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Jonathan Grebinar, J.D. candidate, Fordham University School of Law, 2004; B.S. in Business Administration, Finance, University of Florida Honors Program, 2001. I would like to thank Professor Abraham Abramovsky whose Law and Terrorism seminar inspired this Comment. I would also like to thank the editors and staff of the Fordham Urban Law Journal for their time and dedication.

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RESPONDING TO TERRORISM: HOW MUST A DEMOCRACY DO IT? A COMPARISON OF ISRAELI AND AMERICAN LAW

Jonathan Grebinar*

INTRODUCTION

Terrorism has become commonplace in the world today.¹ In the past decade, the United States was, for the first time, the victim of terrorist attacks on its own soil.² Conversely, the State of Israel has been engaged in a perpetual struggle with terrorism since the day of its founding in 1948.³ As democracies, the United States and Israel⁴ are subject to a great deal of criticism with respect to legislation used to combat terrorism. Responding to terrorism, a question often arises regarding the measures that a democratic state may legally apply in order to effectively protect its citizens and yet

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4. The Israeli declaration of independence unequivocally created a democracy: The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

The Declaration of the Established State of Israel (May 14, 1948).
continue to honor human rights. The ability of a democratic state to efficiently defend itself from terror is a difficult task and ultimately reflects the moral integrity of the state. Maintaining the balance between public safety and human rights is presumably harder today, considering recent suicide bombings. For the United States, protecting against terrorism is especially challenging, considering it has seldom been seen throughout American history. Nonetheless, the United States government has taken numerous steps in response to the new issues it faces arising from the September 11th attacks on New York and Washington, D.C.

This Comment compares the Israeli and American laws that sanction controversial responses to terrorism. It discusses criticisms of these laws with respect to human rights violations and how, if at all, the two governments strive to preserve their law's effectiveness without violating international standards. Part I of this comment briefly discusses the origins of terrorism and establishes a universal definition for the word. Part II reviews the history of three Israeli responses to terrorism, including 1) administrative detention, 2) torture, and 3) the demolition of houses; and describes how these tactics are criticized domestically as well as internationally. Part II further illustrates the present status of relevant Israeli statutory and case law. Finally, Part III discusses comparable measures recently taken by the United States and how these responses are criticized. The importance of a democracy's need to "respond appropriately" to terrorism and the difficulty that flows with it will be stressed throughout this comment.


7. Id. See generally Margot Dudkevitch, Dolphinarium Attack Planner Nabbed, JERUSALEM POST, Nov. 21, 2002, at 2 (discussing the increasing frequency of suicide bombings).

8. See Gross, Democracy's Struggle, supra note 5, at 166 (noting that Israel is "currently facing a war the like of which few states have known in the past"). The Japanese kamikazes operating during World War II are perhaps the best-known example of suicide bombers. These actions, however, were committed by soldiers facing the soldiers of their enemy and hence were different from the modern day suicide bombers. Id.

9. See infra Part III.

10. Specifically, detention, the freezing or blocking of assets, and torture.
I. THE ORIGIN AND DEFINITION OF TERRORISM

The word "terrorism" originated during the French Revolution, when the French government instituted the "Reign of Terror" to execute political opponents, seize their property, and force the rest of the population into submission. Today, the word terrorism has taken on a new meaning. Scholars agree that terror cannot be clearly defined. England, however, attempted to define "terrorism" in part 20 of the British Prevention of Terrorism ("Temporary Provisions") Act of 1989. According to the Act, "terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."

The Fourth Geneva Convention, adopted in 1949, similarly provides that an act of violence against the population, against civilians who are not combatants, for political, ethnic, racial or religious reasons, will be regarded as a terrorist act.

Even with the numerous meanings given to the word terrorism, a majority of the definitions possess a common basis: terrorism is the use of violence against civilians or non-military targets in order to achieve a particular purpose.

II. ISRAELI RESPONSES TO TERRORISM

A. Administrative Detention

The literal definition of administrative detention is detention carried out by an administrative power and not by a judicial power or authority. This definition, however, does not make clear the

14. Id.
17. Emanuel Gross, Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?, 18 Ariz. J. Int'l & Comp. L. 721, 752 (2001) [hereinafter Gross, Human Rights] ("[D]etention is considered administrative detention if . . . it has been ordered by the executive alone and the power of decision rests solely with the administrative authority.").
substance and nature of administrative detention. Administrative detention, often referred to as preventative detention, is commonly understood as imprisonment without trial. For purposes of this comment, administrative detention is treated as the latter.

