Occasional Paper No. 9

AN ILLUSION OF LEGALITY:

A Legal Analysis of Israel's Mass Deportation of Palestinians on 17 December 1992

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West Bank Affiliate of the International Commission of Jurists

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ACKNOWLEDGMENTS

The author, Angela Gaff, is a Solicitor, and volunteer researcher at al-Haq. Documentation for this study was collected by al-Haq fieldworkers and has been entered into the organisation's computerized database. Each study published by al-Haq undergoes comments and revisions by other staff members, by outside consultants on occasions, and by al-Haq's Programme Coordinator who gives final approval.

Special thanks for assistance and consultation in the preparation of this study are due to the Association of Civil Rights in Israel, the offices of Avigdor Feldman, Ellen Fleischmann, the East Jerusalem office of the International Committee of the Red Cross, Jonathan Kuttab, Fiona McKay, Mazen Qupty, Andre Rosenthal, Dr. Ronen Shamir, Raja Shehadeh, Raji Sourani, the offices of Lea Tsemel, and Elani Wesley.

SOME OF AL-HAQ'S PUBLICATIONS

A Nation Under Siege: Al-Haq Annual Report on Human Rights in the Occupied Palestinian Territories, 1989 (Al-Haq, 1990).

Punishing A Nation: Human Rights Violations During the Palestinian Uprising, December 1987-December 1988 (Al-Haq, 1989).

Protection Denied: Continuing Israeli Human Rights Violations in the Occupied Palestinian Territories, 1990 (Al-Haq, 1991).

Israel's Deportation Policy in the Occupied West Bank and Gaza, by Joost Hiltermann, Al-Haq Occasional Paper No. 2, (Al-Haq, 1986, reprinted and updated, 1988).

Enforcement of International Law in the Israeli-Occupied Territories, by Marc Stephens, Al-Haq Occasional Paper No. 7, (Al-Haq, 1989).

Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, In The Occupied Territories, Al-Haq Occasional Paper No. 6, (Al-Haq, 1989).

NEW:

An Ailing System: Israeli Military Government Health Insurance in the Occupied Palestinian Territories, by Linda Bevis and Zuhair Sabbagh, Al-Haq, 1993).

A Thousand and One Homes: Israel's Demolition and Sealing of Houses in the Occupied Palestinian Territories, al-Haq Occasional Paper No. 10, by Lynn Welchman, (Al-Haq, 1993).

FORTHCOMING:

An analysis of the use of anti-tank missiles and high-powered explosives for the destruction of property during searches for "wanted" persons, and an analysis, based on a survey conducted by al-Haq, of the practice of torture in Israeli interrogation.

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Article 49 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 1949.

"151 brothers were deported by the oppressive state from their homeland and transferred to the other land. This was a Nazi action, unprecedented in the history of new Palestine... The government considered itself cultivated, and rules on behalf of a people proud of stressing the principle of habeus corpus. It means to impose fear on the area, to frighten its population ...The land includes all its sects/parties, and must stand in battle against this barbarism."

Unofficial translation of extract of letter written by Justice Shamgar in 1944 following his deportation to Eritrea, printed in Ha'aeretz on 29 January 1993.

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AN ILLUSION OF LEGALITY: A LEGAL ANALYSIS OF ISRAEL'S MASS DEPORTATION OF PALESTINIANS ON 17 DECEMBER 1992.

INTRODUCTION

On 17 December 1992, in a clear breach of international law, 415 Palestinians were deported to Southern Lebanon by the Israeli authorities. Such a mass deportation marked a departure from the usual policy of deporting small numbers of persons at a time. International condemnation was expressed in United Nations Security Council Resolution 799 of 18 December 1992,[1] which demanded the immediate return of the deportees. The Israeli Supreme Court (sitting as the High Court of Justice in this matter) endorsed the deportations, thus overlooking their international illegality and the problematic status of the domestic law on which they were based. The UN Security Council's authority to enforce Resolution 799 was compromised by a "deal", brokered by the government of the United States of America (and never put into effect), based on an offer by Israel to only partially comply with the Resolution and return the deportees in a piecemeal fashion, and reduce the deportation periods of some deportees. (The position taken by the government of the United States of America represented a disturbing shift from that country's previous stance in relation to Israeli deportation.) On that basis, it was proposed that no action be taken to enforce the Resolution. On 12 February 1993, less than two months after the deportation, the issue was removed from the Security Council's agenda.

