At the Supreme Court Sitting as the High Court of Justice

HCJ 8102/03
HCJ 9733/03

Before:	**Honorable President D. Beinisch** **Honorable Justice M. Naor** **Honorable Justice E. Hayut**
The Petitioners in HCJ 8192/03:	1. **MK Zahava Gal-On** 2. **Meretz – Democratic Israel**
The Petitioner in HCJ 9733/03:	**HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent HCJ 8192/03:	**Minister of Defense**
The Respondents in HCJ 9733/03:	1. **The State of Israel** 2. **Israel Defense Forces** 3. **Israel Security Agency** 4. **Israel Police** 5. **Commander of the detention facility referred to as "Facility 1391"**
Petitions for *Order Nisi*	
Session date:	22 Tevet 5766 (22 January 2006)
Representing the Petitioners HCJ 8192/03:	Att. Uri Keidar
Representing the Petitioner HCJ 9733/03:	Att. Yosef Wolfson, Att. Leah Tsemel, Att. Gil Gan-Mor
Representing the Respondents in HCJ 8192/03, HCJ 9733/03:	Att. Shai Nizzan

Judgment

President D. Beinisch

1. Inside a secret military base in the territory of the State of Israel, there is a detention facility named "Facility 1391" (hereinafter: also **the detention facility** or **the facility**). The detention facility is used for interrogations and, in exceptional cases, for holding in custody. Unlike other detention facilities in Israel, the physical location of Facility 1391 is confidential and is not made public. Between 1993 and 2004, 271 detainees were held in the facility; most for short durations no longer than some 50 days. Three detainees, including Sheikh Obeid and Mustafa Dirani, were held in custody in Facility 1391 for a much longer period of time.

2. The two petitions at bar challenge different aspects involved in the operation of the detention facility. HCJ 8102/03 was submitted by Zahava Gal-On when she was serving as a Member of Knesset [MK], due to the Defense Minister's refusal to allow her to visit the detention facility. HCJ 9733/03 was submitted by HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger. This petition included a long list of allegations against the lawfulness of operating a secret detention facility, holding conditions in the facility and the interrogation methods used therein. On April 20, 2004, the court (Justice **M. Cheshin**) ruled that the two petitions would be heard jointly.

3. We shall precede by stating that the scope of the hearing which was laid out upon submission of the petitions is entirely different from the scope of the hearing under our review at the moment. This, since substantive changes in the factual situation pertaining to the detention facility occurred while the petitions were under review. **First**, the petitions led to a public debate about the detention facility, including the state's admission of its existence and operation. **Second**, following the first hearing in HCJ 9733/03, the court issued an *order nisi* which was limited to the issue of the physical location of the detention facility only. As a result, the hearing respecting allegations regarding the physical conditions in the detention facility, the holding conditions in the facility and the interrogation methods used therein was made redundant. **Third**, following the court's recommendation, the state formulated an arrangement restricting the use of the detention facility and imposing substantive limitations on the possibility of using it for the purpose of interrogation. The full details of the arrangement were submitted to the court *ex parte* and its main components, detailed below, were detailed also in the open response submitted by the state. Naturally, these developments significantly restricted the scope of the review which was laid out upon submission of the petitions, such that there now remain two limited issues for review: the lawfulness of withholding the physical location of the detention facility and the possibility of limiting visits by Knesset members in the detention facility. In order to clarify the changes in the factual framework, we shall begin with a description of the arguments made by the parties since the inception of the proceeding. We shall then address the chain of events that followed the submission of the petitions and which led to the restriction of the matters on which we are now to rule.

Parties' Arguments

HCJ 9733/03

4. As stated, the petition in HCJ 9733/03 was submitted by HaMoked: Center for the Defence of the Individual (hereinafter: **the petitioner**). The petitioner filed several pleadings in which it argued in extensive detail against the lawfulness of operating the detention facility as an incarceration facility in general and as a secret detention facility in particular. The main argument presented in the pleadings was that the secrecy surrounding the existence and operation of the detention facility results in violation of the rights of the interrogated, in the absence of supervision over the detention facility. To support this allegation, the petitioner pointed to a list of provisions from Israeli law and international law which, it purports, require publicizing the location of the detention facility.

The petition included attachments of affidavits by ten individuals who had been held in the detention facility at different times. The petitioner claimed that the picture arising from the affidavits and from an article published in HaAretz newspaper, on which it also relied, points to the unlawfulness resulting from operating a secret detention facility. Thus, for instance, the petitioner remonstrated about the procedures by which detainees are brought to the detention facility. It was alleged that the detainees are transported with their heads covered with on opaque sack and their hands and feet in cuffs, in a manner designed to increase their helplessness and disorientation. While in the detention facility too, it was alleged, the detainees were not told where they were. Additionally, the petitioner alleged that the detention rooms have no windows, which makes distinguishing between night and day difficult. Each detainee is held in complete isolation whilst the ability to make contact with other detainees, or the outside world, is denied.