1. International Law on Administrative Detention

Over the past year and a half, the number of Palestinian detainee residents of the occupied territories has reportedly increased from 12 to 929—an increase of almost 8,000 percent. In a 1999 public report discussing administrative detention, Amnesty International acknowledged that Israel, as a High Contracting Party to the Fourth Geneva Convention, has been in violation of the Convention for more than thirty years. Specifically, Israel is in violation of Article 147 of the Geneva Convention, which labels the "willful deprivation of the rights of a fair and regular trial" a grave breach of the Convention. To critics, this infringement represents just one of many instances in which Israel has


19. Id.


22. A High Contracting Party is the terminology used to refer to a party to an international convention.


24. Geneva Convention (IV), Aug. 12, 1949, Part III, sec. 1, art. 147. Article 147 states in full:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.
failed to demonstrate a serious commitment to ensure compliance with international humanitarian law.25

2. History of Israeli Law

a. Upon The Declaration of Independence

Israel (Palestine) was under the control of the British Mandate26 until May 1948, when it declared its independence.27 Contemporaneously with it's Declaration of Independence, Israel adopted the Defense (Emergency) Regulations of 1945, which the British Mandatory Regime had introduced.28 Regulations 108 and 111 empowered the High Commissioner and Military Commander to order the detention of a person if either official believed it necessary for maintaining public order or securing public safety or state security.29

b. Reform Achieved in 1979

Finally, in 1979, after repeated efforts,30 the detention laws of Israel were reformed and a new Israeli statute was enacted—the

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25. See An Abdication of Responsibility, supra note 23. ("Israel has reportedly stated that it would not attend the re-affirmation meeting taking place on 12/5/2001."); see also Amnesty Int. On-line, Israel: Respect of Fourth Geneva Convention must be ensured by High Contracting Parties meeting in Geneva, at http://web.amnesty.org/ai.nsf/Index/MDE15108200 (last visited Dec. 4, 2003) (discussing Israel's claim that the Geneva Convention and the UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment do not apply to the Occupied Territories).

26. After WWI a mandate system was established by article 22 of the Covenant of the League of Nations as formulated at the Paris Peace Conference over the first half of 1919. *Palestine Facts: World War I British Mandate*, at http://www.palestinefacts.org/pf/wwi_british_mandate.php (last visited Dec. 2, 2003). Under this article it was stated that the territories inhabited by peoples unable to stand by themselves would be entrusted to advanced nations until such time as the local population could handle their own affairs. *Id.* In the case of Palestine, which at the time consisted of what is today known as Israel and Jordan, the administrative control, in the form of a Mandate, was given to the British. *Id.*


29. Harold Rudolph, The Judicial Review of Administrative Detention Orders in Israel, 14 ISR. YEARBOOK ON HUM. RTS. 148, 152, 173 (1984). Prior to Israel's independence, these laws were used by the British Mandate primarily against members of Jewish underground organizations. *Id.* at 149. Accordingly, many criticized Israeli adoption of the laws and pressured its government to reform the laws. Shetreet, supra note 28, at 185.

30. The first major attempt to amend the law was in 1951 when the administrative detention of a group of anti-Zionist, ultra-Orthodox Jews, called the "Religious Underground," made the headlines. Gross, *Human Rights*, supra note 17, at 755.
Emergency Powers (Detention) Law of 1979 ("Administrative Detention Law"). The new law gave more rights to detainees than did the pre-existing regulations. The following provisions of the Administrative Detention Law comprise the significant modifications of the previous law:

1) If authorities do not bring the detainee before the President of the District Court within forty-eight hours from the start of detention, the detainee must be released unless some other ground for detaining him exists.

2) The detainee must be present in court during the hearing of his case.

3) A detainee has the right to be present in court at the time of confirmation of the detention order and in the legal proceedings thereafter, unless the judge believes that State security requires otherwise.

4) The orders of the Minister of Defense are limited in time; they are valid for six months only, however, the Minister may extend the order for additional periods of six months.

5) The Chief of the General Staff has subsidiary power. If the Chief of the General Staff has reasonable cause to believe that conditions exist permitting the Minister of Defense to make an order, the Chief of the General Staff, and only he, may issue a detention order not exceeding forty-eight hours. He has no power to extend the forty-eight-hour period and these powers cannot be delegated.

The Administrative Detention Law also adds a further level of judicial scrutiny. Detention must be judicially reviewed three months after the district court confirms the order; thereafter, the President of the district court must re-examine the decision to detain every three months.

Furthermore, the detention order must be the sole available means of achieving the desired result, and if means other than a

31. Emergency Powers (Detention) Law, 1979, S.H. 76. Initially, the new laws only applied to Israel. In 1980, however, they were further applied to the Occupied Territories. Following the violent uprising in 1987, known as the Intifada, Military Order 1229 was given and made similar but more harsh guidelines with respect to administrative detention in the Occupied Territories. Administrative Detention: The Practice of Imprisonment Without Trial or Continuing Imprisonment After the Completion of Sentence, at http://www.geocities.com/onemans_mind/jc/HRW01.html (last visited Dec. 2, 2002).


