in 1949.

89. This fact was made clear in numerous interviews the author had with lawyers employed in the office of the Israel State Attorney's Office during the period 1981 until 1986

B. ISRAEL'S AGREEMENT WITH THE RED CROSS

Israel has an agreement with the International Committee of the Red Cross (ICRC) whereby delegates of that organization are permitted to meet with security detainees in absolute privacy, even with those detainees still undergoing interrogation.⁹⁰ This agreement, unprecedented when made in 1977, allows the first delegate to visit each detainee no later than fourteen days after his arrest.⁹¹

This visit may have the incidental side effect of diminishing the value of the arrested person's statements. Other members of a terror cell, aware that one of their number is in custody and might reveal their strategy, identities or the location their stored weapons, can alter their plans, escape to Jordan and move their arms cache. Under the agreement, subsequent visits to the detained individual may be made as frequently as every two weeks (at the discretion of the ICRC) as long as he remains in custody.⁹²

As a consequence of this agreement, the ICRC delegates visit the jails and prisons in Israel and the Administered Areas on a regular basis. They are thus able to raise any issues regarding the conditions of jails, the behavior of the interrogators and guards, or the health of individual detainees with Israeli governmental authorities.⁹³ Perhaps most significantly, their regular presence acts

90. The author has read, but for reasons of confidentiality cannot reveal, the letter agreement between the Minister of Defence of Israel and the President of the International Committee of the Red Cross.

91. At a press conference given by the President of the International Committee of the Red Cross on February 1, 1978, the President stated that:

Après plus de dix ans de présence dans les territoires occupés par Israël nous avons pu, à la fin 1977, conclure un nouvel accord avec les autorités israéliennes. Nous avons, en effet, éprouvé le besoin, après ces dix années, de revoir l'ensemble de la situation et d'établir de nouveaux contacts avec le Gouvernement, qui a changé entre-temps. Nous avons obtenu, suite à ces négociations, de pouvoir visiter les personnes résidant dans les territoires occupés arabes incarcérées pour une raison ou autre à partir du 14ème jour suivant leur arrestation, une semaine même dans certains cas, ce qui est un grand progrès par rapport à la situation précédente. En effet, ces personnes se trouvent alors sous interrogatoire, et il est exceptionnel que les délégués du C.I.C.R. puissent avoir accès aux détenus durant cette période . . .

Nous sommes cependant très satisfaits de ces nouvelles possibilités d'action dans les territoires occupés par Israël.

Press Conference given by the President of the International Committee of the Red Cross (Feb. 1, 1978), reprinted in ISRAEL NAT'L SEC. OF THE INT'L COMM'N OF JURISTS, *THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL*, 105-06 n.47 (1981) (translation available in Syracuse J. Int'l L. & Com. Office).

92. Such visits may be made regardless of what stage of custody an individual is in, i.e., during interrogation, after having been charged, during trial, or following conviction.

93. The confidentiality of the relationship between the Government of Israel and the ICRC precludes the furnishing of details on particular cases.

as a continual safeguard against any systematic inhumane treatment of those in custody.

C. HUMAN RIGHTS WATCHDOGS WITHIN THE GOVERNMENT

The Government of Israel has internalized its concern for human rights. Governmental responsiveness to human rights inquiries and criticisms is one measure of concern for human rights. Several offices monitor human rights compliance from within the government.⁹⁴ These bodies are regularly involved in sensitive human rights cases and policies, in some instances even before they reach the attention of the public.

One such office is the Human Rights Division of the Justice Ministry, which is a division of the Attorney General's Office. This office, created more than ten years ago, investigates and responds substantively to thousands of inquiries from abroad. The majority of these inquiries are received from Amnesty International,⁹⁵ representatives of the news media, lawyers' groups, academics, and private individuals. Many of these queries are critical of Israel's action as regards a particular case or policy. As a general practice, each letter of inquiry receives an individual response.⁹⁶ Israel's responsiveness has been appreciated. For example, Amnesty International member Sir Jack Kent Hunn of New Zealand wrote in response:

Thank you for your letter of 6 March, 1984 It is only the second acknowledgment I have received in nearly four years from any country. (The other one was also from yourself, on 3 January, 1983 - File No. 164 133 re Bashir Barghouti). I very much appreciate the courtesy of a reply in such detail.⁹⁷

The author's personal experience on the legal staff of the Justice Ministry's Human Rights Division allows him to state that this office is proficient at investigating human rights allegations, substantive or merely contentious, which are leveled at Israel.⁹⁸ In

94. The most prominent of these offices are the Human Rights Division of the Justice Ministry and the Human Rights Desk of the Foreign Ministry.

95. Amnesty International is an international human rights organization based in London. The inquiries made by Amnesty International are from either the International Secretariat or particular members.