The petitioner further alleged that due to the facility's secrecy, there is no supervision over the number of detainees held in the detention facility, the methods of incarceration and interrogation used in the facility, the agencies operating the detention facility and the interrogations in the facility and the causes for holding detainees as well as the fate of some of them. The petitioner also alleged that the secrecy regarding the location of the detention facility leads to violations of basic rights including, the right to autonomy, the right to receive visits in the place of detention; the right to meet with an attorney; the right to a public hearing; the right to meet with members of the clergy; and, with respect to foreign nationals, the right to meet with a consul handling the matters of the state of which they are nationals. It was further alleged that inasmuch as the matter involves prisoners of war [POWs] and protected persons under the 4th Geneva Convention, the detainees' right to receive visits by aid organizations and emissaries of the International Committee of the Red Cross [ICRC], who are barred from entering the detention facilities and visiting the POWs, is violated.

5. On the legal aspect – on which the petitioner's arguments focused following issuance of the order nisi – it was alleged that various statutory provisions in local law stipulate that a detainee may be held only in a location declared as a place of detention. The petitioner focused on the provision of Section 7 of the Criminal Procedure Law (Enforcement Powers – Detentions) 5756-1996 (hereinafter: **the Detention Law**), which stipulates that a detainee is to be held in a site which the Minister of Public Security has declared as a place of detention. The declaration of a site as a prison comes under the purview of Section 69 of the Prisons Ordinance (New Version), 5732-1971, which stipulates that the declaration shall be on "[b]uilding X, or camp X or another place". According to the petitioner, the aforesaid Section 69 requires declaration of a specific place as a place of detention and citing the code for the facility is sufficiently to meet the requirements of the Section. The petitioner alleged that a similar conclusion can also be drawn with regards to detention pursuant to other laws, including administrative detentions under the Emergency Powers (Detentions) Law 5739-1979 and detention pursuant to the Imprisonment of Unlawful Combatants Law 5762-2002, although the petitioner noted that Section 1 of the Imprisonment of Unlawful Combatants Regulations (Detention Conditions) 5762-2002 assumes that an unlawful combatant may also be held in a military camp.

6. As stated, the petitioner pointed to a number of provisions from international law, including those of Articles 23 and 70 of the 3rd Geneva Convention (Convention Relative to the Treatment of Prisoners of War,1949) and the principles adopted by the UN General Assembly which, it is purported, require publication of the location of a detention facility. According to the petitioner, these authorities indicate that the prisoner's family has a right to receive full details regarding the physical location of the prisoner rather than just the fact that he is incarcerated and how to contact him. It is alleged that the notification regarding the place of detention is important *per se*, beyond the ability to ensure that the detainee's rights are upheld. Thus, for example, notification of the

place of detention is psychologically important for the detainee's family as it provides a degree of certainty and gives the family something to hold on to; notification is a guarantee for public arrest, for upholding the rule of law and for preventing abuse of executive power; notification of the physical location of a detainee is one of the guarantees for preventing torture and inhuman and degrading treatment; and, notification regarding physical location is a guarantee for preventing enforced disappearances.

HCJ 8102/03

7. The petitioner in HCJ 8102/03, then MK Zahava Gal-On (hereinafter: **Gal-On**) focused her arguments on the Defense Minister's refusal to allow her to visit the incarceration facility. On August 4, 2003, Gal-On contacted the Defense Minister requesting he allow her to visit the detention facility pursuant to her status as an MK and pursuant to Section 9(a) of the Knesset Members (Immunity, Rights and Duties) Law 5711-1951 (hereinafter: **Knesset Members Immunity Law**). Her request was denied on the basis that for reasons of confidentiality, outside visitors may not be allowed to visit the detention facility. Gal-On alleged that as a member of Knesset, she has a fundamental constitutional right, pursuant to the aforesaid Section 9(a), to visit the detention facility in order to inspect whether basic human rights are violated therein. Gal-On alleged, therefore, that the respondent must show cause why any or all Kneset members are to be denied entry into the detention facility. Such cause would be justified, it was alleged, only if the respondent pointed to a near certainty of real harm to state security; this in view of the significance of freedom of movement as a means for performing parliamentary supervision.

The State's Response

8. In the responses submitted on behalf of the state attorney's office to HCJ 9733/03 (hereinafter, for the sake of convenience, the respondents in both petitions shall be referred to as: **the state**), it was argued that there is no legal impropriety in withholding the physical location of a detention facility and that there are substantive reasons – some of which were later presented to the court *ex parte* – due to which it is appropriate, for reasons of state security, not to disclose it. According to the state, the main reason for secrecy with respect to the location of the detention facility has to do with the fact that it is located inside a secret military base. The state did not dispute the obligation to notify of a person's arrest and whereabouts. Yet, according to the state, the law does not require disclosure of the exact physical location of every detention facility. The duty, it maintains, is to inform the detainee's attorney and relatives of the arrest and provide them with a contact for requests concerning the detainee.

