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The Secret Keepers: Judges, Security Detentions, and Secret Evidence

SHIRI KREBS*

We examined the secret evidence, ex parte. It is impossible to reveal it. Considering the materials that we saw, we cannot say that there is a reason to intervene in the military commander's decision to prolong the administrative detention.

Justices of the Israeli Supreme Court[1]

I. INTRODUCTION

'STARVATION IS A terrible way to die'.[2] Yet for more than six months now, dozens of the 166 Guantanamo Bay detainees have been refusing food.[3] At its peak, 106 detainees have participated in the hunger strike. By the time of writing these lines, 45 of the strikers are still being forced-fed through gastric tubes inserted into their noses while they are strapped into restraint chairs.[4] All of these strikers have been

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Some of the data included in this chapter is based on an empirical research project I conducted, which was originally published as: 'Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court' (2012) 45 *Vanderbilt Journal of Transnational Law* 639. An earlier and shorter version of this chapter, based on a presentation given in an international conference taking place in Milan on December 2012, was published at: David D Cole, Federico Fabbrini, Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham, Edward Elgar Publishing, 2013).

[1] The entire wording of the decision in HCJ 2021/10 *Abu-Sneina v Military Court of Appeals*, 8 April 2010 (unpublished decision) (Israel).

[2] Petty Officer 3rd Class Michael, a Navy hospital corpsman. Jane Sutton, 'Hunger strike at Guantanamo Bay shows signs of weakening', Reuters, 31 July 2013. Available at: www.reuters.com/article/2013/07/31/us-usa-guantanamo-hunger-idUSBRE96U1FZ20130731 (last accessed: 26 August 2013).

[3] Charlie Savage, '15 Held at Guantánamo Are Said to Quit Hunger Strike', *The New York Times*, 14 July 2013. Available at: www.nytimes.com/2013/07/15/us/more-guantanamo-detainees-quit-hunger-strike.html?_r=0 (last accessed: 26 August 2013).

[4] ibid; Paul Harris et al, 'How Guantánamo's horror forced inmates to hunger strike', *The Observer*, 4 May 2013. Available at: www.guardian.co.uk/world/2013/may/04/guantanamo-hunger-strike (last accessed: 26 August 2013).

detained, indefinitely (at least potentially), for security reasons, based on secret intelligence information that was never fully revealed to them.

The hunger strike (as well as practices such as force-feeding), raise many moral and legal issues concerning security detentions. A *New York Times* editorial described the strike as a 'collective act of despair', and reported that prisoners on the hunger strike say that they would rather die than remain in the purgatory of indefinite detention.[5] Clearly, the hunger strike is being used by the detainees to contest their indefinite detention, and to bring attention and some sort of oversight to their cases.

This paper focuses on the alternative: an effective and independent judicial review process, which might provide oversight, rule of law limitations, and protections to security detainees. Indeed, the US Supreme Court emphasised in the *Boumediene* case that 'few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person'.[6] Yet not all security detention regimes are subject to independent judicial review; and among those which are subject to judicial review, different judicial review models have emerged. Among the various judicial review models for security detention cases, the Israeli Supreme Court model – known in the legal literature as the 'judicial management model' – has been praised as being 'robust,' 'effective'[7] and 'interventionalist'.[8] Practitioners and academics around the world have suggested it as a model to be emulated by other states, including the United States.[9]

My previous study demonstrated some of the inherent deficiencies of the Israeli 'judicial management model'.[10] The study was based on two levels of analysis: (i) a systematic analysis of the Israeli Supreme Court's case law regarding security detentions from 2000 to 2010; and (ii) in-depth interviews with participants in the judicial review process, including Supreme Court Justices, defence lawyers, State Attorneys, Israeli Security Agency representatives, and Palestinian detainees. These interviews provided a unique glimpse into the judicial review process and revealed some of the dynamics behind the scenes.

The study's findings revealed a considerable gap between the rhetoric of a few renowned cases and the actual practice of the Supreme Court in hundreds of previously undocumented and under-analysed decisions. *On the one hand* – and contrary to the common view of an interventionist court – the study revealed that the Court systemati-

[5] 'Hunger Strike at Guantanamo', The Editorial Board, *New York Times* (New York, 5 April 2013): www.nytimes.com/2013/04/06/opinion/hunger-strike-at-guantanamo-bay.html?_r=0 (accessed 24 May 2013).

[6] *Boumediene v Bush*, 553 US 723 (2008) (United States).

[7] Aharon Barak, 'Human Rights in Times of Terror – A Judicial Point of View' (2008) 28 *Legal Studies* 493, 500–501; Daphne Barak-Erez and Matthew Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3, 20–21; Stephanie Cooper Blum, 'Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects' (2008) 4(3) *Homeland Security Affairs* 1, 8; Yigal Mersel, 'Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era' (2006) 38 *NYU Journal of International Law & Politics* 67, 110–13; Itzhak Zamir, 'Human Rights and National Security' (1989) 23 *Israel Law Review* 375, 391.

[8] Stephen J Schulhofer, 'Checks and Balances in Wartime: American, British and Israeli Experiences' (2004) 102 *Michigan Law Review* 1906, 1918.

[9] Barak (n 6 above) 500–501; Barak-Erez and Waxman (n 6 above) 20–21; Blum (n 6 above) 8; Mersel (n 6 above) 110–13; Zamir (n 6 above) 391; Philip B Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge MA, MIT Press, 2004) 95–96.

[10] Shiri Krebs, 'Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court' (2012) 45 *Vanderbilt Journal of Transnational Law* 639.

cally refrains from issuing release orders, even when clear procedural flaws were documented. *On the other hand*, the study identified the formation of alternative dispute resolution methods, such as mediation and negotiation, as well as 'bargaining in the shadow of Court' dynamics.

This chapter presents some of the most important and interesting findings of this study, and analyses their broader implications concerning judicial review of security detentions in Israel and elsewhere. Some of the findings are compared and contrasted with decisions from other jurisdictions, including the Supreme Court of Canada, and the UK House of Lords, which adopted a different model of judicial review – that of the 'special advocate' model. This comparison helps to better understand some of the weaknesses of the judicial management model, in particular the way it undermines participation and the possible implications of this weakness. The chapter begins, in Section II, with a description of the theoretical framework relating to security detentions, and introduces the existing judicial review models, as well as the role of secret evidence in these proceedings. Section III briefly describes the security detention regimes adopted and implemented by the State of Israel. Section IV focuses on the reasoning (and the rhetoric) of the Israeli Supreme Court in dozens of reasoned and published decisions concerning security detentions, decided throughout the years (from the foundation of the State of Israel to 2013). Section V then focuses on realising rights of individual detainees, and analyses the outcomes of the cases in relation to the individuals whose liberty was taken. Section VI uses a recent decision to demonstrate the gap between general reasoning of rights and realisation of these rights in individual cases. Section VII complements the reasoning of the decisions and their actual outcomes with the perceptions, opinions and insights of the various participants in the judicial review process, including Justices of the Supreme Court, Intelligence officers, state attorneys, defence lawyers and Palestinian detainees. By combining the reasoning, actual outcomes and 'behind the scenes' dynamics, as well as introducing approaches adopted by other courts, this chapter participates in the continuing international debate concerning the impact of schemes of secrecy and confidentiality on the effectiveness of the judicial review process.

II. SECURITY DETENTIONS, SECRECY AND JUDICIAL REVIEW

Security detention is a preventive mechanism operated by the Executive or military authorities in order to prevent future harm to national security.[11] In accordance with this mechanism, individuals are detained in order to prevent them from committing future crimes or atrocities. Typically, such preventive detentions are based on privileged intelligence information provided by undisclosed sources, and collected secretly by state security agencies. In spite of this infringement of individual liberty and the open justice

[11] Rinat Kitai-Sangero, 'The Limits of Preventive Detention' (2009) 40 *McGeorge Law Review* 903, 905. In fact, the literature on security detentions lacks sufficient coherency, and covers a variety of preventive detention regimes (ranging from quasi-criminal proceedings to various forms of 'executive' or 'administrative' proceedings and to immigration detentions. See, for example, Marc D Falkoff, 'Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention' (2009) 86 *Denver University Law Review* 961, 961; Derek P Jinks, 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India' (2000) 22 *Michigan Journal of International Law* 311, 313.

principle, it has often been argued that states must employ security detentions since criminal law alone is inadequate to combat transnational terrorism.[12]

In the first decade after the emergence of a global 'war on terror', security detentions without criminal charges have become an increasingly popular counter-terrorism mechanism in numerous jurisdictions.[13] The Guantánamo Bay detainees are perhaps the most notorious example,[14] but they are not alone. All around the globe, from India,[15] to Israel,[16] to the Russian Federation,[17] to Australia,[18] states facing terrorist threats are employing some sort of security detention regime. Even Israel, a state which had adopted a system of 'administrative detentions' when it was founded back in 1948 and had successfully implemented this system for decades, introduced new security detention regimes and began using them more widely after the terrorist attacks in the United States on September 11, 2001.[19]

Since security detentions are operated and controlled by the Executive or military authorities, the question of oversight or judicial review becomes critically important. Without a judicial review process, an individual may lose her freedom, potentially forever, based on unchallenged and secret intelligence information. Without independent and effective judicial review hunger strikes might indeed become an individual's only way to draw attention, call for help and actively control his or her own destiny. Judicial review of security detentions becomes particularly important, considering the inherent imbalance between the state and the detainee in this secretive process. As was emphasised by the Israeli Supreme Court in the *Marab* case: 'Judicial review is the line of defence for liberty, and it must be preserved beyond all else'.[20] Nonetheless, several factors join in to challenge the effectiveness and independence of the judicial review process in security detention cases: (i) the state's reliance on secret evidence[21] and ex parte

[12] Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York, Penguin Press, 2008) 151–82. Also, Jack Goldsmith and Neal Katyal, for example, call on 'Congress to establish a comprehensive system of preventive detention that is overseen by a national security court'. Jack Goldsmith and Neal Katyal, Editorial, 'The Terrorists' Court', *New York Times* (New York, 11 July 2007) A19.