[1] See Appendix A.

The questions raised by and the ramifications of this issue are manifold. The episode has highlighted the impunity with which Israel flouts international law in its treatment of Palestinians under its occupation. Existing qualms about the ability of the Supreme Court to act independently of the executive in relation to Palestinians from the Occupied Territories and the low esteem with which the rule of law is regarded in that context have been heightened once again. The Supreme Court has allowed natural justice and human rights to be relinquished yet again to the government's plea of national security. The Supreme Court has also, once again, failed to apply international law to Israel and has in effect sanctioned two grave breaches of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.

Notwithstanding the fact that the United Nations Security Council has recently demonstrated its ability and willingness to firmly enforce unheeded Resolutions, its authority in relation to Israel has, once more, been compromised by extraneous political considerations.

In 1986, in the wake of the reinauguration of the Israeli practice of deportation as part of the government's "iron fist" policy, al-Haq published its first Occasional Paper on deportation.[2] Al-Haq has felt prompted to publish a further study of the mass deportation of December 1992, due to the disturbing new developments of that deportation, *viz.* the unprecedented stance taken by the Israeli Supreme Court and

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[2] Joost Hiltermann, *Israel's Deportation Policy in the Occupied West Bank and Gaza*. Occasional Paper No. 2 (Ramallah: Al-Haq, 1986), reprinted and updated in August 1988.

the new relationship that has apparently developed between the government of the United States of America and the United Nations. Whilst al-Haq does not wish to reiterate the entire contents of its previous publication, some information bears repetition for the sake of completeness.

Section A of this study, the Sequence of Events, sets out the chronology of events leading to and following the mass deportation on 17 December 1992. Section B concentrates on the illegality of deportation itself and on the other infringements of human rights that accompanied the recent mass deportation. The issue of humanitarian assistance is examined in Section C and the role of the Israeli Supreme Court in relation to Palestinian Petitioners in Section D. Finally, Section E concludes with a discussion of the international community's responsibility, under Article 1 of the Fourth Geneva Convention (common to all four Geneva Conventions), to ensure respect for the Convention.

It should be noted that al-Haq's documentation work was handicapped by the delay in a correct list of names being released by the Israeli authorities. Further, it was not until 13 January 1993, when the government submitted its written arguments, that al-Haq learnt the number of Military Order 1381 of 1992 (West Bank), which was the Military Order which was regarded as giving the Israeli authorities the power to deport Palestinians from the West Bank without a prior hearing.[3]

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[3] In fact, al-Haq has of late encountered constant problems in obtaining Military Orders from the West Bank Legal Advisor. At the time of publication, in June 1993, no new military orders had been sent to al-Haq since September 1992.

As regards terminology, the word "deportation" is understood, both in the United States of America and in Britain, to denote the enforced repatriation of an alien. However, in this paper, the word is used, in accordance with the language of Article 49 of the Fourth Geneva Convention, to signify the expulsion, temporary or indefinite, of a Palestinian from his or her home in the Occupied Territories of Palestine.[4]

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[4] *Black's Law Dictionary* (5th Edition) provides two (alternative) definitions of the word "deportation" as follows:-

> Banishment to a foreign country, attended with a confiscation of property and deprivation of civil rights...The transfer of an alien, excluded or expelled, from the United States to a foreign country... The removal or sending back of an alien to the country from which he came...