9. In its response, the state outlined the uniqueness of the detention facility. It was purported that the facility is not routinely used, but is rather designated for special cases and for detainees who are not Israeli residents or residents of the Territories. In general, the facility is not designated for use as an incarceration facility, but its main designation is for use as an interrogation facility in special cases. With the exception of three cases, in which detainees were held in the facility long after their interrogation was completed, the facility is used for purposes of interrogation only.

    The state elaborated on the physical conditions in the facility and the interrogation methods used therein. The state annexed the various regulations respecting admission and holding of detainees in the facility to its response. According to the state, a reading of the procedure indicates that the detention conditions are reasonable and correspond to the relevant legal requirements. Thus, the state noted that the procedure for transporting and admitting detainees to the facility are normal with the exception of the fact that the detainees are led to the facility blindfolded. The state further noted that the detainees are examined by a paramedic who conducts a health and hygiene examination, every day. Once a week, the examination is performed by a physician. The state also

rejected the rest of the factual allegations made in the petition with respect to the use of inappropriate interrogation measures.

10. The state further added that notification of the arrest of detainees held in the facility is given to the relevant individuals, in accordance with legal requirements. It was also stated that the IDF Detention Facilities Control Center (hereinafter: **the control center**) which gathers data regarding the identity of detainees and places of detention and is empowered to provide information to whoever requests it, was instructed to provide anyone who contacts it regarding a person held in the facility that the detainee is held in a facility referred to as 1391. The control center also provides the person seeking information with a contact for inquiries and requests regarding the detainee. The state noted that detainees in the facility may meet with attorneys, unless a specific order preventing the same had been lawfully issued. The same holds true for meetings with the ICRC. With respect to visits by family members, the state argued that as a rule, as is the case in other detention facilities; detainees under interrogation are not allowed to meet with family. This is anchored in Section 12 (c) of the Criminal Procedure Regulations (Enforcement Powers – Detentions) (Conditions of Holding in Detention) 5757-1977.

11. Therefore, according to the state, the fact that the location of the facility is confidential does not detract from the detainees' rights and inspections of the facility's state and the conditions of holding detainees therein are routinely held when detainees are held in the facility. The inspections are carried out by IDF personnel and particularly by representatives of the military attorney general. The state further notes that over the years additional officials from the Justice Ministry and various security officials, including the attorney general and most senior attorneys from the state attorney's office have visited the facility. Judges also arrive in the facility for purposes of holding detention extension hearings in cases where the detainees are not represented by counsel.

12. On the legal aspect, the state argued that its position is that there is no statutory provision requiring the disclosure of the physical location of a detention facility. The state referred to Section 33(a) of the Criminal Procedure (Enforcement Powers – Detentions) Law 5756-1996 which instructs that once it has been decided to detain a person: "notification of his detention and of his whereabouts will be delivered without delay to a relative whose name he has given… unless the detainee requests that such notification not be delivered". The state argues that the obligation to deliver without delay "notification of his detention and of his whereabouts… to a relative" must be interpreted based on its purpose. It is contended that citing the name of the facility where the detainee is held and providing a contact for inquiries and requests are sufficient to meet the notification duty stipulated in Section 33(a). The state contends that the purpose of the notification duty is to inform the relatives of the detainee of his arrest, in order to prevent detainees from "disappearing" and give the relatives information allowing them to provide the detainee with the assistance he requires for protecting his rights. This goal is achieved when the family is informed of the arrest and given a contact for inquiries and requests.

13. With respect to allegations made in HCJ 8102/03, the state argued that the Knesset Members Immunity Law does not grant an MK the right to visit any prison facility, but that this is subject to the administrative discretion of the competent authority. Indeed, it was argued that, among the considerations of the competent authority, it must also consider the identity of the official requesting the visit and when it is an MK "indeed, as a rule, in the absence of a special reason for preventing the visit, the visit will be allowed (subject to conditions and arrangement established in regards thereto)" (response on behalf of the state, August 15, 2005). However, according to the state, from a fundamental legal standpoint, an MK does not have a legally vested right to hold such a visit. The state further argued that with respect to visits to the detention facility, indeed, there are substantive reasons related to state security which necessitate the visit be prevented and which trump the reasons given in support of permitting the visit. The state further argued that an

interpretation along these lines was established in the attorney general's directive no. 21.406 dated January 1, 1973, where the provision of Section 9(a) was analyzed by then attorney general, M. Shamgar. The directive explicitly establishes that "the provision of Section 9 of the Knesset Members Immunity Law does not point to an intention to allow an MK entry into a police or prison facility".