[13] Kenneth Anderson, 'U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms' (2007) 30 *Fordham International Law Journal* 455, 474–81; Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, 355–71; Dominic McGoldrick, 'Security Detention – United Kingdom Practice' (2009) 40 *Case Western Reserve Journal of International Law* 507, 509. For an analysis of preventive detentions in international law and in armed conflict situations, see Ashley S Deeks, 'Preventive Detention in Armed Conflict' (2009) 40 *Case Western Reserve Journal of International Law* 403.

[14] See Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International & Comparative Law Quarterly* 1 (providing background and analysis on Guantánamo Bay detention center).

[15] Derek P Jinks, 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India' (2000) 22 *Michigan Journal of International Law* 311, 313.

[16] Itzhak Zamir, 'Preventive Detention' (1983) 18 *Israel Law Review* 150.

[17] Todd Foglesong, 'Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pre-Trial Detention in Russia' (1996) 14 *Wisconsin International Law Journal* 541.

[18] Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, 355–71; Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007) 17 *Boston University Public Interest Law Journal* 39.

[19] See section III.

[20] HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349, para 26, 5 February 2003 (Israel) (quoting HCJ 2320/98 *El-Amla v IDF Commander in Judea and Samaria*, 52(3) PD 346, 350 (1998) (Israel)).

[21] Daphne Barak-Erez and Matthew Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3, 5; Sarah H Cleveland, 'Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants"' (2005) 68 *Alabama Law Review* 1127, 1132–34.

proceedings;[22] (ii) the court's deference to the state's discretion in issues of national security;[23] and (iii) the bias of all decision-makers in favour of detention, given the differential risks of false positives and false negatives.[24] In other words, an incorrect decision is revealed only when the executive authorities or the judge release a dangerous individual who is later involved in a terrorist activity; while an incorrect decision that approves indefinite detention of an innocent individual who would never have committed a terrorist act is not merely invisible, but unknowable.[25] This distinction from criminal proceedings, which deal with past offences, is plain. If an offence has already occurred, a defendant *can* materially prove his or her innocence. But an innocent person wrongly detained based on security threats that may or may not materialise in the future can never prove that he or she would not have engaged in illegal acts if he or she had been free.

In order to confront these challenges, two distinct models of judicial review have emerged: the 'judicial management' model, which was adopted in Israel, and the 'special advocate' model, which was adopted in the United Kingdom, Canada, and, to some extent, the United States.[26] The judicial management model rests on ex parte proceedings, in which the judge plays a cardinal role in executing an independent, inquisitorial scrutiny of the secret evidence.[27] The latter model introduces 'special advocates', 'cleared counsel' or government attorneys approved by state security authorities, whose role is to represent the detainee's interests with respect to the secret evidence, and are permitted to confront that evidence in closed proceedings.[28] The special advocate communicates with the detainee before seeing the evidence, but generally is not permitted to do so after he or she has been exposed to the secret evidence.[29]

Cole and Vladeck's chapter in this Part (chapter eight) contributes to the understanding of the differences between various models of the 'special advocate' system. They compare and contrast the law and practices concerning special advocates adopted in the United Kingdom, Canada and the United States, and assess the model's merits and weaknesses. In this chapter, I will try to shed some light on the alternative judicial management model.

Comparing and analysing the judicial management model and the special advocate model, Professor (and now Supreme Court Justice) Daphne Barak-Erez and Professor Matthew Waxman recently argued that, overall, the special advocate model enhances participation, while the judicial management model is designed to enhance accuracy,

[22] Daphne Barak-Erez and Matthew Waxman (n 7 above) 21; Hamish Stewart, 'Is Indefinite Detention of Terrorist Suspects Really Constitutional?' (2005) 54 *University of New Brunswick Law Journal* 235, 245.

[23] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York, SUNY Press, 2002) 118; Rinat Kitai-Sangero, 'The Limits of Preventive Detention' (2009) 40 *McGeorge Law Review* 903, 912.

[24] Van Harten elaborates on three different weaknesses in this regard: (1) the judge is precluded from hearing additional information that the individual could have supplied had he known the Executive's claims; (2) courts are uniquely reliant on the Executive to be fair and forthcoming about confidential information; and (3) the dynamic or atmosphere of closed proceedings may condition a judge to favour unduly the security interest over priorities of accuracy and fairness. Gus Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 13 *International Journal of Evidence and Proof* 1, 1.

[25] Rinat Kitai-Sangero, 'The Limits of Preventive Detention' (2009) 40 *McGeorge Law Review* 903, 909.

[26] See Barak-Erez and Waxman (n 7 above) 18–24; Maureen T Duffy and Rene Provosi, 'Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada' (2007) 40 *Case Western Reserve Journal of International Law* 531, 541–43; Derek McGhee, 'Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK' (2008) 29 *Liverpool Law Review* 99, 105.

[27] Barak-Erez and Waxman (n 7 above) 21–22.

[28] ibid, 27–31.

[29] ibid, 27–31.

and can better regulate the detention system across many cases.[30] While other chapters (including the introduction) in this Part cast doubt on the assumption that the special advocate model enhances individual *participation*; this chapter provides empirical data that casts doubt on the validity of the other two assumptions: that the judicial management model enhances *accuracy* and can better *regulate* the detention system across many cases.

III. SECURITY DETENTIONS IN ISRAEL

Since its founding in 1948, the State of Israel has used several security detention regimes to cope with various national security threats. Over the years, Israel held thousands of individuals – mostly Palestinians from the West Bank and Gaza – in security detention for periods ranging from several months to several years.[31] The highest number of security detainees was documented during the first intifada. In November 1989, Israel was holding 1,794 Palestinians in security detention.[32] During the 1990s, the number of security detainees dramatically decreased, and at the end of the decade there were no more than a few dozen security detainees.[33] In December 2000, 10 weeks after the second intifada had erupted, Israel held 12 Palestinians in security detention.[34] However, in April 2002, during Operation Defensive Shield, Israel detained hundreds of Palestinians in the West Bank.[35] By the end of the year, more than 900 Palestinians were detained.[36] Since then, the number of security detainees has constantly decreased,[37] and only 204 detainees remained in December 2010.[38] Today the number of security detainees stands at 147. Over the years, Israel has also held a few Israeli citizens in security detention, both Arabs and Jews.[39] However, these cases were scarce and most of the Israeli detainees were held for short periods only.[40]

The resort to such an expansive security detention regime was justified by Israel as a 'state of emergency' necessity.[41] At its founding in 1948, Israel applied a 'state of emer-

[30] ibid, 36–46.

[31] These numbers were provided to the Israeli NGO 'B'Tselem' by the Israeli Prison Service (IPS), according to their obligations under the Freedom of Information Act of 1998. Hamoked Center for the Defense of the Individual and B'tselem, *Without Trial: Administrative Detention of Palestinians by Israel and the Incarceration of Unlawful Combatants Law* (2009), p 13, available at: www.btselem.org/ Download/200910_Without_Trial_Eng.pdf.

[32] ibid.

[33] ibid.

[34] ibid.

[35] ibid.

[36] ibid.

[37] One of the main reasons for the dramatic decrease in the numbers of detainees was probably the decision of the Israeli Supreme Court in the *Mar'ab* case discussed below, which prohibited the practice of mass detentions without judicial review. For further analysis of the *Mar'ab* case see Section IV(A).

[38] B'Teselm, *Statistics on Administrative Detention*, available at: www.btselem.org/english/administrative_detention/Statistics.asp (last accessed: 20 August 2013).

[39] Hamoked Center for the Defense of the Individual and B'tselem (n 31 above), at p 66.

[40] ibid.

[41] Status: International Covenant on Civil and Political Rights, United Nations Treaty Collection (1 March 2012): treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en (stating Israel's reservations to the Covenant). 'Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

gency' legal regime in its territory, a state of affairs that is valid and implemented in Israel to this day.[42] In 1991, when Israel joined the International Convention on Civil and Political Rights of 1966, it informed the Secretary General of the United Nations that a state of emergency existed within the state, and accordingly declared derogation from the right to personal liberty, as enshrined in the Convention.[43] In its declaration dated 3 October 1991, Israel stated that:

> [T]he State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant. 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 defence 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, Israel thereby derogates from its obligations under that provision.[44]

This legal regime enables the state, under certain conditions, to derogate from the right to personal liberty.[45] Arguably, under this derogation regime, the state is not limited to the use of criminal detentions, but can also confront individual 'dangerousness' by the use of security detentions, if criminal proceedings are not feasible, for various reasons.[46]

Currently Israel employs three different security detention regimes to detain Israelis, Palestinians from the West Bank, and foreign 'unlawful combatants'. The main differences between these legal regimes relate to the maximum length of each individual detention order, the authority that issues the detention order, the courts that review them, and the promptness and frequency of judicial review. In general, it may be said that the detention regime least harmful to individual freedom is that applying within the Israeli territory; a more harmful regime is that employed by the Israeli military regime in the West Bank; whilst the most harmful is that which applies to alien unlawful combatants.

In Israeli territory, the Emergency Powers (Detentions) Law of 1979 (IDL) applies.[47] Under the IDL regime, the Minister of Defense is vested with the authority to order a

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

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> In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."'

[42] ibid.

[43] ibid.

[44] ibid.

[45] International Covenant on Civil and Political Rights, art 4(1), opened for signature 19 December 1966, 999 UNTS 171, 174 (entered into force 23 March 1976).

[46] See HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349, paras 21–24, 5 February 2003 (Israel) (discussing the boundaries of criminal and administrative detention, holding that a person may be detained administratively when the circumstances 'raise the suspicion' that the person 'presents a danger to security'); HCJ 7/48 *Al-Karbuteli v Minister of Defense*, 2(1) PD 5, 97 (1949–50) (Israel) (emphasising the severity of this measure, which harms basic human rights, while accepting its necessity during states of emergency, para 13); see also HCJ 5784/03 *Salama v IDF Commander in Judea and Samaria*, 57(6) PD 721, para 7, 11 August 2003 (Israel) ('The [detention] order did indeed come to protect the public's safety and the security of the area, as per section 1(a) of the order. However, it is clear that the administrative detention severely violates the detainees' freedom. The purpose of the order is to ensure that this violation is within legal and constitutional boundaries'.).