34. Id.

detention order are available, the judge must declare the order invalid.\footnote{36}

The Administrative Detention Law only applies once the Knesset\footnote{37} has declared a state of emergency.\footnote{38} This, however, has virtually no substantive implications, since Israel has been in a declared state of emergency since its establishment.\footnote{39}

c. Further Developments in the Administrative Detention Law

Human Rights organizations continued to criticize Israeli policies on administrative detention despite the new procedural rights afforded to detainees through the Administrative Detention Law.\footnote{40} On April 20, 2000, the Supreme Court of Israel called for the "further hearing"\footnote{41} of Anon v. Minister of Defence to deal with this issue.\footnote{42}

\begin{flushleft}
\textit{Citation:} Rudolph, \textit{supra} note 29, at 157.
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\textit{Citation:} Asher Maoz, \textit{The Institutional Organization of the Israeli Legal System, in Introduction to the Law of Israel} 11, 15 \textup{(Amos Shapira & Keren C. DeWitt-Atar eds., 1995)}. Subsequent to its independence, in 1948, Israel created temporary central institutions of government. \textit{Id.} Shortly thereafter, a constituent assembly was elected. In its first legislative act (the Transition Law, 1949) the constituent officially established itself as the "legislative body" of the state of Israel and it adopted "Knesset" as its name. \textit{Id.} Knesset is the Hebrew term for Assembly.
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\textit{Citation:} Israeli Law, \textit{supra} note 18.
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\textit{Citation:} \textit{Id.} As a result of the war the Arab countries waged against Israel, the government of Israel declared a state of emergency immediately after the declaration of the State of Israel in 1948. \textit{Id.} That initial declaration of a state of emergency remained in effect for many years without being reviewed by the legislature. \textit{Id.} In 1992, Israel adopted a different way of declaring the persistence of the state of emergency. In accordance with Section 49 of Basic Law: the Government, the Knesset, may declare a state of emergency for a period of up to one year, which period may be extended from time to time. Gross, \textit{Human Rights, supra} note 17, at 792 n.18.
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\textit{Citation:} A "further hearing" is a special procedure by which the Supreme Court considers a difficult issue it has previously decided. Gross, \textit{Human Rights, supra} note 17, at 721.
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\textit{Citation:} \textit{Id.} (citing Further Hearing \textup{[F.H.] 7048/97, Anon v. Minister of Defence, 54(1) P.D. 721, 743 (Isr. 2000)}). The petition to the court came from several Lebanese citizens who were detained after they had completed their prison sentences. In accordance with the Administrative Detention Law, the Israeli government extended the period of detention of the prisoners on several occasions. \textit{Id.}
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Although the question before the bench in Anon was a narrow one with respect to the Administrative Detention Law, the court ruled on the general provisions of the law as well.

In relevant part, Section 2(a) of the Administrative Detention Law provides:

Where the Minister of Defence has reasonable cause to believe that reasons of State security or public security require that a particular person be detained, he may be order under his hand, direct that such person be detained for a period, not exceeding six months, stated in the order.

In Anon, Chief Justice Barak held that the term "reasons of state security," used in Section 2 "was sufficiently broad to embrace events where the danger to the security of the state or public did not ensue from the particular person himself." He stated that he was not content with a "linguistic" interpretation of "reasons of state security" and that the law had to be interpreted accordingly. Barak definitively held that a democratic society may hold a person in administrative detention only if such person poses a "direct threat and real danger to the State." "In other words, if the de-

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43. The Lebanese petitioners were being held by the Israeli government in efforts to strike a bargain with the Lebanese government regarding the return of captured Israeli soldiers. Id. at 723. The narrow question before the court was whether detention for reasons of state security, as set forth in the Administrative Detention Law, included detention solely for the purpose of creating "bargaining chips," specifically in negotiations with terrorist organizations that could supply information about the missing Israeli soldier Ron Arad. Id.

44. Id.


46. Gross, Human Rights, supra note 17, at 726 (citing Anon v. Minister of Defence, 54(1) P.D. 721, 743 (Isr. 2000)).

47. Id. In Anon, Justice Barak recognized that "[t]he purpose behind every law has both objective and subjective elements." Id. From the subjective point of view, Chief Justice Barak clarified that there was nothing in Knesset's various bills that showed the legislature intended a particular purpose to be considered in the interpretation of the law or that enabled the detention of a person who did not directly imperil the security of the State or the public. Id.

As for the objective purpose, it has to be weighed against basic values that the law seeks to preserve. The Administrative Detention Law's objective goals are (1) the preservation and protection of State security and (2) the preservation of the basic values of dignity and freedom vested in every person. Chief Justice Barak noted that in seeking to understand the scope of these basic values and the proper balance between them in cases of administrative detention, a genuine, difficult and intense conflict is encountered.

Id.