96. See Letter of Itzhak Zamir (Attorney General, State of Israel) to Thomas Hammerberg (Secretary General, Amnesty International) 5-6 (Mar. 10, 1986) (discussing the Amnesty International Report of 1985).

97. *Id.* at 6.

98. Among the methods used by this office are the review of court files, contacting the

the event that an allegation is meritorious, the Attorney General, by virtue of the independence of his office from the political arena, an independence guaranteed by law, is able and will intervene with the relevant authorities to see that human rights are defended.

In addition to the Human Rights Division in the Justice Ministry there exists in the Foreign Ministry an office which also deals with these matters. These two offices work in conjunction with the legal advisors of the Israel Defence Forces, the General Security Service, the Prisons Service, the Police and other official bodies to exercise continual overview of governmental policies and how they affect individual rights.⁹⁹

D. EVIDENCE NECESSARY FOR A CONVICTION

In some modern jurisdictions, such as England,¹⁰⁰ New Zea-

responsible authorities in the Israel Police, Israel Defence Forces and Prison's Service and discussing the matter with the attorneys involved.

99. The author of this article served on the legal staff of the Human Rights Division of the Israeli Ministry of Justice from 1981 until 1987. During this period the cooperation extended to the Justice Ministry by the other branches of the government named in the body of this article was generally good or excellent.

The one exception was for a period during 1986 when the relationship between the Justice Ministry and the General Security Service was under great stress as a result of what was known as the General Security Service Affair. This affair arose from the killing of two PLO terrorists who were captured after they had hijacked a bus and held its civilian passengers and driver hostage.

During the hijacking the terrorists attempted to negotiate for the release of hundreds of convicted PLO terrorists from prison. As the bus was retaken by Israel Defence Forces troops one passenger was killed and a number of others wounded. The two terrorists in question were captured alive but subsequently killed by General Security Service personnel.

The campaign to see justice done by then Attorney General Itzhak Zamir resulted in a temporary rupture of relations between the Justice Ministry and the General Security Service. The governmental crisis that resulted from this affair resulted in the removal from office of the head of the General Security Service and a number of his subordinates.

An additional controversy has arisen very recently as a result of the publication of the report of the Landau Commission of Inquiry. This Commission was appointed by the government to investigate the General Security Service. It was headed by retired Supreme Court Justice Moshe Landau. Although the author has not yet obtained a copy of the report, initial news coverage of the findings are very disturbing. They indicate that the General Security Service has for years used physical pressure on suspected terrorists and that it covered-up this practice to avoid having its evidence thrown out of court. Friedman, *Israelis Seem Ambivalent on Violence in Domestic War*, N.Y. Times, Nov. 8, 1987, sec. 4, at 2, col. 4.

In the opinion of this author, the government sponsorship of the Landau Commission is indicative of the self-cleansing nature of Israeli democracy; something unique in the Middle East. Moreover, it demonstrates that while shaken, human rights and the rule of law remain central and authentic values that Israel strives to fulfill.

100. The English rule is that a person may be convicted of any offense, with the possible exception of capital offenses, upon his own extrajudicial confession without any corroboration.

land,¹⁰¹ Australia,¹⁰² and American jurisdictions such as Wisconsin,¹⁰³ a suspect's confession can form the sole evidentiary basis for a conviction, provided that such confession was voluntary. By contrast, the rules of evidence in Israel¹⁰⁴ and the Administered Areas¹⁰⁵ are more favorable to accused individuals in that they require some independent additional evidence in order to find the accused guilty. This evidence may consist of proof that no one but the accused could have possibly committed the offense, proof that the accused controlled the weapon used in the offense, or proof that the accused had knowledge that could have been possessed only by the person who committed the offense.¹⁰⁶

This rule of evidence has the result of further reducing the temptation of the investigator or prosecutor to threaten or maltreat the accused in order to obtain a confession. If the accused retracts his confession on the grounds that it was involuntary, a "little trial"¹⁰⁷ is held. The burden of proof in the little trial lies with the prosecution which must demonstrate that the confession was not obtained under duress. Should the prosecution fail to discharge this burden, the court will rule the confession inadmissible.¹⁰⁸

This rule of evidence regarding confessions makes prosecution of terrorist acts significantly more difficult. This is because not infrequently a suspect who has made a confession will be tempted to complicate the prosecution's case by later alleging that his statement was involuntary. In addition, the little trial procedure confers a tactical advantage on the defense because it interrupts the trial and places a significant additional burden on the state.¹⁰⁹ Despite these costs, this rule of evidence has credibility as a safeguard against the abuse of suspects and the conviction of the innocent.

rative evidence. See 8 HALSBURY'S STATUTES OF ENGLAND 588 (3d ed. 1969).

101. *R v. Murray*, [1951] 1 K.B. 391-92; [1950] 2 All E.R. 925, 927.