A. SEQUENCE OF EVENTS.

14 December 1992: The Israeli authorities commence mass arrests of Palestinians in the Occupied Territories, following the discovery of the dead body of Border Guard Sergeant Major Toledano, who had been taken hostage by Hamas on 12 December 1992. Hamas had sent a message to the Israeli authorities that unless jailed Hamas leader Sheikh Ahmad Yaseen was released by 9 p.m. on 12 December 1992, Toledano would be killed.

16 December 1992: The number of arrested Palestinians rises to approximately 1600. Following an emergency cabinet meeting in the evening, cabinet decision 456 was made:

> in the light of the emergency situation and in order to preserve public order, the prime minister and defence minister are empowered to order officers in Judea, Samaria, and Gaza to issue orders for temporary expulsion without delay.[5]

Authorization No. 97 is issued, granting military commanders in the West Bank and Gaza Strip:-

> ...the authority to issue orders, as required by the immediate and necessary security requirements, without prior notices, to expel inciters from among the population of their

[5] See Judgment of Supreme Court, handed down 28 January 1993, Appendix B.

> locality, who endanger lives by their activities, for a period determined by the military commanders but not to exceed two years.[6]

Two *Temporary Provisions Orders* are made, signed by Danny Yatom, Brigadier General Commander IDF Forces in Judea and Samaria (West Bank), and Matan Vilnai, Brigadier General of the IDF Forces Gaza Strip District.[7] The orders are numbered respectively 1381 of 1992 (West Bank), and 1086 of 1992 (Gaza Strip). The *Temporary Provisions Orders* provide for temporary deportation orders for a period of nine to twenty-four months, with appeals subject to a 60-day limitation period, heard by a Committee whose decisions are binding, *after* the implementation of the deportation order.[8]

Two composite deportation orders (*i.e.* two general orders with attached schedules of names), referring to deportation periods of either 18 or 24 months, are signed by the aforementioned Military Commanders of the West Bank and Gaza Strip respectively. There are 284 orders for the West Bank of which 39 are for 18 months, and 245 for 24 months. There are 202 orders in the Gaza Strip, 100 for 18 months, and 102 for 24 months. The deportation orders in relation to 78 (43 from the Gaza Strip and 35 from the West Bank) of those originally slated for deportation are cancelled at the "eleventh hour". The orders are in fact dated 17 December 1992, although the authorities embark on their implementation on 16 December

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6 *ibid.*

7 *ibid.*

8 *ibid.*

1992.[9]

In the middle of the night, the deportees are driven in buses, handcuffed and blindfolded, to Metullah on the Lebanese/Israeli border.

Attorney Lea Tsemel is informed of the proposed deportations at 8 p.m. by a journalist. She and Attorney Andre Rosenthal obtain interim injunctions from the Duty Judge, Justice Barak, as regards 40 deportees, whose names they had managed to obtain.

17 December 1992 At 1 a.m., Justice Barak issues an interim injunction which restrains the government from implementing any of the deportation orders.

Later in the day, a hearing takes place before a sitting of the Supreme Court consisting of seven judges, presided over by the President of the Supreme Court, Justice Meir Shamgar. The government is represented by Legal Advisor, Yosef Harish, the Attorney General, Dorit Beinish, declining to represent the government. Chief of Staff, Ehud Barak, is called to give oral evidence by the State as to the urgency of the perceived security needs. The Court orders the government to show cause, within 30 days, as to the legality of the *Temporary Provisions Orders.* The *order nisi* granted earlier in the day is revoked. The Court's decisions are made on the basis of a 5-2 majority.

Four hundred and fifteen deportees are forced over the

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[9] *ibid.*

Zomriya crossing, north of the IDF Security zone. Four hundred and eight have "valid" orders against them and seven are deported without such orders. They have their identity cards confiscated. The Lebanese authorities do not allow them to cross Beit Nofel, the crossing-point south of the area controlled by the Lebanese army. The deportees are then forced to remain at a makeshift camp.