48. Id. at 727.
tainee were released, he would likely threaten the security of the state and the ordinary course of life." 49

d. Present Status of Administrative Detention in Israel

Those familiar with the progression of the administrative detention laws in Israel acknowledge that the Supreme Court of Israel is more willing to intervene than it used to be when ruling on a security decision. 50 Today, the Court's attitude is that everything is subject to judicial review; Chief Justice Barak has encapsulated this approach in the phrase "everything is justiciable." 51 To this day, many people and organizations debate exactly what is permitted under Israeli detention laws. 52 Despite the rights newly afforded to detainees in Israel and the Occupied Territories, 53 many still feel that the present application of the Administrative Detention Law undermines basic human rights and blatantly opposes relevant international laws such as the Fourth Geneva Convention. 54

B. Torture

1. Definition of Torture?

Before analyzing the effectiveness and appropriateness of employing torture as a response to terrorism, it is necessary to decide what may be deemed "torture." There is, however, no agreed upon definition of the word. 55 Article 3 of the European Convention for the Protection of Human Rights acknowledges a distinction between torture and inhumane or degrading treatment, but fails to clarify the meaning of torture. 56 The European Court of Human Rights has held that the difference between these categories is determined by the amount of suffering one experiences and has defined torture as the deliberate use of inhumane treatment that causes severe and cruel pain and suffering. 57 Professor Daniel Stetman, a well-respected scholar on torture, asserts that there is a

49. Id. at 752 (citing A.D.A. 1/82, Kawasma v. Minister of Defence, 36(1) P.D. 666, 668-69 (Isr. 1982)).
50. Id. at 758.
51. Id.
52. See id. at 759-60.
53. See discussion supra Part II.A.2.b.
54. See Administrative Detention: Despair, Uncertainty and Lack of Due Process, supra note 40.
56. Id.
difference between terrorist torture and interrogational torture.  

Other than the aforementioned, a widely accepted definition of torture is found in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.  

Article 1 states:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

2. International Law

Notwithstanding the differences found among the various definitions of torture, international law explicitly prohibits torture and any use of physical force or the intentional infliction of mental suffering in interrogation—even if restricted to life-saving cases. As

58. See Daniel Stetman, The Question of Absolute Morality Regarding the Prohibition on Torture, 4 LAW & GOV'T 161, 162 (1997) (defining terrorist torture as torture aimed at deterring those members of the group to which the suspect is affiliated by instilling fear in the group so that they shall cease their activities; defining interrogational torture as the infliction of severe physical or mental pain during the course of the interrogation, with the purpose of extracting certain information from the suspect, and not exclusively for the purposes of deterrence or instilling fear.)


60. Id.

61. B’Tselem: Israeli Information Center for Human Rights in the Occupied Territories, Torture: International Law, at http://www.betselem.org/english/Torture/International_Law.asp (last visited Dec. 2, 2001) [hereinafter B’Tselem: Torture: International Law]. Article 5 of the Universal Declaration of Human Rights, which the UN General Assembly adopted on 10 December 1948, states that, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Id. Article 147 of the Fourth Geneva Convention of 1949 classifies “torture or inhuman treatment” and “willfully causing great suffering or serious injury to body or health” as “grave breaches” of the Convention, all of “which are the equivalent of war crimes” under international law. Id. Further, Article 31 of the Fourth Geneva Convention of 1949 directs that, “No physical or moral coercion shall be exercised against
per international law, torture is treated like slavery, genocide, and war crimes, and is deemed unjustifiable at all times and in all circumstances. The U.N. Convention Against Torture states that "[n]o exceptional circumstances . . . may be invoked as a justification for torture." While the reasons for this prohibition are numerous, two are commonly accepted as the most obvious: 1) the physical and mental integrity of the person must be honored, as democracy is based upon respect for such a security; and 2) evidence obtained through the use of torture is inherently unreliable as doubts as to the validity of confessions and information elicited by force are immediately formed.

3. History/Succession of Israeli Law

a. Aftermath of the Landau Commission

Until recently, Israel was the only democratic country in the world whose judiciary had legally sanctioned the use of torture as a legitimate means of extracting confessions and other information from suspects during interrogation. The government of Israel employs its General Security Service ("GSS") as the principal body responsible for the fight against terrorism. Sanctions gave the GSS the exclusive right to implement special measures during such interrogations.

protected persons, in particular to obtain information from them or from third parties." Id. Article 3 of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, unanimously adopted by the U.N. General Assembly in 1975, states: "No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment." Id.

62. Id.
63. UN Convention Against Torture, supra note 59, art. 2.
Specifically, a 1987 governmental report (the "Landau Commission") recommended that the GSS exercise the use of "moderate physical and psychological pressure" on Palestinians suspected of "security" offenses. The Landau Commission concluded that in certain circumstances, the use of "a moderate measure of physical pressure" in the course of interrogation is justified by the defense of necessity. In response to the practices authorized by the Landau Commission, in 1997 and 1998, the U.N. Committee Against Torture deliberated on Israel's use of "moderate pressure" and unanimously ruled that the GSS interrogation methods constituted torture.

b. The Decision in the GSS Torture Case

Finally, on September 6, 1999, the issue of torture was decided by the Supreme Court of Israel. The decision was made in response to seven petitions to the Court made by human rights organizations on behalf of Palestinian interrogees. That same day, a nine-judge panel of the Supreme Court unanimously outlawed methods of physical force that were routinely used during interrogations by the GSS. The court held, in opposition to the Landau Commission Report, that the defense of necessity does not con-
stitute a source of authority allowing GSS investigators to make use of physical means during the course of interrogations. The panel explicitly stated that such authority “must be rooted in an authorization prescribed by law.”