102. *Wright v. R*, 15 Austl. L.R. 305, 310-11 (1977).

103. *Potman v. State*, 259 Wis 234, 47 N.W.2d 884 (1951).

104. See, e.g., *Dahan v. State of Israel*, Cr. App. 515/73, 33(iii) P.D. 432 (1979).

105. The rules of evidence applicable in Israeli courts martial are applied in the military courts in the administered areas

106. See, e.g., *Cr. App. 515/73, Dahan v. State of Israel*, 28(i) P.D. 460 (1974).

107. The little trial procedure is known as the "mishpat zuta."

108. *Criminal Procedure Law (Consolidated Version)*, 36 Laws of the State of Israel 35, sec. 153, at 63 (1982); see, e.g., *Andalarski v. Attorney General*, Cr. App. 3/49, 2 P.D. 589 (1949).

109. The author was apprised of such examples of the misuse of the "little trial" procedure by lawyers in the Military Prosecutor's Office.

E. THE DEATH PENALTY

The death penalty is currently available in thirty-seven American states,¹¹⁰ despite questions regarding its constitutionality¹¹¹ and the fairness with which it is applied.¹¹² Israel, with a security situation much more challenging than that of any American state, has never used the death penalty against a terrorist, although thousands of terrorists (among them hundreds of murderers) have been tried and convicted.

Imprisoning terrorist murderers poses a special risk to Israeli society. The PLO terrorist who is imprisoned for murder, unlike individuals imprisoned for "ordinary" killings, immediately becomes the catalyst for further terrorist acts aimed at securing his release. Such acts typically involve the menacing of civilian hostages,¹¹³ which is clearly contrary to international law.¹¹⁴

110. AMNESTY INT'L, USA: THE DEATH PENALTY 192 (1987).

111. See *Furman v. Georgia*, 408 U.S. 238, *reh'g denied*, 409 U.S. 902 (1972).

112. *Id.*

113. Chalfont, *Our Main Problem: The Climate of Appeasement*, in INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE *supra* note 16, at 79, 86 (1981). One possible means of discouraging the taking of hostages to force the authorities to release convicted terrorist murderers would be to utilize a conditional death sentence. That is, the individual would be sentenced to death but this penalty would be commuted unless and until hostages were taken by others in his organization demanding his release. Thereupon the death penalty would be effectuated. To the best of the author's knowledge no government has implemented such a statute.

114. There can be no question that taking of civilian hostages is forbidden in both international conflicts and non-international conflicts. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armend Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 147, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The PLO's standard operating procedure has featured the taking of hostages.

For example, on May 13, 1974, approximately 90 teenagers on a school outing in the Northern Israeli town of Ma'alot were taken hostage in a school. The choice of children as hostages was deliberate. Their captors, who were members of the Popular Democratic Front for the Liberation of Palestine, a faction of the PLO, demanded the release of 26 prisoners in Israeli jails. Twenty of the children were killed (along with several other Israeli civilians) and some 70 were wounded by the terrorists when Israeli troops re-took the school. See D. HIRST, *THE GUN AND THE OLIVE BRANCH: THE ROOTS OF VIOLENCE IN THE MIDDLE EAST*, 329-30 (1977).

115. Specified acts of treason in times of armed hostilities are punishable by either life imprisonment or the death penalty. Perpetrators of acts intended to impair the sovereignty of the State, acts intended to bring about military action against the State, and acts intended to assist an enemy in war against Israel all risk capital punishment. Penal Law,

The death penalty has been abolished in Israel for all but a few crimes.¹¹⁵ During the nearly forty years the state has been in existence, a death sentence has been carried out only once - in the case of Nazi war criminal Adolf Eichmann.¹¹⁶

In the Administered Areas, although the death penalty had been authorized by local Jordanian law¹¹⁷ as well as the Fourth Geneva Convention,¹¹⁸ Israel has administratively prevented the imposition of the death penalty.¹¹⁹

Government policy through the successive Labor, Likud and National Unity governments, has been never to instruct the military prosecutor to request the death penalty.¹²⁰ This policy has been maintained, despite periodic public protests, even for terrorists convicted of especially cruel acts of murder.¹²¹ After an upsurge in terrorism, the Knesset (Israel's legislature) in 1985 reconsidered Israel's policy on using the death penalty. This review, which took place at a time of public outrage over the murders of a number of young Israelis, did not result in any change in policy.¹²²

The price of Israel's terrorist policy has continued to be felt by innocent victims. In November 1986, a yeshiva student named Eliahu Amedi was fatally stabbed as he walked through the old city of Jerusalem. His three assailants were caught near the scene of the crime. They were convicted after having confessed. Sentenced to life imprisonment, they announced in court that they

Special Volume, Laws of the State of Israel, secs. 96-99, at 34-35 (1977).