[47] Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (1979) (Israel).

person's detention without trial for the protection of state security and public safety for a period of up to six months. The detention may be extended indefinitely by issuing repeat orders.[48] The IDL mandates judicial review by the civilian court system;[49] initially, within 48 hours from the time of arrest,[50] and then every three months.[51] Since detention orders are often based on secret evidence, the IDL specifies that while assessing the secret evidence, the reviewing judge is not bound by the regular rules of evidence.[52] In particular, the judge may 'admit evidence not in the presence of the detainee or his representative, or without revealing it to them', if he is convinced that disclosure of the evidence is liable to 'harm the security of the region or public security'.[53]

In the West Bank (and until recently also in Gaza) – an area regarded by Israeli courts as subject to belligerent occupation – military law applies and independently authorises preventive detention.[54] The most recent military order governing preventive detentions in the West Bank is Preventive Detentions Order No 1591 (MDO).[55] The MDO authorises the IDF's military commanders to detain a person for a maximum period of six months when there is 'a reasonable basis to believe that the security of the region or public security' requires it.[56] Here too, the detention may be extended indefinitely, six months at a time.[57] The detainee must be brought before a military judge within eight days to determine whether the detention is justified.[58] Similarly to the IDL regime, the MDO includes a provision permitting the use of secret evidence that is not revealed to the detainee or his or her representative, and permits deviations from the regular rules of evidence.[59] The military court's decision may be appealed in the Military Court of Appeals (MCA) by either the detainee or the military commander.[60] Although, according to the MDO, the decision of the MCA should be the last instance of review for the military commander's decision, a practice has developed over the years of submitting habeas corpus petitions to the Israeli Supreme Court, sitting as High Court of Justice, to review the decisions of the MCA.[61]

[48] ibid, Art 2(a).

[49] Mara Rudman and Mazen Qupty, 'The Emergency Powers (Detention) Law: Israel's Courts Have a Mission – Should They Choose to Accept It?' (1989) 21 *Columbia Human Rights Law Review* 469, 470–71; see also Itzhak Zamir, 'Preventive Detention' (1983) 18 *Israel Law Review* 150, 153.

[50] Emergency Powers (Detention) Law Art 4(a).

[51] ibid, Art 5.

[52] ibid, Art 6. For discussion on secret evidence in Israeli preventive detention proceedings, see Daphne Barak-Erez and Matthew Waxman (n 7 above) 19.

[53] Emergency Powers (Detention) Law Art 6(c).

[54] See, eg, HCJ 7957/04 *Mara'abe v Prime Minister of Israel* (2006) 45 ILM 202, 207 (Israel); HCJ 2056/04 *Beit Sourik Village Council v Government of Israel*, 58(5) PD 807, para 23, 15 September2005 (Israel); HCJ 3799/02 *Adalah Legal Center for Arab Minority Rights in Israel v GOC Central Command* (2006) 45 ILM 491, 498 (Israel); see also Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 148–60; Daphne Barak-Erez, 'Israel: The Security Barrier – Between International Law, Constitutional Law, and Domestic Judicial Review' (2006) 4 *International Journal of Constitutional Law* 540, 542–48.

[55] Military Order Regarding Preventive Detention (Judea and Samaria) (No 1591), 5767-2007, Art 1 (Israel), available at: www.btselem.org/sites/default/files/ preventive_detention_military_order_1591_eng.pdf.

[56] ibid, Art 1(a).

[57] ibid, Art 1(b).

[58] ibid, Art 4(a).

[59] ibid, Arts 7–8.

[60] ibid, Art 5.

[61] Esther Rosalind Cohen, 'Justice for Occupied Territory? The Israeli High Court of Justice Paradigm' (1986) 24 *Columbia Journal of Transnational Law* 471, 471.

In 2002, the Israeli Parliament introduced a new security detentions law: the Incarceration of Unlawful Combatants Law of 2002 (UCL).[62] The UCL gives state authorities the power to detain 'unlawful combatants', who are as defined in Article 2 of the law as persons who have taken part in hostilities against the State of Israel, directly or indirectly, or who are members of a force carrying out hostilities against Israel, and who do not satisfy the conditions of prisoner of war status under international humanitarian law.[63] According to the UCL, persons identified as unlawful combatants may be subject to preventive detention for an unlimited period of time if the Chief of Staff believes that their release will harm state security.[64] Article 5(a) determines that within 14 days from the date of arrest, the detainee must be brought before a District Court judge to determine if the detention is justified.[65] A District Court judge must then review the detention every six months.[66] Article 5(e) permits the court to depart from the rules of evidence, including the admittance of evidence without the presence of the detainee or the detainee's lawyer.[67]

All three security detention regimes include a judicial review process before the Israeli Supreme Court. The judicial review process is of a unique design: due to the importance of the right to personal liberty, and unlike other appellate proceedings, the Court examines the case de novo, assessing all of the relevant information and analysing all of the relevant evidence, in spite of the fact that it is either an appeal to reverse the District Court's decision (under the IDL and UCL regimes) or a petition to reverse the MCA decision (under the MDO regime).[68] Whether the case is being heard by a sole Justice (IDL and UCL) or by a panel of three Justices (MDO), both the state and the detainee are allowed to plead their case before the Court and to present the Court with all of the relevant materials.[69] They are not restricted to legal matters or to appellate claims.

After both parties plead their case, the Court then conducts, in most cases, an ex parte hearing in which the State Attorney presents the secret evidence that is meant to justify the detention.[70] In the absence of the detainee or his attorney, the Court is the one to independently examine the secret evidence and to investigate the Israeli Security Agency (ISA) representatives who collected and assessed the secret evidence.[71] This process has crucial significance in these cases, since in most instances the Court's decision is based on these 20 minutes of ex parte hearing, and on the credibility, variety, and strength of the secret evidence presented.[72]

[62] Incarceration of Unlawful Combatants Law, 5762-2002, SH No 1834 p 192, reprinted in Yoram Dinstein and Fania Domb (eds), *Israel Yearbook on Human Rights*, vol 32 (Leiden/Boston, Martinus Nijhoff, 2003) 389.
[63] ibid, art 2.
[64] ibid, art 3(a).
[65] ibid, art 5(a).
[66] ibid, art 5(c).
[67] ibid, art 5(e).
[68] This description of the process is based both on interviews with Supreme Court Justices, state attorneys, and defence lawyers, and on personal observation of dozens of such court hearings.
[69] Krebs (n 10 above) 667.
[70] ibid.
[71] ibid.
[72] The data was provided to me by the Registrar of the Israel Supreme Court.

IV. REASONING RIGHTS: BALANCING SECURITY AND LIBERTY IN THE SHADOWS OF SECRECY

The Israeli Supreme Court has, since 1948, reviewed hundreds of security detention orders, and published dozens of reasoned decisions which crafted, interpreted and implemented the various security detention regimes. In some of its decisions, the Court created *legal constraints* on the Executive, which limited expansive detention regimes, and established legal standards and due process guarantees to protect security detainees from arbitrary or unnecessary detentions. In other cases, the Court set out *instructions concerning the judicial review process* itself, including specific instructions concerning how to handle the secret evidence, the weight that should be attributed to such information, and the delicate balance that should be carefully made between security and liberty.

A. Legal Constraints

One of the Court's landmark cases construing the boundaries of security detentions and interpreting the IDL is *Kawasma v Minister of Defense*.[73] In *Kawasma*, the Minister of Defense issued an administrative detention order against Kawasma, who had been acquitted in a criminal trial.[74] The state appealed that acquittal, and in order to keep Kawasma behind bars until the appeal was heard, the state issued an administrative detention order against him.[75] After the detention order was approved by the District Court, Kawasma appealed to the Israeli Supreme Court.[76] In its decision on this case, the Supreme Court emphasised that the power of administrative detention must be exercised with great care, and only in cases where the danger to security is grave and when administrative detention is the only way to avert the danger.[77] The Court concluded that these criteria were not met in the unique circumstances of the *Kawasma* detention order. Therefore, the Court annulled the detention order and ordered the immediate release of the detainee.[78]

A more recent cornerstone in the judicial review of IDL detentions is the decision of the Israeli Supreme Court, sitting as High Court of Justice, in *Anonymous Persons v Minister of Defense*.[79] The petitioners were Lebanese citizens held by Israeli authorities as bargaining chips in an attempt to release an Israeli navigator from captivity.[80] In its decision – reversing its previous judgment on the matter – the Supreme Court held that the desire to release Israelis from captivity does not justify administrative detention.[81] The Court explained that the only lawful means of detaining the petitioners administratively was under the IDL regime, which only allows for detention justified by *individual*

[73] CrimA 1/82 *Kawasma v Minister of Defense*, 36(1) PD 666, 668–69 (1982) (Israel).
[74] ibid.
[75] ibid.
[76] ibid.
[77] ibid.
[78] ibid.
[79] CrimFH 7048/97 *Anonymous Persons v Minister of Defense*, 54(l) PD 721, 743, 12 April 2000 (Israel).
[80] ibid.
[81] ibid.

dangerousness.[82] Accordingly, the Court determined that without individual dangerousness there was no legal basis to continue detaining the petitioners.[83] This judgment motivated the Knesset (the Israeli Parliament) to introduce a new security detention regime – UCL – which was discussed earlier.