According to the state, if MKs were permitted to freely visit the detention facility, its location would have been uncovered and state security would have been substantively compromised. However, although the state maintains that MKs do not have a right to visit the detention facility, in its pleadings, it recognized the need to allow parliamentary supervision of the detention facility. According to the state, in view of the substantive security reasons which underlie the secrecy of the detention facility's location, there is a need to create a balance between the security necessity and the possibility of conducting parliamentary supervision. The state maintained that the right balance is struck by its suggestion that the MKs serving on the Secret Services Subcommittee of the Foreign Affairs and Defense Committee, who are exposed to state secrets in any case, would be allowed to visit the facility. The state noted that such an arrangement is no different from arrangements accepted in the past with respect to other secret facilities (which are not detention facilities), where visits by MKs at large were also not possible.

Factual developments while the petitions were pending before the court

14. The court held three sessions in the petitions at bar (a hearing in HCJ 9733/03 was held on December 1, 2003; hearings on the joint petitions were held on December 15, 2004 and January 22, 2006). At the end of the first hearing, following oral arguments by the parties, it was decided to issue an order nisi (Justices **M. Cheshin, D. Beinisch**, and **E. Hayut**), "only regarding the physical location of the facility named Facility 1391". The decision further stated that:

> [T]he Petitioner contends that the facility itself is not suitable for holding detainees; that the conditions in which the detainees are held in the facility are improper; and that improper and forbidden interrogation methods are used. In all these matters, the petitioner petitioned us before exhausting the process of submitting specific and focused complaints that deal expressly with each of the aforesaid subjects to the competent authorities. The petitioner may, therefore, submit specific and focused complaints on one of the aforesaid subjects to the competent authorities and it is presumed that the authorities will properly examine the complaints and provide the petitioner with specific and pertinent responses. Attorney Shay Nizzan, counsel for the state, notified us that, inasmuch as the complaints relate to ISA [Israel Security Agency] interrogations, the complaints will be forwarded to the Department for the Investigation of Complaints of Detainees in the ISA (*MAVTAN)*, which is under the control of the head of the Special Functions Department [of] at the State Attorney's Office. Other complaints will be forwarded to the military advocate general, who will determine the manner in which they will be handled and who will handle them. The petitioner has the right to return to the court after receiving the authorities' response.

It should be noted that the petitioner's request for an order instructing the state to specify which agencies made use of the facility, the nature of such use and the authority thereto, was rejected.

15. It is noted that in accordance with the aforesaid decision, the petitioner contacted the competent authorities and submitted two petitions to the court in the matter of two detainees in the facility

(HCJ 11447/04 **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger v. Attorney General** (unpublished, June 14, 2005)). In these petitions, the petitioner presented arguments similar to the factual allegations presented before us with respect to the holding conditions and interrogation methods in the detention facility and challenged the decision of the attorney general and military advocate general not to launch an investigation following these complaints. The court (**President A. Barak**, Justice **A. Grunis** and Justice **E. Hayut**) rejected the petitions and ruled that, in that case, the scope and quality of the examination as well as the discretion of the attorney general and the military advocate general were reasonable.

16. Shortly after issuance of the order nisi, the state submitted a response to the petition in which it repeated the arguments made in its first response. On December 12, 2004, the state submitted a supplementary notice which included additional particulars regarding the detention facility following a request for provision of additional particulars submitted by the petitioner on August 19, 2004. The response indicated that between 1993 and 2004, 271 detainees were held in the detention facility, 158 of whom were held by the ISA between April 2002 and March 2003, following operation "Defensive Shield". As stated in the state's response, the ISA no longer uses the detention facility. Of the 113 detainees who were held in the facility (and who were not arrested during operation "Defensive Shield"), 26 were held in the detention facility between 1997 and 2001; that is, on average, three to four detainees per year. Since 1997, detainees were held in the facility for purposes of interrogation only (rather than being held under administrative detention), most for short interrogations periods. With the exception of four detainees who were held in the facility for 54 days, the rest of the detainees were held for periods no longer than 30 days.

17. On December 15, 2004, the court held a second hearing in the joint petitions (**President A. Barak** and Justices **Y. Turkel** and **Y. Adiel**), during which arguments were heard *ex parte* and the court reviewed confidential material. During the hearing, the court made a few suggestions to the state mainly aimed at substantially reducing use of the facility. Counsel for the state, Att. Shay Nizzan, requested time to examine the court's suggestions. Counsel for the state also relayed that at the time, there were no detainees in the facility. In the decision handed down that day, the court instructed that should the need to use the detention facility arise while the state was examining the possibility of restricting its use, notification thereof would be given to the court *ex parte*.

18. On August 15, 2005, further to the suggestions made by the court, the state submitted a supplementary notice in which it noted that:

> Following consideration of the Honorable Court's suggestions by security officials, the latter have decided – with the approval of the attorney general – **to formulate an arrangement which substantively limits use of Facility 1391 for the purpose of holding detainees**. Among the conditions stipulated for holding detainees in the facility, it has been determined that detainees will be held in the facility only upon the approval of an IDF officer holding the rank of Major General and the military attorney general approval thereof. Additionally, as a rule, detainees who are citizens of Israel or residents of the Territories will not be held in the facility." (Emphasis in the original, D.B.)