4. Present standing of Torture Law in Israel

Despite this breakthrough decision, many criticize the judgment of the High Court. Some feel that, notwithstanding the restrictions on the GSS imposed by the ruling, much more must be done before the use of torture in Israel and the Occupied Territories is finally put to rest. Some feel that the panel’s recommendation that the Knesset enact legislation that will enable the GSS to engage in similar activity effectively renders the decision meaningless in advancing the cause of the rule of law in Israel.

the “lesser evil”—harming the suspect for the purpose of saving human lives—the “necessity” defence shall be available to him. GSS Torture Case, supra note 66.

75. GSS Torture Case, supra note 66 (emphasis added). The court went into lengthy discussion about the defense of necessity and its effect on interrogations. Id. They made clear that even though the defense of necessity may be available, after the fact, to absolve an investigator of criminal liability, it will not authorize an infringement of human rights. Id.

76. Id. The panel stated:

[i]f the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. This release would flow not from the “necessity” defense but from the “justification” defense which states: ‘A person shall not bear criminal liability for an act committed in one of the following cases: (1) He was obliged or authorized by law to commit it.’

Id.

77. See Imseis, supra note 64, at 330.

78. Id. at 349. The following are other alleged deficiencies of the High Court’s opinion:

1) “its failure to review other harsher methods of torture that GSS interrogators have been implicated in using;” Id. 2) “its failure to scrutinize the undoubtedly abusive interrogative activities of the IDF and the Israeli police force;” Id. 3) “its refusal to examine the torture and ill-treatment that occurs during the post-arrest/pre-interrogation period;” Id. and 4) “its overly simplistic contextualization of the case before it as merely requiring a balance between respecting the liberty rights of “hostile terrorists” and protecting the ‘security’ of the state.” Id.
C. Demolition of Houses

1. Israeli Law

Another measure frequently taken by Israel in response to acts of terror is the demolition of homes of alleged terrorists.\(^{79}\) Israeli law justifies such activities based on Regulation 119 of the Defense (Emergency) Regulations of 1945.\(^{80}\) Regulation 119 empowers the military commander to order the demolition of a house and to confiscate the land on which it is built.\(^{81}\) In relevant part, Regulation 119(1) of the Defense Regulations provides:

A military commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land from in which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown detonated, exploded or otherwise discharged or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence, and when any house, structure or land is forfeited as aforesaid, the Military commander may destroy the house or the structure or anything in or on the house, the structure or the land.\(^{82}\)

The terms of Regulation 119 clearly give the military commander broad power to respond to terrorist acts that impair the security of the population or threaten public order.\(^{83}\) One issue that arises from Regulation 119 is whether it is just to allow an administrative authority, vis-à-vis a judicial authority, to order a house demolition.\(^{84}\) Opponents of this deterrent method argue that by granting a governmental authority power that, in a democratic regime, characteristically belongs to the judiciary, it blatantly violates basic


\(^{80}\) Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 119, para. 2 at 1089 (Supp. II Sept. 27, 1945) [hereinafter Defense Emergency Regulations].

\(^{81}\) *Id.*

\(^{82}\) *Id.*

\(^{83}\) See Gross, *Democracy's Struggle*, supra note 5, at 186.

\(^{84}\) *Id.* at 186-93.
human rights by punishing a person without due process. On the contrary, advocates of this approach assert that even a democratic state, finding itself in a grave predicament, such as the state of war, must equip its commanders with effective tools to provide an immediate response to terrorist acts—including not only “sophisticated weaponry”, but also legal tools that can provide for the immediate deterrence of potential terrorists.

2. International Law

Various international instruments label the demolition of houses in Israel as collective punishment. Article 33 of the Fourth Geneva Convention defines collective punishment as punishment of an individual for an offense he or she has not personally committed. Article 33 unequivocally prohibits collective punishment: “[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”

Moreover, the demolition of houses is explicitly forbidden by international law. Article 53 of the Geneva Convention reads:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The International Committee of the Red Cross defines the vague term “military operation[s]” as “movements, maneuvers, and other actions taken by the armed forces with a view to fighting.”

The Hague Convention of 1899 is another international instrument that prohibits collective punishment. Article 50 of the Hague Convention reads: “[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of

85. Id.
86. Id. at 187.
89. Id.
90. Id. at part III, sec. 3, art. 53.
91. Id. (emphasis added).
92. B’tselem: House Demolitions, supra note 79.
individuals for which they cannot be regarded as jointly and sever-
ally responsible.993

Many sources prohibit collective punishment, thus denying the
legality of Regulation 119.94 The primary criticisms of Regulation
119 can be summed up as follows:

1) Regulation 119 violates the prohibition on collective
punishment.
2) Regulation 119 violates the prohibition on violating the right
of property.
3) Regulation 119 violates the provision of the international law,
that provides private property cannot be seized.
4) Regulation 119 violates the right to due process.95