Dealing with the question of the constitutionality of the UCL, the Court, yet again, offered a limiting interpretation of the law, thereby meaningfully narrowing its scope of application.[84] While upholding the law, as well as the specific detention orders against the detainees,[85] the Court determined – against the plain language of the law – that a detention order will only be valid if the state can prove, with clear and convincing evidence, that the detainee poses a *real threat* to the security of the state.[86]

The Court went on to hold that mere association with a terrorist organisation is not enough to be considered an unlawful combatant under the UCL and that a detention will be justified only if the detainee's *own* actions pose a security threat.[87] In this regard, the Court clearly deviated from the purpose of the UCL's framers, whose goal was to empower the Israeli officials to detain any terror organisation member, regardless of his actual actions or the depth of his involvement.[88] Moreover, the Court narrowed the UCL's scope of application by determining that the law cannot apply to citizens and residents of the State of Israel, but only to *aliens* who endanger the security of the state, again disregarding the clear and broadly applicable language of the law.[89]

Mar'ab v IDF Commander in the West Bank is another interesting example of legal constraints created by the Court. In this decision, handed down during Operation Defensive Shield in 2002 (an intensive IDF military operation in the West Bank), the Court nullified detention orders that allowed for 12- and 18-day detentions with no judicial review.[90] In its decision, the Court held that according to both Israeli and international humanitarian and human rights law, a detainee must be brought before a judge

[82] ibid.
[83] ibid.
[84] CrimA 6659/06 *A v State of Israel* (2008) 47 ILM 768, para 3, 11 June 2008 (Israel).
[85] ibid, para 53.
[86] ibid.
[87] ibid, para 18.
[88] The Incarceration of Unlawful Combatants Law was originally denominated 'Incarceration of Members of Enemy Forces Not Entitled to Prisoner-Of-War Status' when introduced in 2000. Shlomy Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 379, 399. The bill was a legislative response to the Israeli court's decision to release the Lebanese detainees in *Anonymous Persons v Minister of Defense* (n 79 above). Although both human rights groups and various Israeli jurists criticised the bill, Prime Minister Ehud Barak vigorously claimed that 'due to the special reality in our region, Israel should have a legal instrument enabling it to hold captive members of enemy forces which in reality could not be held as POWs'. Therefore, the bill was transformed into the Incarceration of Unlawful Combatants Law. As originally written, the mere membership in a 'force perpetrating hostile acts', even to a level that does not pose a threat to national security, was enough for a person to be deemed an 'unlawful combatant'. Zachary (ibid, at 401).
[89] CrimA 6659/06 *A v Israel* (2008) 47 ILM 768, para 11 (Israel). A few months after the release of the Supreme Court's judgment, the Knesset amended the UCL. The most important modifications enabled sweeping and swift detentions of a large number of individuals for a prolonged period if the government declares the existence of 'wide-scale hostilities'. In such a case, the UCL now permits the Minister of Justice to transfer the judicial review authority from the District Court to a special military court. Also, in such circumstances the law authorises an officer holding the rank of at least captain to temporarily order the detention of a person (for a period that will not exceed seven days) if the officer has reasonable basis to believe the person to be an unlawful combatant. Incarceration of Unlawful Combatants Law (Temporary Provision), 5762-2002, SH No 1834 p 192, art 7 (as amended 5768-2008) (Israel). Nonetheless, this article was only valid for two years, and expired in July 2010, before it was implemented.
[90] HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349, 5 February 2003 (Israel).

'promptly'.[91] Accordingly, it ruled that the detention orders, designed to enable the IDF to detain hundreds of Palestinians during the combat operations, were void.[92] Nonetheless, the Court suspended its judgment for a period of six months in order to give the state enough time to reorganise in accordance with the judgment.[93]

B. Instructions Concerning the Judicial Review Process

The Court has repeatedly held that the delicate balance between national security and individual liberty would change over time in favour of individual liberty.[94] For example, in the unlawful combatants' law case, the Court declared that:

> [E]ven an internment order under the Internment of Unlawful Combatants Law cannot be sustained indefinitely. The period of time that has elapsed since the order was granted constitutes a relevant and important consideration in the periodic judicial review for determining whether the continuation of the internment is necessary. In the words of Justice A. Procaccia in a similar context:
>
> 'The longer the period of the administrative detention, the greater the weight of the prisoner's right to his personal liberty when balanced against considerations of public interest, and therefore the greater the onus placed upon the competent authority to show that it is necessary to continue holding the person concerned in detention. For this purpose, new evidence relating to the prisoner's case may be required, and it is possible that the original evidence that led to his internment in the first place will be insufficient'.[95]

In the *Mar'ab* case, the Court emphasised the importance of judicial review and the role of the courts as the defender of personal liberty and due process:

> Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of detention . . . [J]udicial review is an integral part of the detention process. Judicial review is not 'external' to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not 'appeal' his detention before a judge. Appearing before a judge is an 'internal' part of the dentition [sic] process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.[96]

In other cases, the Court stressed the importance of a judge thoroughly examining the materials, ensuring that each piece of evidence connected to the matter at hand be sub-

[91] ibid, para 48.
[92] ibid, para 49.
[93] ibid.
[94] CrimA 6659/06 *A v Israel* (2008) 47 ILM 768, para 46 (Israel) (citing HCJ 5784/03 *Salama v IDF Commander in Judea and Samaria*, 57(6) PD 721, para 8, 11 August 2003 (Israel); CrimFH 7048/97 *Anonymous Persons v Minister of Defense*, 54(1) PD 721, 744, 12 April 2000 (Israel)).
[95] CrimA 6659/06 *A v Israel* (2008) 47 ILM 768, quoting HCJ 11006/04 *Khadri v IDF Commander in Judea and Samaria* [47], para 6 (2004) (unpublished decision).
[96] HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349 (2003) paras 26, 32 (citations omitted) (Israel). In the *Mar'ab* case, the Court had invalidated a military order allowing for 18- and 12-day detention periods without judicial oversight (ibid, para 49). However, the Court gave the state a period of six months to fix the detention orders. ibid.

mitted to him, and never permitting quantity of cases to affect either the quality or the extent of the judicial examination.[97] In this regard, the Court emphasised that:

> [T]he fact that certain 'material' constitutes valid administrative evidence, does not exempt the judge from examining its degree of credibility against the background of the other pieces of evidence, and the entirety of the case's circumstances. As such, the 'administrative evidence' label does not exempt the judge from the need to demand and receive explanations from the bodies that are able to provide them. To say otherwise, would mean to greatly weaken the process of judicial review and to allow for the elimination of liberty for extended periods of time, on the basis of poor and inadequate material.[98]

In a more recent case, the Court dealt specifically with the problem of secret evidence, and with its own practical solutions for this problem, stating that:

> The administrative detention entails, more than once, a deviation from the rules of evidence, among other reasons, since the materials raised against the detainee are not subjected to his review. This deviation imposes on the court a special duty to take extra care in the reviewing of the confidential material, and to act as the detainee's 'mouth' where he is not exposed to the adverse materials, and cannot defend himself.[99]

In still another case, the Court openly declared that in these cases the Court itself must become a 'temporary defence attorney'.[100]

Therefore, according to the leading cases, as well as scholarly understanding of them, the Supreme Court Justices play a dual role: they function as both inquisitorial judges and as the detainees' lawyers during the ex parte hearings.

V. REALISING RIGHTS: THE OUTCOMES OF JUDICIAL REVIEW RELATING TO THE NAMED INDIVIDUALS

In six different cases the Israeli Supreme Court has released security detainees from detention. The first and second releases came as early as 1949[101] and 1950[102] – shortly after the foundation of the State of Israel, when its security situation was arguably more unstable and while the Israeli state was fighting for its existence. Neither decision was based on substantial reasons relating to the justifications for, or necessity of, the detentions but, rather, on procedural errors including a failure to specify in the detention order the detainee's place of arrest. (In contrast to these decisions, in a recent UCL case, which will be discussed below, the Court identified four different procedural flaws before upholding the detention order.[103]) The third and fourth decisions to release

[97] ibid, para 33 (quoting *Sajadiya v Minister of Defense*, 42(3) PD 801, 821, 8 November 1988).

[98] Daphne Barak-Erez and Matthew Waxman, (n 7 above) 22 (quoting HCJ 4400/98 *Barham v Judge Col Shefi*, 52(5) PD 337, 346 (1998) (Israel)).

[99] ibid, 23 (quoting HCJ 11006/04 *Khadri v IDF Commander in Judea and Samaria* (*sub nom Qadri v IDF Commander in Judea and Samaria*), para 6 (2004) (unpublished decision) (Israel)).

[100] ibid, 23 (quoting HCJ 9441/07 *Agbar v IDF Commander in Judea and Samaria*, para 8 (2007) (unpublished decision) (Israel)).

[101] Ilan Saban, 'Theorizing and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel's First Three Decades (1948–1978)' (2011) 25 *Emory International Law Review* 299, 335 (citing HCJ 7/48 *Al-Karbuteli v Minister of Defense*, 2(1) PD 5, paras 14–15 (1949–50) (Israel)).

[102] ibid (citing HCJ 95/49 *Al-Khouri v Chief of Staff*, 4(1) PD 34, 41, 48 (1950) (Israel)).

[103] ADA 1949/09 *Salach v State of Israel* (2009) (unpublished decision) (Israel).

detainees were given in the 1980s.[104] In *Kawasma*, the Court emphasised the importance of internal state oversight and stated that: '[T]he minister of defence should not be a rubber stamp of the ISA [the Israeli Security Agency – S.K.]'.[105]

The fifth decision in this category is a unique case from 1990 – the only recorded case in which the Israeli Supreme Court ordered the release of an MDO detainee. In its brief decision, the Court found that the secret evidence did not justify the continuation of the detention and therefore ordered the release of the detainee.[106] The sixth and final decision is the '*Bargaining Chips*' case discussed earlier, where the Court ordered the release of Lebanese detainees that were detained under the IDL as 'bargaining chips'.[107]

All of these decisions were given before the so-called 'war on terror' era. Unfortunately, it seems that during this period, the sensitivity of the Israeli Supreme Court to procedural flaws in the detention process, as well as its readiness to release detainees whom the state claims threaten the security of the State of Israel, has declined.

In the first decade of the twenty-first century, the Israeli Supreme Court performed judicial review of 322 security detention cases of which none resulted in a judicial decision to release the detainee.[108] The one petition that the Court granted (out of 282 MDO petitions, totalling 0.35 per cent) was a state petition to reverse the MCA's decision to release a detainee.[109] Farhat As'aad Abdullah Mahmad was detained from February 2003 until September 2005 based on secret intelligence information according to which he was an active member of the Hamas terror organisation. On July 2006, less than a year after his release, he was arrested again, based on similar accusations. His security detention was approved by the military court. Mahmad appealed, and the MCA accepted his claims and ordered the state to release him from custody. The decision to release him was based on three main reasons: *first*, the non-military nature of the spokesmanship activities which were attributed to him; *secondly*, the public nature of these activities, which allowed authorities to follow his moves and collect evidence for criminal trial; and *thirdly*, a rejection of the state's assumption that he would necessarily resume his military activities within Hamas. In an unusual and even extreme move, the state decided to submit a petition to the Supreme Court, sitting as High Court of Justice (henceforth Supreme Court), to overrule the decision of the MCA. The Supreme Court, with the consent of both parties, returned the case to the MCA to re-hear the security experts and reconsider its previous ruling. Following the re-hearing, the MCA again found that the secret evidence did not justify the detention and ordered his release. The state returned to the Supreme Court, insisting that the Court hear the case on its merits. Deviating from its well-founded precedent that the Court will only intervene in rare and unique cases, and that the Court will not replace the MCA's judgment with its own, the court reversed the release decision based on its own interpretation of the secret evidence.