This notice did not satisfy the petitioner and on August 24, 2005, it submitted its response according to which it would not be satisfied with publication of the physical location of the facility itself, but was seeking its closure. The petitioner further argued that the restrictive arrangement did not resolve the issue arising from the existence of a secret facility, including the fact that publication of the location of a detention facility is a vital guarantee against arbitrary arrest and

enforced disappearances as well as torture and inhuman and degrading treatment. The petitioner added that this conclusion is supported by a number of European Union decisions against secret detention facilities.

19. On January 22, 2006, we held a further hearing in the petitions (Justices **D. Beinisch, M. Naor** and **E. Hayut**). During the session we heard details regarding the arrangement formulated by the state and made further suggestions for restricting use of the detention facility for holding detainees. On January 29, 2006, following the hearing, the state submitted another supplementary response in which it notified that it accepts the recommendation to further restrict use of the detention facility under normal circumstances. The arrangement now establishes three major types of restrictions: **First**, the restrictions relate to the identity of the detainees. The arrangement expressly stipulates that detainees who are citizens of Israel or residents of the Territories will not be held in the facility. **Second**, the arrangement stipulates that only a high ranking official may approve holding detainees in the facility. **Third**, the arrangement stipulates the maximum duration for holding in the facility, which is, in fact, extremely short. Extensive details of the arrangements were attached in a confidential annex for review by the court only. The state further declared in the open section of its notice that: "withholding the physical location of Interrogation Facility 1391 largely stems from the need to protect the secret military base in which this facility is located, the facility itself and those in it from various threats and withholding the physical location of the facility is in no way designed to serve as a 'means of pressure' during interrogations".

20. It shall be noted that following the third hearing and submission of the restrictive arrangement by the state, the parties submitted further supplementary notices, mostly addressing allegations made in the other pleadings. The court, on its part, granted the state time to implement the restrictive arrangement. On August 6, 2006, the state submitted a notification *ex parte* (the notification was sent to the petitioners two days later), which stated that following the military operation against Hizbullah in Lebanon at the time, two detainees, Hizbullah terrorists, were held in the facility as of August 4, 2006. Another detainee apprehended by the IDF during operations in Lebanon arrived at the facility on August 6, 2006. Since this notice by the state dated August 6, 2008 and until today, no further notice regarding holding of detainees in the facility was received. Therefore, presumably, the facility has not been in use since 2006.

Review

21. We have described parties' arguments and the factual chain of events in the petitions at bar at length. We have done so as we have come a long way from the scope of the review which was laid out when the petitions were submitted proceeding to its restriction in the framework of the *order nisi* and ending with the formulation of the restrictive arrangement by the state. We shall rule on the petition in the context of the aforesaid developments.

    As stated, two matters remain to be reviewed. The first and central issue relates to the secrecy of the physical location of the detention facility. The second matter, which is tied to our ruling on the first issue, relates to the possibility of approving visits in the detention facility by MKs at large. We begin with the first issue.

The secrecy of the physical location of the detention facility

22. It shall be stated at the outset that there is no dispute between the parties with regards to the obligations imposed by Israeli law respecting the declaration of a certain site as a place of detention or the obligation to notify a relative or another person selected by the detainee of his arrest and whereabouts (in accordance with Section 7 of the Detention Law and the provision of Section 505 of the Military Jurisdiction Law 5717-1955; and in accordance with Section 33 of the Detention Law respectively). The dispute between the parties revolves around the scope of the duty imposed

by these statutory provisions on the respondents in the circumstances of the matter before us. The petitioner seeks to interpret the statutory provisions literally and linguistically such that the declaration of a detention facility and notification of a person's arrest require reference to an exact physical location. According to the petitioner, this is the interpretation to be given to various provisions of international law referenced by it. On the other hand, the state claims that under an interpretation based on the purpose of the statutory provisions, citing the code name of the detention facility and providing a contact for submitting inquiries and receiving information regarding the detainee suffice to meet the obligations stipulated in the law.

23. Although this is the central legal dispute between the parties, as stated, the gaps between their positions are wider than the formal, restricted dispute. The petitioner, as indicated by its arguments, is not interested merely in the publication of the physical location of the detention facility. This location, it argued before the court, has already been publicized in a certain newspaper article. According to the petitioner, the very existence of a secret facility is unacceptable both of itself and particularly due to the possible results of its operation.