18 December 1992: United Nations Security Council Resolution 799 of 1992 condemns the action taken by Israel and demands the safe and immediate return of the deportees. It also reaffirms the *de jure* applicability of the Fourth Geneva Convention to those territories occupied by Israel since 1967.[10]

19 December 1992: A list of names is released to the ICRC, with the proviso that the list is not released to the public. The families of potential deportees are obliged to contact the ICRC to find out whether a family member has been deported. It later transpires that the list is incorrect.[11]

21 December 1992: Israeli troops open fire with mortars and live ammunition when the deportees attempt to march back across the Zomriya crossing. Three deportees are wounded.

20 and 22 December 1992: The Supreme Court hears two supplemental petitions that the deportees should be returned, or kept in a safe place. The basis of the petitions is that the

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[10] See Appendix A.

[11] Information from report of Middle East Watch dated 12 January 1993.

deportation orders had not in fact been implemented because of the Lebanese government's refusal to allow the deportees to cross into territory controlled by the Lebanese army. The Court rejects the petitions, and rules that the deportation orders have been implemented because, although the deportees do not find themselves in territory controlled by the Lebanese army, they are neither in Israeli territory.

24 December 1992: The ICRC asks the Israeli government to allow the passage of aid to the deportees.

25 December 1992: The Supreme Court is petitioned for an order that the government release lists of the names of the deportees.

26 December 1992: The Cabinet decides to oppose the passage of aid on the basis of an 8-6 majority decision.

The Israeli authorities set up appeals committees.

27 December 1992: The Supreme Court hears the petition asking for the release of lists of names of the deportees. It transpires that the lists were attached to the doors of the Civil Administration offices two days previously. The government accepts that it took no steps to inform the families of the deportees personally.

28 December 1992: Israel refuses to allow French doctors to cross the security zone to reach the deportees. Lebanon also refuses access via Lebanese territory.

30 December 1992: A further petition is entered to allow the

return of the deportees on the basis of the change of circumstances, *viz.* the worsening weather, and the administrative "mistakes" which have come to light.

A petition requesting that those who are ill be allowed to receive medical treatment is also entered. A further petition is entered requesting that Palestinians from within the "Green Line" be able to transport food and medical supplies across the Israeli security zone.

Israeli Prime Minister Rabin appeals for a third country to accept the deportees.[12]

31 December 1992: Prime Minister Rabin says that the ICRC cannot have access to the deportees unless the Lebanese government also indicates *its* agreement. The Israeli government also says that those deportees who are sick cannot be taken to a hospital in Marjayoun (*i.e.*, via the Israeli Security Zone).

Prime Minister Rabin announces that ten deportees who were deported "by mistake" can be returned. Seven of the ten do not have "valid" orders against them, and three had been included by "mistake" on the temporary deportation order.

1 January 1993: Prime Minister Rabin announces that all the deportees can return on the condition that there is an immediate suspension of the *Intifada.*[13]

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[12] *Jerusalem Post*, 31 December 1992.

[13] Reported in the *Jerusalem Post*, 2 January 1993.

The Lebanese government prevents the ICRC from entering the camp to arrange for the removal of the sick.

2 January 1993: Prime Minister Rabin rejects a plea by the ICRC to allow a medical convoy to reach the deportees via the Israeli security zone.

7 January 1993: Rabin announces his government's decision to agree to one ICRC visit to survey the humanitarian needs of the deportees. The Lebanese government agrees that the ICRC team can fly over its territory. Rabin, however, reaffirms that the Israeli government will not allow humanitarian assistance to pass through Israeli-occupied zones without a reciprocal agreement from the Lebanese authorities.

9 January 1993: The fact-finding visit by two ICRC representatives takes place. They bring back a 16 year-old who had been "mistakenly" deported. They also take another deportee suffering from a kidney complaint to a Lebanese hospital.

Rabin announces the Israeli government's agreement to there being a second ICRC visit to bring back the other nine deportees who were "mistakenly" deported.

13 January 1993: The Israeli government announces that another six deportees who had been serving prison sentences prior to deportation-should not have been deported. Their deportation orders are cancelled and the deportees in question brought back, with a view to their completing their prison sentences.