[104] ADA 7/88 *A v Minister of Defense*, 42(3) PD 133 (1988) (Israel); ADA 1/82 *Kawasma v Minister of Defense* 36(1) PD 666 (1982) (Israel).

[105] *Kawasma* 36(1) PD at 668–69.

[106] HCJ 907/90 *Zayad v Military Commander in the West Bank*, (1990) (unpublished decision) (Israel).

[107] CrimFH 7048/97 *Anonymous Persons v Minister of Defense*, 54(l) PD 721, 743 (2000) (Israel).

[108] With the exception of the Lebanese Bargaining Chips case described above, which originated in 1994 in an appeal that was denied. In 1997, the Court agreed to rehear the case, and in April 2000 accepted the petitioner's legal claim that the IDL does not authorise the state to detain non-dangerous aliens as 'bargaining chips' for purposes of future negotiations. *Anonymous*, (n 79 above).

[109] HCJ 1389/07 *Commander of IDF in the Judea and Samaria Area v Military Court of Appeals*, 28 February 2007 (Israel).

In its final decision, the Supreme Court determined that the MCA's decision was 'extremely unreasonable', since the secret evidence indicated that Mahmad's activities within the Hamas organisation extended beyond mere spokesmanship. Without elaborating upon those other activities, the Court declared that the respondent's activities were diverse and presented a significant danger to the safety of the area and the public.[110] This case is the only example in a decade in which the Israeli Supreme Court has intervened in an MCA decision in individual detention cases.

The only other case under the MDO regime in which the applicant was partially successful was that of *Mar'ab*, discussed earlier. In this case the Court invalidated military orders that authorised IDF officers in the West Bank to order the detention of a detainee for a period of 12 days (under one order) and 18 days (under another order), without judicial review.[111] However, this declaration of nullification was suspended for a six-month period; moreover, the Court made no order for the release of any of the thousands of individuals that were detained according to these orders.[112]

Regarding the 13 IDL appeals, five (38 per cent) were partly successful: in two cases the Supreme Court shortened the length of the detention orders;[113] in another two cases the Court reversed part of the District Court's legal analysis, thus setting out a binding legal framework for the lower court in accordance with the detainees' legal arguments;[114] the fifth case being the Lebanese *Bargaining Chips* case discussed earlier, in which the Court determined that the IDL did not authorise the state to detain non-dangerous aliens as 'bargaining chips' for purposes of future negotiations.[115]

Of the 27 UCL appeals, only one was partly successful. In *A v State of Israel*,[116] the Court accepted the detainee's argument that he did not fall under the UCL's definition of 'unlawful combatant', since he did not qualify as 'a member of a force carrying out hostilities against the State of Israel'.[117] In his judgment, Justice Jubran determined that in order to be a 'member of a force carrying out hostilities against Israel' it is not enough that the detainee be a member of any hostile organisation. Rather, the detainee must belong to an active and organised terror organisation that consistently carries out terrorist attacks against the State of Israel.[118] But instead of ordering his immediate release, the Court suspended its judgment for 21 days to enable the state to consider alternatives.[119] Here, too, the focus of the case was on clarifying the wording of the law, not on the concrete circumstances of the case and the detainee. In fact, while rejecting the District

[110] ibid, para 5.

[111] *Military Commander in the West Bank v Military Court of Appeals* (2007) (unpublished decision) (Israel); HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank* 57(2) PD 349 (2003) (Israel).

[112] ibid, para 36.

[113] ADA 10198/09 *Anonymous v State of Israel* (2010) (unpublished decision) (Israel); ADA 2627/09 *Osama Rashek v State of Israel* (2009) (unpublished decision) (Israel).

[114] ADA 4794/05 *Ufan v Minister of Defense*, para 41 (2005) (unpublished decision) (Israel); ADA 4414/02 *Anonymous v State of Israel*, 57(3) PD 673, 677 (2002) (Israel).

[115] See n 107 above. The case, which originated in 1994, brought the release of some of the detainees on April 2000.

[116] Ron Avital, Ido Rosenzweig and Yuval Shany, The Israeli Democracy Institute, 'A.D.A. [Administrative Detention Appeal] 7750/08 *Anonymous v State of Israel*' (January 2009) (see n 117 below).

[117] ADA 7750/08 *A v State of Israel* (2008) (unpublished decision) (Israel). For a discussion of the judgment, see Ron Avital, Ido Rosenzweig and Yuval Shany, 'A.D.A. [Administrative Detention Appeal] *7750/08 Anonymous v State of Israel*' (2009) 1 *Terrorism and Democracy*, available at: en.idi.org.il/analysis/terrorism-and-democracy/issue-no-1/ada-%5Badministrative-detention-appeal%5D-775008-anon-v-state-of-israel/.

[118] ibid.

[119] ibid.

Court's interpretation of the UCL, the Court accepted the ISA's interpretation of the secret evidence, and determined that it justified the security detention of the detainee under another detention regime – the MDO.

Finally, in five of the cases, the Court shortened the time periods between judicial reviews.[120] In one instance, that of *Salach*, the Court identified four different procedural flaws before upholding the detention order (though shortening the time period between judicial reviews to three months).[121] *Salach* was detained in Gaza on 4 January 2009, during Operation Cast Lead. Only 12 days later an arrest warrant against him – under the UCL detention regime – was issued and signed by the state authorities. The warrant was vague, neither giving reasons for detention nor specifying any of the allegations against Salach. It took two more days to bring Salach before an IDF officer for an initial hearing. The hearing was brief, and it was unclear whether a translator was present. On 27 January, 23 days after his initial arrest, a judicial review process before the District Court was first held. In the hearing, the state authorities refused to share any of the information – including his own (alleged) confession – with Salach or his lawyer, and stated that it would be presented to the court during the ex parte hearing. On 3 February the detention order was upheld by the District Court. Based on these many procedural flaws, Salach appealed to the Supreme Court. Only on 30 March, a day before the Supreme Court hearing, was Salach first interrogated by the police in order to examine the possibility of initiating criminal proceedings against him.

The Supreme Court, after considering these many procedural flaws, criticised the way in which the detention process was conducted in this case, and set instructions for the future. It criticised the state for refusing to give Salach the gist of or even a paraphrased version of his own confession, and for failing to consider a criminal prosecution instead of using preventive detention (in light of the existing evidence in Salach's case). Furthermore, the Court stressed that the state authorities should examine the 12-day gap between the initial arrest and the issue of the detention order and strain to prevent such incidents in the future. It also stated that it '*assumes*' that the state authorities will investigate Salach's allegations that he and his son were abused by IDF soldiers following his arrest. The Court further emphasised the importance of holding a meaningful hearing immediately after the arrest; providing the detainee with some information on the accusations against him or her; and allowing him or her to respond to these accusations. It criticised the state for holding back information and for failing to provide Salach with the main accusation against him – namely, that he belonged to the Palestinian 'popular front' organisation – until late in the proceedings; and for conducting the first police investigation of Salach only a day before the Supreme Court hearing. Considering these flaws, and especially the possibility of initiating criminal proceedings against Salach, the Court ordered the District Court to review the case again after three months (instead of the mandatory six months.) At the same time, the Court denied the appeal and upheld the detention order, based on the secret evidence that was presented during the ex parte

[120] ADA 2595/09 *Sofi v State of Israel*, para 27 (2009) (unpublished decision) (Israel) (ordering to hold the next judicial review process within three months); ADA 6409/10 *Al-Amudi v State of Israel*, para 5 (2010) (unpublished decision) (Israel); ADA 6406/10 *Sarski v State of Israel*, para 5 (2010) (unpublished decision) (Israel); ADA 2156/10 *Anonymous v State of Israel*, para 13 (2010) (unpublished decision) (Israel); ADA 9257/09 *Anonymous v State of Israel*, para 6 (2009) (unpublished decision) (Israel). In the last four cases the Court did not intervene in the timing of the judicial review process per se, but ordered the state security authorities to review the necessity of the detention every month.

[121] ADA 1949/09 *Salach v State of Israel* (2009) (unpublished decision) (Israel).

stage of the hearing, despite determining that the dangerousness of the appellant 'is not of a high level'.

Finally, in some of the cases the Court played the role of mediator between the parties, or used non-binding recommendations. In 15 per cent of the cases heard by the Court, it included in its decisions specific '*recommendations*' to the parties. These included calling for the state to reconsider its position; recommending that the state not prolong the detention in the future; or stating that new and updated materials should be considered before issuing a prolonged detention order. In nine per cent of the MDO cases, the Court successfully mediated between the parties and memorialised their agreement or the state's concessions. A typical agreement was that the state would not issue a new detention order at the end of the current detention period, as long as new intelligence information against the detainee was not found. In other cases, although upholding the detention order, the Court's judgment included general instructions on security detentions, such as instructions to the state to interrogate detainees immediately after their arrest (invalidating the state's practice of holding Palestinians in preventive detention for long periods of time without conducting any interrogation).[122]

VI. BETWEEN REASONING RIGHTS AND REALISING RIGHTS: *JABER MAMDUCH ABERAH V IDF COMMANDER IN THE WEST BANK*

A recent example demonstrates both the Israeli Supreme Court's rigorous reasoning and willingness to create legal constraints, and its reluctance to realise the individual's rights in particular cases. In the *Aberah* case,[123] the Israeli Supreme Court, sitting as the High Court of Justice, upheld a detention order based on secret evidence in spite of severe flaws, including the refusal of state authorities to provide the detainee with significant un-classified information. Israeli security authorities suspected Aberah of being a member of, and participating in the Hamas terror organisation. Aberah denied these accusations. The evidence the state obtained was insufficient for criminal proceedings. The state responded by issuing a security detention order against him, based on secret intelligence information.