    It should be recalled that the petition was filed in the context of the publication of a newspaper report regarding the existence of a secret detention facility the location of which as well as the conditions of holding detainees therein were confidential and concealed from the public. Yet, submission of the petition has significantly taken the sting out of the argument regarding the possible repercussions of operating a secret detention facility. As we have previously noted, prior to submission of the petition there were a few media reports in which allegations of the purported existence of a secret detention facility were made. Following submission of the petitions, and apparently following the hearings we have held, the secrecy of the detention facility has been brought for reconsideration by the officials in charge of the issue. Whether or not the existence of the detention facility was known prior to submission of the petition – and we are not addressing the situation prior to the hearing of the petition – in the course of the hearing before us, the state confirmed the existence of the detention facility and was prepared to provide details thereof, most in open court and some *ex parte*. The state has also taken upon itself an arrangement which restricts the possibility of bringing detainees to the facility and interrogating them therein in a manner which significantly decreases use of the facility. As stated, according to information provided to us recently, in 2009, between 2006 and the present day, no detainees were held in the facility.

24. In addition to publication of the existence of the detention facility and restriction of its use, the state also notified the court and the petitioners that withholding the location of the detention facility stems from it being located inside a secret military base. The state noted that the secrecy of the location of the facility is not used as a "means of pressure" during interrogations. The state also guaranteed that certain details regarding the location of the detention facility would be provided to detainees remaining therein. Moreover, it has been declared before us, that upon the arrest of an individual, notification of the arrest is provided to the relevant persons, in accordance with legal requirements. Such notification is also given to the IDF Detention Facilities Control Center (the control center), which gathers data regarding the identity of detainees and places of detention. The control center has been instructed to provide anyone who contacts it regarding a person held in the facility that the detainee is held in a facility referred to as 1391. Requests for meetings with an attorney, relatives or representatives of international organization can be sent to this address.

25. Considering these developments, it is difficult to say that there is room for comparing the facility which is the subject matter of this petition to another type of secret facilities to which the petitioner refers in its pleadings. The existence of such detention facilities, where detainees are brought with no one knowing what befell them or where they are, has been denied – so according to the publications attached to the petitioner's brief and referring to detention facilities which allegedly exist in Europe. The factual reality with regards to the detention facility which is the subject of the

petitions at bar is entirely different. The existence of the detention facility is known and is not denied by the state. According to procedures that have been put in place, holding detainees in the facility is subject to authorization by high ranking officers and the duration of holding detainees in the facility is extremely limited. Notification of a person's detention is given to the relevant individuals and people do not "disappear" when brought into the facility. The notification which is given to the relevant individuals is not limited to stating that the detainee is held in Israel, but includes specific reference to the fact that he is held in Facility 1391. Additionally, these individuals are provided with a contact for inquiries and requests with respect to the detainee. Unless there is a preclusion anchored in statutory provisions, the detainees are provided with an opportunity to meet with an attorney.

26. Additionally, holding detainees in the facility is subject to rules which uphold the provisions of Israeli law and the principles of international law and there is no room to accept the petitioner's argument that the secrecy regarding the **physical** location of the detention facility violates international law. The provisions of international law cited by the petitioner were not designated, in principle, to regulate incarceration in detention facilities such as Facility 1391, namely, a facility whose physical location only is withheld. These provisions were mainly designated for confronting the phenomenon of enforced disappearances; a phenomenon which has been revealed in certain regimes and which the international community battles. Thus, for example, the petitioner cited a number of declarations made by the Committee on Legal Affairs and Human Rights of the Council of Europe allegedly rebuking the existence of secret prisons in unidentified countries in Central and Eastern Europe. People are purportedly held in these prisons incommunicado, without anyone knowing that they are being held there. The petitioner also attached various materials and documents relating to criticism of the existence of such facilities, however, all the examples presented are far removed from the matter at hand.

The detention facility, as we previously noted is not a facility whose existence is denied and detainees, if and inasmuch as they are held therein, do not lose the rights granted to any detainee in the State of Israel. The existence of the facility has been confirmed by the state in the proceedings before us and the state also provides international organizations with details of the facility in the context of official reports. Detainees brought to the facility do not "disappear". As stated, using methods accepted with respect to all individuals detained by the IDF, the relatives of the detainee or a competent official are notified of the arrest, as the case may be respective to each detainee. The detention facility is also subject to supervision by various officials in the military advocate general's office and its use is subject to the various conditions undertaken by the state in the framework of the restrictive arrangement. In these circumstances, use of the detention facility is not on a par with enforced disappearances of individuals in any way; particularly in view of the definition of an "enforced disappearance" as recently adopted in the International Convention for the Protection of All Persons from Enforced Disappearance, which came into effect in late 2010. Section 2 of the Convention sets forth:

> For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Namely, denial that a person is in custody and his incarceration in a secret location are at the crux of the enforced disappearance. Note well: this does not relate to incarceration in a detention facility

whose physical location is kept secret, but to an incarceration facility the very existence of which is denied in a manner which places the detainee outside the protection of the law. As stated, this is not the case with respect to detainees in Facility 1391.