The High Court of Israel has held on more than one occasion
that international law is irrelevant with respect to 119.96 The Court
reasoned that Regulation 119 is part of domestic law, which takes
precedent over provisions in international treatises.97

Despite its seemingly indifferent attitude toward international
law, the High Court has responded to the petitions against, and
pervasive criticisms of, the Israeli government’s practices by setting
forth certain requirements for an order of a house demolition.98
The court has implemented a proportionality test and a reasonableness test.99 The proportionality test requires that the military com-
mander ordering the destruction of a house conform the exercise
of his power to the severity of the case or to the gravity of the
circumstances.100 The reasonableness test examines the reasonableness of the military commander’s decision and asks whether a
reasonable military commander would have adopted a similar deci-
sion.101 Notwithstanding the High Court’s efforts, most interna-
tional organizations are unsatisfied with the prevailing Israeli law
regarding house demolitions.102

93. THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 123
94. See supra notes 80-87 and accompanying text.
95. See Gross, Democracy’s Struggle, supra note 5, at 193.
96. B’tselem: House Demolitions, supra note 79.
97. Id.
98. Gross, Democracy’s Struggle, supra note 5, at 184 (citing H.C. 6026/94, Nazal
v. Commander, 48(5) P.D. 338, 342 (Isr. 1985)).
99. Id. at 185-86.
100. Id.
101. Id.
102. See Amnesty: Collective Punishment, supra note 87.
III. The United States Responses to Terrorism

A. Administrative Detention: The Patriot Act

Well before September 11, 2001, the United States government targeted Osama Bin Laden and his Al Qaeda network through a series of anti-terrorist programs dating back to the mid 1990's.\(^{103}\) Within one week of the terrorist attacks on New York and Washington, D.C., Congress strengthened the nation's anti-terrorist sanctions and began passing laws to more effectively fight the war on terror.\(^{104}\)

The most noteworthy law enacted in response to September 11th has been the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act").\(^{105}\) The Patriot Act gives the government broad power and discretion in acting to fight the war on terror.\(^{106}\)

103. Peter L. Fitzgerald, Managing "Smart Sanctions" Against Terrorism Wisely, 36 New Eng. L. Rev. 957, 957-58 (2002). Specifically, the United States government implemented the Terrorist Sanctions Regulations in 1996, which requires "U.S. persons" to freeze the assets of those who threaten peace in the Middle East, and the Foreign Terrorist Organizations Sanctions Regulations in 1997, which criminalizes providing support or resources to certain foreign terrorist organizations. Id.

104. Senate Joint Resolution 23, the Military Force Authorization bill, enacted on September 18, 2001, authorizes the President to use all necessary force against any organization or State found to have been involved in planning or committing the terrorist attacks on the United States. Joshua D. Zelman, Recent Developments in International Law: Anti-Terrorism Legislation—Part One: An Overview, 11 J. Transnat’l L. & Pol’y 183, 185-86 (2001) [hereinafter Zelman, Part One]. Additionally, such force can be utilized against any country that is found to have been a safe haven for such terrorist organizations. Id. On November 19, 2001, President Bush signed S. 1447, the Aviation and Transportation Security Act, into law. Id. The ASA establishes the Transportation Security Administration, which is responsible for all domestic transportation, including security screening at all airports. The Under Secretary is given the authority to place Federal air marshals on every passenger flight and requires that the Under Secretary place an air marshal on every long-distance flight that is determined to present high security risks. Id. Furthermore, all of baggage checked in any U.S. airport must be screened by all airlines and the screeners, who will be subject to a background check along with all other airline workers, must all be U.S. citizens. Id. Most significantly, however, the ASA not only directs the National Institute of Justice to determine the range of less-than-lethal weaponry available to flight deck personnel, it allows pilots to carry firearms. Id. at 186. For purposes of this paper we will not discuss the preceding provisions in detail.


106. The Patriot Act makes available the use of military assistance in the enforcement of civil law. Zelman, Part One, supra note 104, at 186. Amongst the broad powers granted to the President of the United States, the Act also authorizes the President to seize the property and funds of foreign nationals suspected of being involved in plotting an attack against the United States. Id. Section 201 adds several
This comment concentrates on sections 411 and 412 of the Act, the sections that have drawn the most criticisms from civil libertarians.

1. Section 411: Definitions Relating to Terrorism

Section 411 of the Patriot Act expands the definition of "terrorist activity" as used in the Immigration and Nationality Act. Section 411 also expands what is considered engaging in terrorist activity and makes an alien who provides "material support" (i.e., food, shelter, transportation, funds etc.) to a terrorist removable whether or not the alien knew the person was involved in such activity.