Aberah challenged the detention order before the Military Court. In an effort to refute the secret evidence, his lawyer questioned the military prosecutor in detail about the reason for the arrest, the type of activity attributed to his client, and the duration of his alleged activity, and so forth. The prosecutor did not answer these questions, but declared that everything would be presented to the Court during the ex parte hearing. After the ex parte hearing, the Court determined the secret evidence to be reliable and convincing, and proceeded to affirm the detention order.

Aberah appealed to the MCA which was sympathetic to his claims, and emphasised the increased duties of the state authorities in security detention proceedings. Furthermore, the MCA determined that these increased duties include answering questions concerning

[122] See, eg, HCJ 1546/06 *Gazawi v Military Commander in the West Bank*, para 6(3) (2006) (unpublished decision) (Israel); HCJ 6068/06 *El-Afifi v Military Commander in the West Bank*, para 6(5) (2006) (unpublished decision) (Israel); HCJ 9015/06 *Taweel v Military Commander in the West Bank*, para 4(2) (2006) (unpublished decision) (Israel).

[123] HCJ 317/13 *Aberah v Military Commander in the West Bank* (unpublished decision from 27 January 2013).

the secret evidence to the maximum extent possible without endangering sources and confidential information. Nonetheless, after examining the secret evidence, the MCA found that there was reliable and up-to-date evidence showing Aberah to have been involved in 'dangerous activity that is intended to harm state security'. While finding the state's interpretation of the secret evidence 'correct and appropriate', the Court observed that this conclusion required a 'certain interpretation' of the secret evidence. The MCA upheld the Military Court's decision to affirm the detention order against Aberah.

Aberah submitted a petition to the Israeli Supreme Court. Interestingly, the decision was given by Justice Shoham, who was appointed to the Supreme Court in 2012, and who had previously served on the MCA. In his decision, Justice Shoham reiterated the MCA's determination that the Military Court, as well as the military prosecution, has 'increased duties' to inspect the secret evidence with care, and to offer the defence all possible information provided always that doing so will not harm state security. He emphasised the Court's role as the detainee's lawyer during the ex parte hearing, serving as the detainee's mouth, and scrutinising the secret evidence deeply and thoroughly. Once again, the Court emphasised the priority that should be given to criminal proceedings, whenever it is possible, as well as the duty to conduct meaningful investigation at an early stage.

After considering the secret evidence and the nature of the information requested by the defence in this case, the Court determined that there was no reason not to answer the defence's questions, since no threat to state security arose thereby. The Court determined that neither the military prosecution nor the Military Court had fulfilled their duties to the detainee by providing him with all relevant and necessary information. The Court stated that in future cases, the military prosecutor should be well-briefed by the security agency investigators, and be prepared to answer the detainee's counsel's questions in a sincere and genuine effort to provide the defence with the full information, without compromising the secrecy of the confidential material.

Nonetheless, the Court did not return the case to the Military Court for re-hearing, this time with proper defence. Rather, it dismissed the petition and upheld the detention order. While disclosing most of the information to Aberah, the Court did not seem to think that this new development had any impact on the judicial review process. Moreover, the Court examined, ex parte, the evidence and determined that the secret evidence was clear and required no 'interpretation' in order to conclude that Aberah was dangerous and should remain behind bars.

The decision of the Israeli Supreme Court in the *Aberah* case emphasises the main weakness of the judicial management model: the Court interprets the secret evidence without any involvement or participation by the detainee, without allowing him or her to defend themselves, and as Justice D stated in the interview – 'without tools' properly to assess the credibility and meaning of the secret evidence. Moreover, the fact that the Court decided the case based on information that should have been delivered to the detainee and his counsel, without allowing the detainee and his counsel to use the information and to respond to it, undermines basic principles of participation and fairness. It remains possible that the Court's decision was correct, as it does that its interpretation of the information was also correct. It might also be that the information would not have been useful to the detainee's case. As it is, we shall never know. It is a matter of fundamental concern that the Court discounted the possibility that information that was wrongfully withheld from the detainee could, potentially, be useful for his defence. This

approach is markedly different from that adopted by the UK House of Lords, following the decision of the European Court of Human Rights in *A v United Kingdom* in which the ECtHR ruled that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him. In *Home Secretary v AF (No 3)*, the House of Lords identified several policy considerations advocating a rule according to which a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. In the Court's words:

> The first [policy consideration] is that *there will be many cases where it is impossible for the court to be confident that disclosure will make no difference*. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. *A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge* (emphasis added).[124]

Earlier in his decision, Lord Phillips quoted the judgment of Sedley LJ in the Court of Appeal, stressing what should have been obvious – that without well-informed cross-examination, nothing is certain:

> It is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know.

In contrast to the UK special advocate model, the design of the Israeli judicial management model downplays participation and bolsters the judges' ability to determine whether disclosure matters. It builds on an assumption that the judges are capable to determine, independently and without hearing the detainee, whether disclosure matters.[125] Interestingly, the opposing view of the House of Lords decision in *AF* was unanimous, as it was in the Israeli Supreme Court in *Aberah*. While the Israeli judges expressed full confidence in their ability to interpret the information and to assess its potential impact on the case, the Lords agreed, that irrespective of the circumstances, it is impossible for a judge to be confident that disclosure will make no difference.

[124] *Home Secretary v AF (No 3)* [2009] UKHL 28, 63.

[125] Unfortunately, as was revealed in the interviews, it is now evident that even the utmost professional judges are very limited in their ability to interpret secret intelligence evidence. See Section VII(A) infra.

VII. THE SECRET KEEPERS: BEHIND THE CLOSED DOORS OF THE JUDICIAL MANAGEMENT MODEL

The above analysis of the Court's decisions revealed a strong reliance on ex parte proceedings and on secret evidence during the administrative detention hearings.[126] As the interviews discussed in the next Section suggest,[127] reliance upon secret evidence and ex parte proceedings, as well as the Court's unique dynamics that are developed, has several significant implications for the judicial review process. First, the Court relies on *uncontested one-sided information*, that has not been scrutinised by cross-examination and that the detainees have not been able to challenge as they do not know the exact information against them and the sources of that information. Secondly, the secret evidence creates a *special courtroom dynamic* and trust between the Court and the state representatives. These factors make judicial deference to the security authorities more likely, and further burdens the Court's ability to reject the secret evidence or to disagree with the state's interpretation of it. Third, the scheme of secrecy, together with the high volume of cases, leads to *de-individuation* of the court's decisions. Fourth, the reliance on secret information and proceedings has wider implications concerning transparency and *open justice* in general. Finally, these unique dynamics have contributed to the emergence of *alternative dispute resolution* techniques, sponsored and encouraged by the Court.

A. Judicial Management Model and Secret Evidence

In the interviews, almost all of the former Supreme Court Justices expressed at least some level of discomfort with the practice of secret evidence, as well as with the Court's ability to question the ISA position. One Justice emphasised the feeling of unease that accompanied handling these cases,[128] and explained that these hearings are extremely difficult due to their unique ex parte and administrative character.[129] He further clarified that for a judge, who is trained in due process, it is very difficult to send someone to prison without trial, and therefore the judges just have to 'do the best they can'.[130] More specifically, regarding the ability of the judge to differ with the ISA interpretation of the secret evidence, Justice D stated:

[126] 95% of the Court's decisions from 2000 to 2010 were based on secret evidence and ex parte proceedings.

[127] The 17 interviewees included five retired Supreme Court Justices that served in the Israeli Supreme Court during the period examined in the study (2000–10); four state attorneys (three former and one current), all of whom were representing the State in Supreme Court hearings on preventive detention cases until recently; four defence lawyers – two Israeli Jews and two Israeli Palestinians (each of these groups included one private lawyer and one NGO lawyer); two ISA representatives (one former and one current); and two Palestinians who were previously held by Israel under preventive detention. Most of these interviews were conducted face to face in private meetings, but some were held via telephone. Each interview lasted between 40 and 120 minutes. The direct quotations are taken from interviews in which the interviewees gave their consent to freely use their exact words. Most of the interviews were recorded. While some of the interviewees agreed to be quoted by their full name, I decided against this in order to protect the identities of those who preferred to maintain their anonymity.

For elaborate information concerning the interviews methodology and protocols, see: Krebs (n 10 above) 698–702.

[128] Interview with Justice A, Supreme Court of Israel (20 December 2010).

[129] ibid.

[130] ibid.

> The judges cannot differ with the ISA story. How can I? I don't have the defence lawyer jumping to say 'it never happened', 'this is not true'. My ethos, as a judge, is that I have two parties. Of course, I can think by myself, but I need tools, which are missing . . . for the most part I have very limited tools.[131]

So the judges do 'the best they can' with very limited tools. Unfortunately, this leads to the prevalence of one-sided information, unchallenged by cross-examination or conflicting accounts.

While justices of the Court revealed their difficulties in challenging the secret evidence, defence lawyers considered the hearings wholly inadequate. In Defence Lawyer A's opinion, the ex parte hearing *is a sham*, an appearance of justice and nothing more.[132] 'How can substantive justice be achieved, given that the detainee cannot refute the evidence against him?'[133] Defence Lawyer C further demonstrated the dynamics of such proceedings, stating that: 'the state attorneys should also come to the hearing nervous and tense – but they are always very relaxed. They know that no matter what they say or do, they will always win'.[134] All of the defence lawyers that participated in the interviews expressed frustration in the way that the reliance on secret evidence and ex parte proceedings influenced their ability to 'fight back' and to challenge the ISA narrative. 'I feel like a blind defence lawyer', and 'I represent my client with two hands tied behind my back' were common metaphors during the interviews.[135] 'The ISA determines the facts',[136] said Defence Lawyer B. He then continued:

> There is no judicial discretion here, since the Justices do not know the facts. They don't have the tools to decide what the level of dangerousness is . . . in one of the cases in which I served as defence lawyer, it took the ISA two years to tell him [the detainee] what the allegations against him were. Then, when I asked my client about it, it turned out that it was a murder case that happened near his house, in which he had no involvement with whatsoever. When I brought this to Court and asked the ISA representatives about it – I could tell that the Justices knew nothing about it. I could see their surprise. It then took two more detention orders until he was finally released.[137]

The detainees themselves expressed similar views. 'The ISA determines everything',[138] Detainee B explained. He then further stated:

> I turned to the Supreme Court only after I gave up any hope with regard to the military courts. Unfortunately, here, too, it was all about the secret evidence and I did not have any chance.