27. Articles 23 and 70 of the 3rd Geneva Convention, cited by the petitioner in its pleadings, were not designed to address a detention facility such as the detention facility in the petition at hand. These Articles relate to a situation of war between two powers, in which prisoners recognized as prisoners of war were taken. The provisions formulated in these Articles were designed to prevent phenomena which took place during World War II and form which the international community has drawn lessons which are expressed in these provisions. The principles adopted by the General Assembly of the United Nations, also cited by the petitioner, do not support deviation from the conclusion that use of the detention facility – in its current format and noting the restrictive arrangement undertaken by the state – does not contravene the provisions of Israeli and international law. The principle stipulating the obligation to record various particulars relating to the arrest and whereabouts of an individual and the principle establishing the right of the detainee himself, or the appropriate authority, to notify relatives or other individuals selected by the detainee, of his arrest and whereabouts, have also been anchored, with certain changes, in Israeli law. As stated, Israeli law imposes an obligation to declare a certain site as a place of detention. With respect to these duties, the state argues that they can be met such that all the information relevant to the arrest and required for the protection of the detainee is transmitted without providing the specifics of the physical location of the detention facility. The state declared before us that noting the exact physical location of Facility 1391 immediately upon arrest is not necessarily required. It maintains that the obligation to notify of a person's arrest in Israel and of his whereabouts is met by the notification that the person is located in Facility 1391 and the provision of a contact for inquiries and requests regarding the detainee. This obligation effectively accomplishes the purposes underlying the notification duty: preventing the enforced disappearance of individuals and giving the detainees' relatives and attorneys the possibility to provide them with the assistance they may require.

For the security reasons presented before us and relating to the nature of the military base where Facility 1391 is located and to which detainees are brought, if and when such are brought, for interrogation and in view of the state's undertaking not to hold detainees in the facility beyond a limited and extremely brief duration not exceeding the number of days noted by counsel for the state in the annex to the second supplementary response on behalf of the state attorney's office, submitted for review by the court only (section 7 of the annex), indeed it is possible to rule that even if the arrangement formulated by the state injures the rights of the detainees and their relatives to receive accurate information regarding the physical location of the detention facility, this injury is proportionate, considering the overall circumstances and guarantees declared by the state. As previously noted, there is no, heaven forefend, phenomenon of enforced disappearances with all the repercussions thereof. Detention in Facility 1391 is subject to the provisions of both Israeli law and international law and notification of the detention is indeed given to the relevant individuals, and, as undertaken by the state in the restrictive arrangement, such notification is also delivered to the attorney general. The rest of the detainees' rights are also upheld in the detention facility. As such, the issue under dispute, which is rather restricted, is the issue of the physical location of the facility; particularly considering the petitioner itself confirmed that it no longer ascribes significance to disclosure by the state on this issue. **Nevertheless**, we see fit to note that should the state seek to hold detainees in the facility for a duration exceeding that which was determined in the restrictive arrangement, it shall be obligated to relay the physical location of the detention facility also and merely citing the code name for the detention facility and providing a contact for inquiries will not suffice.

28. Considering the above, in view of the developments with respect to detention in the facility at the present time and the measures taken by the state to prevent concealment of the detention itself, the question of the geographic location of the facility has become less important. Indeed, one cannot ignore the fact that significant progress has been made since the petition was submitted, progress to which submission of the petition greatly contributed. As stated, as we initially maintained that use of the detention facility raises difficulties, over the course of the hearings, several suggestions were presented to the state with a view to significantly reducing use of the facility. Our suggestions were considered by the state. Some were accepted in the restrictive arrangement. Naturally, we are unable to expose the details of the arrangement brought for our review *ex parte* in the context of the judgment, but it is apparent that effort was indeed made to restrict use of the facility to circumstances of imperative security necessity. The restrictive arrangement currently places obligations on the state when seeking to hold a detainee in the detention facility, including the requirement to receive authorization from high ranking officials for using the facility. The duration of holding detainees in the facility has been significantly restricted and it was determined that no residents of Israel or residents of the Territories would be held therein. The fact that no detainees were held in the facility between 2006 and the present day indicates that the restrictive arrangement has indeed significantly limited use of the detention facility, apparently, as part of ensuring it is used only when there is an imperative security need to do so.

29. The state's pledge, also given in the context of the hearing before us, that detainees held in the facility, if and when such are held, shall have the right to meet with attorneys and representatives of international organizations (inasmuch as the same has not been restricted due to the requirements of the interrogation as per the conditions stipulated by law), remains intact. As for the facility itself, indeed, we have been convinced, by the overall material presented to us, that the facility is routinely inspected by various legal entities and other review bodies. As noted above, parliamentary supervision has also been made possible under certain conditions. The review bodies will presumably hold thorough inspections of the holding conditions and ensure that they are in keeping with the law. In any event, as noted in the court's decision dated December 1, 2003, the possibility of contacting the competent officials and turning to the court in individual cases, inasmuch as the need arises, remains intact.