The death penalty may be imposed by the court under the following provisions: Nazis and Nazi Collaborators (Punishment) Law, 4 Laws of the State of Israel, sec. 2(f), at 154 (1950); Defense (Emergency) Regulations of 1945, art. 111 (1945), as incorporated into Israeli law by the Law and Administration Ordinance, 1 Laws of the State of Israel, sec. 11, at 7 (1948).

115. The Eichmann case was decided more than 25 years ago. *Eichmann v. Attorney General*, Cr. App. 336/61, 16(iii) P.D. 2033 (1961). See generally E. COHEN, *supra* note 43, at 141.

116. Local law in force when Israel entered the Administered Areas provided for the death penalty for the unauthorized carrying of firearms, for discharging of firearms at a person/s, sabotage and membership in a group where any one or more of its members committed an offence punishable by death. Defence (Emergency) Regulations of 1945, art. 58, in PALESTINE GAZETTE No. 1442, at 1058 (Supp. No. 2, 1945). Local civil law also provided for the mandatory death penalty in certain circumstances. See E. COHEN, *supra* note 43, at 140.

117. Fourth Geneva Convention, *supra* note 44, art. 68, para. 2 (1949).

118. Local Courts Death Penalty Order, No. 268-1968, in PROCLAMATIONS, ORDERS AND APPOINTMENTS (JUDEA AND SAMARIA) No. 14, at 537; see also E. COHEN, *supra* note 43, at 140.

119. E. COHEN, *supra* note 43, at 141.

120. See *id.*

121. Letter from Yona Blatman (Acting Attorney General, State of Israel) to Ian Martin (Secretary General, Amnesty International) 3 (July 22, 1987).

122. *Amedi Murders Get Life*, Jerusalem Post, Dec. 24, 1986, at 1.

were members of the Popular Front for the Liberation of Palestine (an extreme faction of the PLO), that "any Jew" would have sufficed as a target, and that "We have no regrets. We'll be released anyway in the next prisoner exchange."¹²³

VII. A BALANCING TEST: HUMAN RIGHTS AND SECURITY

The security risks facing Israel today are substantially dissimilar to those in the United States and other Western democracies. This must be taken into account when striking the balance between two worthy goals: human rights and security.

What would happen if human rights were expanded at the expense of security? In a Middle Eastern context this would engender anarchy. Residents of Jerusalem would live in fear as do the residents of Beirut. Terrorists of various persuasions and affiliations, including some Jews,¹²⁴ would exploit the opportunity to victimize innocent civilians. On the other extreme, Israel could tighten security, but at the risk of becoming a police state.

Obviously the side effects accompanying both extremes are undesirable. Israel has therefore chosen to balance these two values, security and human rights; despite the obvious drawbacks of this compromise.

VIII. CONCLUSIONS

Recent events indicate that the laws against terrorism have failed to protect Israeli society. Moreover, the efforts of some to exculpate terrorist acts against Israeli targets have enjoyed some success at the United Nations.¹²⁵ Israel therefore faces a grave situation where it is censured for using its legal tools to combat terror-

123. The early 1980's saw the emergence of a new terrorism in Israel and the Administered Areas - Jewish terrorism. A number of attacks on Arabs were made on civilians. Subsequently, the 28 members of so-called "Jewish Underground" and a smaller number of others were apprehended and convicted. While the immediate danger of Jewish terrorism appears to have passed, in the author's opinion there continue to exist individuals who, if provoked (i.e., by PLO attacks on Jewish targets) would strike at innocent Arabs.

124. See, e.g., Soafer, *Terrorism and the Law*, FOREIGN AFF. 901 (1986); see also Kirkpatrick, *The Totalitarian Confusion*, in TERRORISM: HOW THE WEST CAN WIN, *supra* note 2, at 56, 58. For an examination of the United Nation's obsession with Israel, see Bialkin, N.Y. Times, Nov. 10, 1985, § 1, at 27. An authoritative legal analysis of General Assembly resolutions critical of Israel appears in J. STONE, ISRAEL AND PALESTINE 27-44 (1981).

125. See, e.g., Van Aggelen, *Protection of Human Rights in the Israeli Held Territories Since 1967 in the Light of the Fourth Geneva Convention*, 32 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 83, 90-101 (1976).

ism. This criticism is typically couched in human rights terminology.

Regrettably, legal measures cannot alone solve the problem of terrorism. However, much more can be achieved, especially if international cooperation increases. Among the proposals worth considering are the examination of diplomatic pouches for weapons, paying rewards to informants, and most importantly, penalizing countries that sponsor or harbor terrorists. Nations should energetically pursue international cooperation with the goal of eliminating all manifestations of terrorism. At every step along the way we must, as the State of Israel does, consider not only its citizen's security, but all people's human rights.