Detainee A felt the same:

> I never knew what the case against me was, or what the evidence against me was. I had no information, and therefore had nothing to say for my defence.[139]

[131] Interview with Justice D, Supreme Court of Israel (22 December 2010).
[132] Interview with Defence Lawyer A (19 December 2010).
[133] Interview with Defence Lawyer B (20 December 2010).
[134] Interview with Defence Lawyer C (22 December 2010).
[135] Interview with Defence Lawyer A (19 December 2010); Interview with Defence Lawyer B (20 December 2010).
[136] Interview with Defence Lawyer D (23 December 2010).
[137] ibid.
[138] Interview with 'Mohamed', Palestinian Detainee (12 January 2011).
[139] Interview with 'Yusuf', Palestinian Detainee (12 January 2011).

Surprisingly, state attorneys also felt that the judicial review process in these cases is 'handicapped'[140] due to the total reliance by the Court on the secret evidence presented during ex parte hearings. 'In some cases even I felt that it was too easy',[141] said State Attorney A. State Attorney B further clarified: 'With all the good will on the part of everybody, there is no way to conduct a fair ex parte hearing. The human nature and the dynamic of the process prevent fair hearing of the case'.[142]

B. Judicial Management Model and Courtroom Dynamics

As revealed by the interviews, excluding the defence lawyer and the detainee from the hearing is problematic not only because of the difficulty in refuting the ISA information, but also by its contribution to the development of a unique courtroom dynamic. Both state attorneys and ISA representatives expressed their feelings that the unique atmosphere and dynamics of the ex parte proceedings created a trust-based relationship between the Justices and the state representatives. As explained by State Attorney C: 'The ex parte proceedings create intimacy between the state representatives and the Justices'.[143]

State Attorney A described this as a 'secret dialogue' between the state attorneys and the Supreme Court.[144] ISA Representative A added his impression that the closed doors and the repeated interaction created a 'shared language' between the ISA representatives, the state attorneys, and the Supreme Court Justices.[145] 'After all', he added, 'we all know each other and work together'.[146]

C. Judicial Management Model and De-Individualisation of Justice

As the case law analysis revealed, most of the written decisions concerning concrete detention orders were so brief as to ignore many of the individual circumstances and specific details of each case. In the interviews, both defence lawyers and former detainees expressed their frustration with this practice, which ignores the individual characteristics of the detainees and tends to neglect crucial details, such as the length of detention. As one defence lawyer stated: 'There is no human being in the case: not where he is from, not how old he is, not even how long his detention is; nothing'.[147]

State Attorney A shared this perception of an alienating and de-individualised, process and opined that the entire process of security detentions, from the detention order, to the appeal, to the Military Court, to the petition to the High Court of Justice, is merely 'a copy-paste from the beginning to the end'.[148] This description was affirmed by ISA Representative A, who characterised the process as an 'assembly line', and expressed discomfort with the effects of this process on ISA methods:

[140] Interview with State Attorney B (23 December 2010).
[141] Interview with State Attorney A (21 December 2010).
[142] Interview with State Attorney B (23 December 2010).
[143] Interview with State Attorney C (26 January 2011).
[144] Interview with State Attorney A (21 December 2010).
[145] Interview with ISA Legal Advisor A, Israeli Security Agency (14 February 2011).
[146] ibid.
[147] Interview with Defence Lawyer A (n 135 above).
[148] Interview with State Attorney A (n 144 above).

> I am not fond of preventive detentions; not because of personal liberty aspects of it, but rather due to the impact of its mass use on the professionalism of the ISA. Instead of using a sharp scalpel – well, it harms the quality of our work.[149]

In the interview ISA Representative A further explained that the second Intifada, which began on October 2000, changed the organisation's methods of work: before the Intifada, the ISA had to collect intelligence information concerning a small number of Palestinians, mainly political leaders, and was therefore able to carefully collect the relevant information regarding each individual ('with tweezers'). The new security challenges presented by the popular uprising changed this situation and forced the ISA to start collecting intelligence information on hundreds of Palestinians.[150] Under these circumstances, the quality of the information concerning each individual had to be somewhat downgraded. In his words: 'This is, of course, a very convenient tool, but when you use it too much it becomes dull'.[151]

These assessments may shed light on why, in many of the cases, the detainees did not request their presence at their own hearings, and preferred to remain locked up in their prison cells rather than participate in the judicial review process.[152] Defence Lawyer B, who represented the detainee in one of the few cases that received a fully elaborated legal decision, did not feel any joy of success. On the contrary, she felt even more frustrated because she was unable to share this partial success with her client: 'my client was very much disappointed, since the decision wasn't at all about him'.[153]

In her opinion, both the cursory written decisions and the legally substantiated decisions are similar in the sense that they are never focused on the individual detainee: the former decisions are short and laconic, a cut-out template with no individual details or characteristics; the latter – those fewer, longer and legally substantiated decisions – too, are not focused on the individual detainee, but rather on the general legal framework:

> The more reasoned judicial decisions are no more than a bunch of clichés, since they are not implemented . . . the Justices talk highly about being the 'detainee's mouth', but they can't. How can they be his mouth, when they know nothing at all about his side of the story?[154]

D. Judicial Management Model, Transparency and Open Justice Principles

The interviews revealed a more subtle weakness of this complicated and sensitive judicial process: namely, an ambiguity regarding the actual certainty, and feelings of the various stakeholders participating in this process. Although state representatives and Justices expressed confidence, decisiveness, and assertiveness during the courtroom hearing, doubts were raised in the interviews. There was lingering concern in a number of the interviews that despite doing 'the best they can', the judges were limited in their

[149] Interview with ISA Legal Advisor A (n 145 above).
[150] Interview with ISA Legal Advisor A (n 145 above).
[151] ibid.
[152] The database I created recorded 59 such requests, all MDO cases, which is about 30% of the MDO cases that reached the stage of a courtroom hearing.
[153] Interview with Defence Lawyer B (n 135 above).
[154] ibid.

ability to challenge the secret evidence, and filled with doubts.[155] Despite making incredible efforts, the Supreme Court Justices expressed discomfort with their role as the detainee's representative, and admitted that these are indeed very difficult cases to deal with. 'We try to add a criminal process aroma to the proceedings',[156] explained Justice B, acknowledging that it is merely an 'aroma'. State Attorney B described his own feelings regarding the dynamics surrounding the secret evidence regime, confessing that:

> To the detainees, the Justices demonstrate a façade of effective review, while deep down they are not fully convinced. Even we, the state attorneys, do that: I always felt a stomach ache that was never transferred to the detainee's lawyer.[157]

E. Judicial Management Model and Bargaining in the Shadow of the Court Dynamics

The research identified a significant rate of withdrawals: 36 per cent of the MDO cases were withdrawn by the petitioners (the detainees) shortly before the court hearing. Moreover, in 19 per cent of the MDO cases, the petitions were withdrawn after the Court had examined the secret evidence ex parte. The interviews shed some light on these findings, pointing out that, in fact, many of the MDO petitions are submitted not to initiate a judicial review process, but rather to instigate some sort of negotiation with the state's representatives and prompt a settlement. Apparently, as is evident from the state attorney and ISA interviews, the submission of a petition to the High Court of Justice initiates an internal state process, in which the ISA reassesses the necessity of the detention.[158] If, at the end of this process, the ISA insists on the necessity of the detention, a specific state attorney is assigned to examine the strength of the case, and in some cases pressures the ISA to reach a settlement.[159] The relevant attorneys – both state attorneys and defence lawyers – described this process of 'bargaining in the shadow of the Court',[160] and explained the 'behind the scenes' impact of the Court on the state's position.[161] The interviews showed that, this 'bargaining' process is pursued by detainees' lawyers not only to reach a beneficial settlement, but also to acquire some information regarding the strength and nature of the secret evidence.[162] The high withdrawal rate – 36 per cent of the MDO cases – is therefore explained either by: a settlement ending the detention (usually not immediately, but within a couple of months); or an 'understanding' on detainees' part that the secret evidence against them is strong and that it is therefore ill advised, and potentially harmful, to continue with the judicial review process and present the secret evidence to the Court.[163]

[155] Interview with Justice A (n 128 above); Interview with Justice B, Supreme Court of Israel (21 December 2010); Interview with Justice C, Supreme Court of Israel (20 December 2010); Interview with Justice D (n 131 above).

[156] Interview with Justice B, ibid.

[157] Interview with State Attorney B (n 142 above).

[158] Interview with ISA Legal Advisor A, Israeli Security Agency (14 February 2011); Interview with State Attorney A (n 144 above).

[159] Interview with State Attorney A, ibid.

[160] A phrase coined by Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 950.

[161] Interview with Defence Lawyer A (n 135 above); Interview with Defence Lawyer B (n 135 above); Interview with Defence Lawyer C (22 December 2010); Interview with State Attorney A (n 144 above); Interview with State Attorney B (n 142 above); Interview with State Attorney C (26 January 2011).

[162] Interview with Defence Lawyer B (n 135 above).

[163] ibid.