    Considering the restrictive arrangement undertaken by the state, and subject to our finding in §27 that should the state seek to hold detainees in Facility 1391 for a duration exceeding that stipulated in the restrictive arrangement, it shall be compelled to relay the physical location of the detention facility, the petition in HCJ 9733/03 must be rejected. It should be noted that whilst the petition was pending before this court, the respondents were obligated to notify the court when Facility 1391 was being used. Following delivery of this judgment, the obligation to notify the attorney general of detentions in Facility 1391, as pledged by the respondents in the restrictive arrangement, will remain intact.

Knesset member visits to the detention facility

30. We reached a similar conclusion also with respect to the petition in HCJ 8102/03. We accept the state's position that the balance among the various interests in the case at bar justifies restricting visits by MKs at large to the detention facility and that allowing such a visit for MKs who are members of the Secret Services Subcommittee of the Foreign Affairs and Defense Committee is satisfactory.

31. Section 9(a) of the Knesset Members Immunity Law stipulates:

> A direction prohibiting or restricting access to any place within the State other than private property, shall not apply to a member of the Knesset,

> unless the prohibition or restriction is motivated by considerations of State security or military secrecy.

Section 9(a) was designed to protect Knesset members' freedom of movement, which they require in order to perform their duties and hold parliamentary supervision (see for example, Amnon Rubinstein and Barak Medina, **The Constitutional Law of the State of Israel**, Vol. 2: Government and Civil Authorities 686 (6th edition, 2005). For this purpose, MKs were granted immunity from restrictions on freedom of movement. The immunity stipulated in Section 9(a) is mainly designed to prevent MKs from being subjected to certain movement restrictions which may be imposed on the general public. The provision of Section 9(a) is broad and general. Therefore, its implementation in every specific case requires a balance among the overall relevant interests (see Rubinstein and Medina, *ibid.*).

32. As contended in the state's pleadings, the provision of Section 9(a) was interpreted by the attorney general in directive no. 21.406. Under the instruction of the attorney general it was found that the provision of Section 9(a) was not designed to entitle an MK to enter a site which the entire public is prevented from visiting. Rather, the purpose of Section 9(a) is:

> To ensure that actions of the administration limiting public access to a site, subjecting it to conditions etc. – do not apply to members of the Knesset, namely, so long as some part of the public may access a certain site, the MK shall always have his share. In other words, Section 9 denies the right of the governing authorities to place prohibitions and limitations that apply to members of Knesset (with the exception of the security and military prohibition as stated in the Section). If one seeks to restrict public access to a certain locality due to an event,… indeed this does not apply to a member of Knesset; places which some of the public may reach, may be reached by him as well. However, the Section does not confer access rights to sites which no 'part of the public' is entitled to enter. (Members of Knesset Immunity, **Attorney General Directives** 21.406, 5-6 5733).

The attorney general proceeds to determine that "the provision of Section 9 of the Knesset Members Immunity Law does not point to an intention to allow an MK entry into a police or prison facility" (*ibid.*, p. 7). For the above detailed reasons, and in view of the purpose of the provision of Section 9, which was designed to guarantee freedom of movement for members of Knesset, we accept the attorney general's directive.

33. This conclusion is also relevant with respect to visits by MKs to Facility 1391. The balance struck on the basis of the statutory provision ensures that on one hand public interest is served by the performance of parliamentary supervision over the detention facility, including, as noted by Gal-On in her pleadings, inspection that detainee rights are not violated therein. However, on the other hand, there is a public interest in maintaining the secrecy of the physical location of the detention facility due to pure and vital security necessities which were presented to the court. In balancing the two interests, the state suggested to allow visits by MKs serving on the Secret Services Subcommittee of the Foreign Affairs and Defense Committee. We are of the opinion that this is an acceptable balance. It allows parliamentary supervision without compromising the security reasons underlying the secrecy of the physical location of the detention facility. This, due to the fact that members of the subcommittee are exposed to state secrets by nature of their position. Once we have found that there is a substantive security need due to which the physical location of the detention

facility is kept confidential, it cannot be said that the balance struck by the state between the need for parliamentary supervision and safeguarding the security requirement is not proportionate.

34. In these circumstances, and considering the fact that Section 9(a) has not vested MKs with a right to visit detention facilities *ab initio*, the petition is rejected. This, as stated, subject to the state's notification that it would allow visits by members of the Secret Services Subcommittee of the Foreign Affairs and Defense Committee.

In conclusion, subject to our comments in paragraphs 29 and 34 above, the petitions are hereby rejected. In the circumstances of the matter, there is no order regarding costs.

President

Justice M. Naor

I concur.

Justice

Justice E. Hayut

I concur.

Justice

Ordered as stated in the opinion of President D. Beinisch.

Given today, 15 Shvat 5771 (20 January 2011).

President Justice Justice