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2. Section 412: Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review

This section allows the indefinite detention of aliens when the Attorney General "has reasonable grounds to believe that the alien is a terrorist."[109] Section 412 further states that an alien must be released seven days after the commencement of detention if he is not placed in removal proceedings[110] or charged with a criminal offense.[111] Section 1226(a)(6) of this section, entitled "Limitation on Indefinite Detention,"[112] implies that the government limits the length of time that an alien may be detained.[113] A reading of the statute, however, reveals that detention may be continued indefinitely, through a series of additional six-month periods, if the attorney general continues to assert that the alien poses a threat to national security or to the safety of others.[114]

Similar to the criticisms of Israeli detention laws, many have criticized the Patriot Act’s legalization of a deprivation of basic human rights such as due process.[115] The United States has sustained one’s right to due process of law since its establishment.[116] The Due Process Clause of the Fifth Amendment states that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”[117] The Due Process Clause applies to all “persons,” not just U.S. citizens.[118] The Supreme Court has held that illegal aliens are afforded the protections of the Fifth and Fourteenth Amendments, which, among other things, grant the right of due process.[119] Many argue the terms of 412 permitting an alien be detained for seven days without any charge[120] do not provide a de-

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109. See Patriot Act § 1226(a)(3).
110. A removal proceeding is a proceeding used to determine whether an alien will be deported or permitted to remain in the country.
111. Patriot Act § 1226(a)(3).
112. Id. § 1226(a)(6).
113. See id.
114. See id.
115. See Zelman, Part Two, supra note 107, at 426-35.
116. U.S. CONST. amend. V.
117. Id.
118. Zelman, Part Two, supra note 107, at 426 (stating that it is recognized that all citizens are "persons," but not all "persons" are citizens).
tainee with his most basic right of Procedural Due Process.\textsuperscript{121} Furthermore, the provisions governing the detention of an alien terrorist do not mention a trial or hearing requirement to determine, beyond a reasonable doubt, whether the alien committed the acts of which she is accused.\textsuperscript{122}

The Patriot Act has been one of the prime tools used by the U.S. government in responding to terrorism since September 11th.\textsuperscript{123} It was drawn up and enacted under severe pressure to respond to the September 11th attack and has since been the subject of much criticism.\textsuperscript{124} Many disapprove of the broad authority it grants certain U.S. officials and question whether its legislation contradicts the general principles on which a democratic society is based.\textsuperscript{125}

B. Freezing of Assets

1. Generally

Economic sanctions are frequently the government's first and principal tool to deal with international terrorism.\textsuperscript{126} In the United States, the Treasury Department's Office of Foreign Assets Control ("OFAC") administers the various economic sanction programs.\textsuperscript{127} "The Terrorist Sanctions Regulations (TSR), promulgated in 1996, require 'U.S. persons' (i.e., U.S. citizens or residents wherever located, and U.S. business entities including their overseas branches) to block or 'freeze' the assets of those who threaten the Middle East peace process."\textsuperscript{128} These controls were expanded to cover all global terrorism when, on September 23, 2001, President Bush invoked his authority under the International Emergency Ec-


\textsuperscript{122} See Patriot Act § 1182.


\textsuperscript{124} See, e.g., Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 YALE L.J. 1011, 1033 (2003) (stating that the Congress moved to pass the Patriot Act despite criticisms that it was "interfering unnecessarily and excessively with individual rights and liberties.")

\textsuperscript{125} Id.

\textsuperscript{126} Fitzgerald, supra note 103, at 958.

\textsuperscript{127} Id.

\textsuperscript{128} Id.
onomic Powers Act\textsuperscript{129} to issue Executive Order 13224 ("Order 13224").\textsuperscript{130} Generally, this order provides a means to disrupt the financial support network for terrorist organizations, blocking or freezing their assets as well as those of their front organizations, agents, and associates, and other entities and individuals that provide services or assistance to them.\textsuperscript{131} Prior executive orders and legislation have been directed at combating terrorism,\textsuperscript{132} but Order 13224 provides for sanctions against terrorists and their supporters that are broader in scope than previous sanctions.\textsuperscript{133}

Specifically, Order 13224:

1) Authorizes the blocking of the property and interests in property, including bank deposits, of those designated in the Annex\textsuperscript{134} by the President, as well as those subsequently designated by the Secretary of State or the Secretary of the Treasury, as authorized in the Order.

2) Targets foreign entities and individuals determined to have committed, or to pose a significant risk of committing, acts of terrorism that "threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States," as determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.

3) Targets other entities or individuals that are acting for or on behalf of, or are owned or controlled by, persons designated in or pursuant to the Order; that assist in or provide support or financial or other services to those entities and individuals designated in or under the Order; or are associated with certain categories of entities and individuals designated in or under the Order, as determined by the Secretary of the Treasury, in con-
sultation with the Secretary of State and the Attorney General. (This may include non-governmental or charitable organizations, as well as financial institutions in third countries that provide financial or other services to or for persons designated in or pursuant to the Order.)