Without ignoring the advantages – namely the state's internal re-inspection that sometimes leads to ending the detention – there are some inherent deficiencies with this practice. First, there is a meaningful and structural imbalance between the state and the detainee. The detainee and his or her lawyer come to the negotiating table not knowing the quality, reliability and quantity of the information held by the state, and may therefore be pressured to agree to poor settlements. Secondly, the Court is unaware of the majority of these negotiated settlements. It does not scrutinise them, and therefore cannot regulate the detention system. Moreover, it is precisely in these cases – in which the ISA prefers not to go to court – that judicial review would be the most necessary and useful. According to the ISA interviews, the ISA typically agrees to settle where they assess the evidence is not strong enough, or does not comply with the Court's legal instructions, and therefore (in their legal opinion) there are chances that the Court will decide to intervene.[164]

This dynamic is not restricted to the pre-hearing stage of the process. In many MDO cases the Court acted as a mediator in this bargaining process, suggesting to both the detainee and the state various alternatives to the continuation of the detention (including deportation).[165] In 13 per cent of the MDO cases the Court offered specific recommendations for the state, including recommending that the state not issue a prolonged detention order or that a senior ISA officer be involved in such a decision. While the state does not automatically implement such recommendations, the Supreme Court's statements can potentially influence the Military Courts' judicial review. Accordingly, ISA Representative A emphasised the restraining effect of the Court, and the desire of the ISA to avoid 'bad decisions'.[166]

Many of the interviewees emphasised the effective shift of judicial review from the main stage, the courtroom, to the behind-the-scenes actions: internal state proceedings and negotiations with the defence lawyers, either before or after the court hearing. In this context, State Attorney B emphasised the shift of the review from the Court to the state authorities, and expressed discomfort with having to play this dual role: 'a part of the judicial review is transferred from the Court to the state attorneys, and since they represent the ISA – they are under conflict of interests'.[167]

State Attorney C added his own impression, explaining that this duality does not produce robust state scrutiny of the necessity of the detention:

> The state attorney's power should not be overstated or idealised. We represent the ISA even in borderline cases, especially when we are dealing with masses of cases, and the idea that we are conducting a meaningful review is not more than a myth.[168]

ISA representatives affirmed this assertion, stating that the ISA conducts an independent assessment when a petition is submitted to the Supreme Court, and offers a settlement only if it coincides with its own agenda.[169]

In short, although the bargaining process may sometimes lead to releases of detainees, it is not necessarily desirable due to several weaknesses: *the inherent imbalance of the*

[164] Interview with ISA Legal Advisor A (n 145 above).

[165] See, eg, HCJ 8142/10 *Ayad Dudin v Military Commander in the West Bank* (2010) (unpublished decision) (Israel); HCJ 9456/05 *Tsubach v Military Judge* (2005) (unpublished decision) (Israel).

[166] Interview with ISA Legal Advisor A (n 145 above).

[167] Interview with State Attorney B (n 142 above).

[168] Interview with State Attorney C (n 161 above).

[169] Interview with ISA Legal Advisor A (n 145 above).

process; the blindness of the detainee regarding the secret evidence and its strength; and the finding that, indeed, in many of the cases, the settlement represents ISA interests alone.

VIII. JUDICIAL MANAGEMENT VS SPECIAL ADVOCATES

Interestingly, almost all of the relevant stakeholders interviewed that participate in the proceedings – including the Justices themselves – agreed that the judicial management model suffers from inherent weaknesses that potentially prevents, at least in some of the cases, meaningful and independent judicial assessment of the secret evidence.

As previously discussed, a competing judicial review model for security detention cases is the 'special advocate' model: the appointment of special advocates, approved by the state to represent the detainees in these hearings.[170] In their contribution to this book, Cole and Vladeck compare and contrast three versions of the special advocate model – adopted in Canada, the United Kingdom and the United States. Their conclusion is that none of these models sufficiently guarantees individual liberty in the face of competing security interests. The interviews with Israeli Justices and lawyers reveal similar difficulties balancing security and liberty in the face of secret evidence and the security crisis. As Justice B observed in interview: 'It is not pleasant. You want to run away from it as fast as you can, but you know that it is necessary for the sake of your people and homeland'.

In many of the interviews the Justices explained the difficulty of challenging the secret evidence, and therefore some of them expressed enthusiastic support for the adoption of a special advocate model in Israel. In the interviews, each of the Justices individually explained that using a special advocate – although not an ideal solution – would help reduce the one-sided nature of ex parte proceedings.[171] None of the Justices thought the functioning of his or her active role as 'the detainee's lawyer' satisfactory; whilst being aware of the shortcomings of special advocates, they felt that adopting such a system could only improve the current situation.[172] Justice D put the point succinctly: '[A special advocate] is better than nothing. Now we have nothing'.[173]

This is very different from the formal approach the Court often expresses in its judgments, as was elaborated in Section IV. Formally, the Court's decisions demonstrate confidence, and pride even, in the Court's ability to play the role of the detainee's lawyer during the ex parte proceedings, and to be his or her 'mouth'. The Justices' personal perceptions and scepticism reflect a similar approach to the one expressed by some of

[170] While this research does not pretend to provide any systematic assessment of the advantages and disadvantages of the special advocate model, the opinions of the stakeholders – mainly, the Justices – on the use of it, will be used here to shed more light on the judicial management model, rather than assessing this model independently. For elaborated analysis of the 'special advocates' model, see generally Kent Roach, 'The Three Year Review of Canada's Anti-Terrorism Act: The Need for Greater Restraint and Fairness, Non-Discrimination, and Special Advocates' (2005) 54 *University of New Brunswick Law Journal* 308.

[171] Interview with Justice A, Supreme Court (n 128 above); Interview with Justice B, Supreme Court (n 155 above); Interview with Justice C, Supreme Court of Israel (20 December 2010); Interview with Justice D, Supreme Court (n 131 above).

[172] Interview with Justice A, Supreme Court (n 128 above); Interview with Justice B, Supreme Court (n 155 above); Interview with Justice C, Supreme Court (n 171 above); Interview with Justice D, Supreme Court (n 131 above).

[173] Interview with Justice D, Supreme Court (n 131 above).

their Canadian counterparts. Thus, in the *Charkaoui* case[174] (discussed more deeply in the introduction (chapter six) as well as in the two other chapters in this Part), the Canadian Supreme Court ordered the adoption of a special advocate model in Canada. The Canadian Supreme Court refused to embrace this role (of being the detainee's lawyer) and expressed concern for its potential effects on the Court's independence and impartiality. As was stated by McLachlin CJ:

> Three related concerns arise with respect to independence and impartiality. First is the concern that the IRPA may be perceived to deprive the judge of his or her independent judicial role and co-opt the judge as an agent of the executive branch of government. Second is the concern that the designated judge functions as an investigative officer rather than a judge. Third is the concern that the judge, whose role includes compensating for the fact that the named person may not have access to material and may not be present at the hearing, will become associated with this person's case.

But while justices in both Israel and Canada expressed support for the special advocate model, the lawyers participating in these proceedings were less enthusiastic. In the interviews, both state attorneys and defence lawyers assessed that having a special advocate is not likely to change the outcome of the cases, but only make the process 'look better'.[175] As stated by Defence Lawyer C: I'm against the use of special advocates. We don't need to make this process look better – we need to reduce its use.[176]

Defence Lawyer D agreed that as to mass security detentions, the special advocate model does not have the potential to improve the fairness of the ex parte hearings:

> Special advocates can only help in a very minimal detention regime, when only a few people are detained. When there is a massive use of administrative detentions no one will be able to deeply investigate the evidence and the allegations.[177]

The opinions expressed by the Israeli lawyers who participate in the proceedings described as the judicial management model are almost identical to the opinions expressed by their colleagues in the United Kingdom, who participate in the special advocate model proceedings there. The UK barristers working as special advocates in the UK system recently gave important statements to an inquiry of the Parliamentary Joint Committee on Human Rights. That Committee summarised the special advocates' evidence thus:

> After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening . . . has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.[178]

Listening to the voices of those participating in hearings which are dominated by secret evidence is troubling. Judges and lawyers alike are painfully aware of their limitations in

[174] *Charkaoui v Canada (No 1)* [2007] 1 SCR 350.
[175] Interview with State Attorney C (n 161 above).
[176] Interview with Defence Lawyer C (n 134 above).
[177] Interview with Defence Lawyer D (23 December 2010).
[178] *Al Rawi v The Security Service* [2011] UKSC 34, 37.

challenging the secret evidence and promoting both truth and justice. In essence, these voices and views undermine the debate over the details of the specific judicial review model, and bring back to life the basic question concerning the legality, morality and wisdom of this dubious mechanism altogether.

IX. CONCLUSION

The combination of security crisis, secret evidence and preventive detentions poses unique challenges to effective judicial review. In Israel, a quasi-inquisitorial judicial management model has emerged to confront these challenges and ostensibly to provide strong guarantees against arbitrary and unjustified detentions. The analysis of the reasoning of the Supreme Court in many of its decisions demonstrates the Court's ability (and willingness) to craft legal limitations and instructions concerning security detentions. Nonetheless, the empirical evidence presented and discussed above sheds some light on the actual practice of the Court and cast doubt on the effectiveness of review with regard to the individual detainees. As was revealed, the Court systematically avoids issuing release orders and the secret evidence almost always outweighs all other considerations. As both the case-law analysis and the interviews demonstrate, the Court refrains from openly rejecting the ISA assessment of the secret evidence, and prefers either to focus on general legal instructions or to be satisfied with non-binding 'recommendations'.

The findings summarised here should prompt doubt about the advantages of the judicial management model, which scholars argue reveals the 'actual truth' and regulates the detention system. *First*, the interviews suggest that the Supreme Court's ability to regulate the detention system is much more meaningful with regard to the legal interpretation of the statutory regime, than the assessment of the secret evidence and the individual circumstances of the case. The findings demonstrate that, indeed, the Court's main impact in these cases is through crafting legal limitations by narrowly interpreting statutory language, and not by analysing the credibility and strength of secret evidence itself. Moreover, as revealed by this research, most of the borderline cases are withdrawn before they reach a courtroom. The outcomes of these cases are the result of settlements between the detainee and the state, not meaningful judicial review. Therefore, the Court's regulatory capacity is limited because the cases that could have potentially instigated such a regulatory intervention are left undecided. *Secondly*, regarding inquisitorial fact-finding, this research identified a 'bargaining phenomenon', where parties resolve individual detention cases through alternative dispute resolution mechanisms, such as mediation and negotiation. These mechanisms do not focus on rigorous fact-finding or verification of the justifications for detention, and, instead promote practical solutions in the immediate interest of the parties.

Finally, the massive use of security detentions causes de-individuation of the detention process. In the assembly line of security detentions individuals are constantly stripped of their unique personal characteristics, and court dockets become templates of security considerations. Secret evidence, and specifically the security authorities' interpretation of it, dominates the judicial review process, and repeatedly outweighs individual liberty and procedural transparency and fairness. In a detention system in which judicial review makes very little impact on individual detainees, alternative protests such as hunger strikes are more likely to signal their pursuit of selfhood and identity.