The Israeli government submits its arguments to the Supreme Court. The government cites 21 Hamas attacks and 18 Islamic Jihad attacks as justification for the deportations, as well as the killing of Toledano. The arguments include the first publication of the two composite deportation orders (for the West Bank and Gaza Strip). The government removes the 60-day limitation period for the submission of appeals.

17 and 20 January 1993: The Supreme Court, comprising seven judges, hears argument as to the validity of the *Temporary Provisions Orders*. The Israeli government is represented by its Legal Advisor, Yosef Harish. The government is ordered to provide a factual supplement setting out the details of the appeals facilities and the precise criteria for the selection of deportees.

23 January 1993: A further ICRC visit takes place. Eight hundred and fifty messages are delivered from the families of the deportees. Seventeen deportees are evacuated, four of whom are sick and 13 "mistakenly" deported. (Another two who had been "mistakenly" deported choose to stay.)

25 January 1993: The government issues its factual supplement, as ordered by the Supreme Court, clarifying the criteria for the selection of deportees and giving details of appeal facilities.

UN Secretary General Boutros Boutros Ghali's report is issued. He states that

> I would be failing in my duty if I did not recommend to the Security Council that it should take whatever measures are required to ensure

> that its unanimous decision, as set out in Resolution 799 (1992), is respected.[14]

The report also advocates that a UN monitoring mechanism be established in Israel.

28 January 1993: The Supreme Court gives its judgment. It rules that the the *Temporary Provisions Orders* were void because it was *ultra vires* the powers of the government to create new legal norms in setting out a blanket exclusion of a prior hearing. (The Court accepts that there may be some circumstances in which it would be valid to deprive a proposed deportee of the right to a prior hearing due to security needs, but that each case would have to be adjudged on its merits.) However, the Court does not revoke the deportation orders which it finds were made under the 1945 British Defence (Emergency) Regulations. The government is ordered to set up appeals facilities near the deportees' camp.

1 February 1993: The Israeli cabinet announces a "package deal", brokered by the US government, whereby 100 deportees would be returned immediately, the deportation periods of those remaining would be reduced, and Israel would ensure the free passage of aid to them.

9 February 1993: Israel's Ambassador to the UN, Gad Ya'acobi, sends a letter to the UN Security Council setting out the terms of the proposed compromise.

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[14] *Report submitted to the Security Council by the Secretary-General in Accordance with Resolution 799 (1992), 25 January 1993.*

12 February 1993: UN Security Council President Ahmed Snoussis makes an official statement that includes the announcement that the deportation issue is no longer on its agenda, in view of the "deal" put forward by the Israeli authorities. The statement urges respect for Resolution 799. It also urges a resumption of the peace negotiations which had been suspended as a result of the deportations.

13 February 1993: The deportees, in response, lower a coffin marked "UN Security Council" into a freshly-dug grave.

At the time of publication, 395 deportees were still in Southern Lebanon. Of the 415 deportees originally deported, a total of 20 left Southern Lebanon: six were brought back due to sickness,[15] six had their deportation orders cancelled because they had been serving prison sentences prior to deportation, and of the other 10 people who were "mistakenly" deported, only eight agreed to return, the other two preferring to remain in Southern Lebanon.

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[15] The last deportee to return to the Occupied Territories was Ali Abu Ajawa who returned to his home in the Gaza Strip on 21 June 1993.

B. THE ILLEGALITY OF DEPORTATION.

It must be stressed that the Israeli practice of deportation is not new; it is an established component of Israeli policy.[16] According to statistics compiled by al-Haq, there have been more than 1,270 deportations of Palestinians since the Israeli occupation of the West Bank and Gaza Strip in June 1967, including 66 deportations carried out since the commencement of the *Intifada* in December 1987. These figures do not include those deported on 17 December 1992.