While the powers given under Order 13224 are clearly broad in scope, President Bush, in his message to Congress regarding the Order, "committed to exercising [these powers] responsibly, with due regard for the culpability of the persons and entities potentially covered by the order, and in consultation with other countries." 136

2. Criticisms

The dominant criticisms of the OFAC's regulations allege that there are too many legal and practical obstacles in challenging OFAC's rulings or actions. 137 On a practical level, while OFAC's regulations permit parties to administratively request reconsideration of their assets being frozen, there is no right under the regulations to review the factual basis or reasons for the initial blocking decision. 138 It is argued that such a blocking or freezing of assets amounts to a "taking" of property without Due Process under the Fifth Amendment, and is therefore unconstitutional. 139 Ruling on this issue, the Supreme Court noted that blocking or freezing orders only effect a temporary deprivation of property, because when lifted, the property is released into the custody of the owner. 140 Accordingly, the Supreme Court held that pre-deprivation hearings are not required. 141 In *IPT v. United States Department of Treasury*, 142 the Supreme Court was quoted:

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135. See id. at 946.
137. See generally Peter L. Fitzgerald, "If Property Rights Were Treated Like Human Rights, They Could Never Get Away With This": Blacklisting and Due Process in U.S. Economic Sanctions Programs, 51 Hastings L.J. 73, 88-110 (1999) (discussing OFAC's actions and the obstacles involved in challenging these actions).
138. Fitzgerald, supra note 103, at 976.
139. Id.; see also Chang v. United States, 859 F.2d 893, 894 (Fed. Cir. 1995).
141. Id.
142. No. 92 Civ. 5542, 1994 U.S. Dist. LEXIS 15807, at *13-14 (S.D.N.Y. Nov. 4, 1994). In this case, Plaintiff IPT Company, Inc, engaged in importing and exporting goods internationally, challenged the blocking of its assets implemented by former President Bush's Executive Orders, 12,808 and 12,810. Similarly, President Bush issued these two orders under the authority of the International Economic Emergency Powers Act.
The power [to issue Executive Orders] in peace and war must be given generous scope to accomplish its purpose. Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country. To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest. That fact, however, cannot lead us to narrow the broad coverage of the Executive Order.\textsuperscript{143}

Critics also argue that one would likely be intimidated to request a reconsideration based on the OFAC's broad authority.\textsuperscript{144} Critics assert that in order to challenge a particular decision, the stakes would have to be sufficiently large to offset the fear of upsetting future dealings with an agency vested with a tremendous amount of authority and subject to relatively little oversight.\textsuperscript{145} Consequently, it often takes something like being placed on the blacklist (the list of parties whose assets are blocked) itself,\textsuperscript{146} which threatens the ongoing viability of a business, before a party is inclined to initiate action against OFAC.\textsuperscript{147}

Notwithstanding the criticisms\textsuperscript{148} of and the challenges to the OFAC's ability to freeze or block the assets of organizations and businesses suspected of affiliation with terrorism, the Supreme Court consistently upholds the constitutionality of Order 13224.

\section*{C. Torture}

The United States government maintains that it conforms to the widely accepted international laws and provisions\textsuperscript{149} relating to torture.\textsuperscript{150} Furthermore, torture remains an unexplored issue before the United States courts and Congress and, hence, is not a subject of much contention.

\begin{footnotesize}
\begin{enumerate}
\item[143.] \textit{Id.} (citing Propper v. Clark, 337 U.S. 472, 481-82 (1949)).
\item[144.] Fitzgerald, \textit{supra} note 103, at 976.
\item[145.] \textit{Id.}
\item[146.] This is different than being subject to restrictions on dealings with blacklisted parties.
\item[147.] Fitzgerald, \textit{supra} note 103, at 976.
\item[148.] \textit{See supra} notes 114-24 and accompanying text.
\item[149.] \textit{See supra} notes 61-64 and accompanying text.
\item[150.] The Geneva Convention (IV), Aug. 12, 1949, Part III, sec. 1 (including the United States as a High Contracting Party).
\end{enumerate}
\end{footnotesize}
CONCLUSION

Terrorism is no longer an issue that the people of the United States can trivialize. On September 11, 2001, America’s eyes were forced open, and a people were made aware of the gravity of a problem that until then was seemingly a distant one. Conversely, Israel has been dealing with terrorism since the day of its founding in 1948. Almost every day, the death toll rises in Israel as a result of mass murder committed by Palestinian suicide bombers. In response, Israeli law grants its governmental agencies exceptionally broad powers in efforts to prevent terrorism.

This comment discussed a number of legal tools employed by Israel and the United States at a time when terrorism poses an imminent threat to national security. During such times, a democratic government must protect its nation while preserving human rights and civil liberties, including those of the terrorists; for freedom is the very notion on which a democracy is based. Clearly, the task of maintaining this balance is a precarious one. Many United States citizens are concerned that to the extent that we emulate Israeli rationales and procedures in fighting the war on terror, we risk depriving individuals of basic civil liberties. People fear that if the U.S. government continues to use national security as a justification, like Israel, torture may one day become an issue before our courts as well.

It is essential that people question a government’s ability to restrict the rights of others. Without this pressure a government could easily abuse its powers and run amok. Considering the viability of chemical warfare, however, we cannot underestimate the nature of the threat before us. Terrorists today are not only willing to die for their cause, but they incorporate that willingness into the execution of their plans.