It must be borne in mind that other measures which are tantamount to short-term deportation orders are routinely implemented against Palestinians. These measures have apparently been unrelated to security considerations. As has been previously pointed out by al-Haq,[17] Palestinians wishing to leave the Occupied Territories may be asked to sign an agreement before their departure, stating that they agree to stay away for a specified period of time (usually between one and three years). The alternative in many instances would be a refusal of permission to leave and a consequent inability to attend to personal or business affairs abroad.

The illegality of deportation in international law has been

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[16] See Joost Hiltermann *op.cit.* and also Al-Haq Alert "International Community Must Act to Halt Israel's Deportation of 12 Palestinians", Al-Haq, 7 January 1992.

[17] *A Nation Under Siege. Al-Haq Annual Report on Human Rights in the Occupied Territories.* (Ramallah: Al-Haq, 1989), pp. 232-233.

expressed in many UN Security Council Resolutions.[18] Further, the status of the domestic law on which deportation is based is problematic. Notwithstanding the irrefutable illegality of this policy, the Israeli Supreme Court has repeatedly sanctioned deportation.

This section will first examine the question of a proposed deportee's right to due process, which was perhaps the most crucial and vexed issue upon which the Supreme Court had to adjudicate in the December 1992 and January 1993 hearings, and the new position taken by the Court in that regard. It will then examine the ways in which deportation is illegal in terms of international law, and how its basis in domestic law is questionable. Lastly, this section will consider how the recent mass deportation brought about further infringements of human rights than has hitherto been the case with Israeli deportations of Palestinians.

1. Due process, the right to a prior hearing, and the new position of the Supreme Court.

The particular denial of due process entailed in the recent mass deportation constitutes a further illegal aspect of an already illegal measure. Arguments in relation to due process, and the extent to which the right to due process can be subjugated to the perceived needs of national security, dominated the Supreme Court's deliberations in the December

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[18] Other UN Security Council Resolutions which condemn Israel's deportation of Palestinians include: SCR 468 (8 May 1980), SCR 469 (20 May 1980), SCR 484 (19 December 1980), SCR 605 (1987), SCR 607 (5 January 1988), SCR 608 (14 January 1988), SCR 636 (7 July 1989), and SCR 641 (31 August 1989), and SCR 681 (20 December 1990), and 726 (6 January 1992).

and January hearings. The stance taken by the Court in upholding the denial of due process marks, as we shall see, a significant and disturbing shift from its previous position.

Articles 70 to 75 (inclusive) of the Fourth Geneva Convention of 1949 set out the essential components of a "fair and regular trial". These articles are declaratory of principles which are universally understood, and which have attained the status of customary law. Indeed, Article 147 of the Convention defines "wilfully depriving a protected person of the rights of a fair and regular trial" as prescribed in that Convention as a grave breach. Article 72 of the Convention provides that accused persons have the right to present evidence necessary to their defence and may call witnesses. In addition, they have the right to be represented by the Counsel of their choice who should be able to visit the accused freely and "enjoy the necessary facilities for preparing the defence". It is clearly implicit that the accused should have the right to be present at the hearing.

Palestinian deportees, subjects of extra-judicial punishments, have generally been denied due process because they have never been charged or indicted, have not even been assured of the right to attend a hearing, and have not had the right to disclosure of the totality of any evidence against them. Until the recent mass deportation, however, proposed deportees at least had the right to a hearing prior to the implementation of the deportation order, albeit a hearing that they might not necessarily be able to attend. It is accepted (including, on a *prima facie* basis, by the Israeli Supreme Court) as a tenet of natural justice that there should be a prior hearing.

Appeals procedures were set out in the 1945 Emergency Regulations, but were eschewed prior to 1977 at which point the Israeli government decided to formalize them and insist upon their implementation. In brief, the procedures were as follows: proposed deportees were detained from the moment that they were served with the order. An Advisory Committee hearing would usually take place at the detention centre where the deportee was held. It was not mandatory that the proposed deportee and his or her counsel be informed of the hearing and be given an opportunity to attend.

The deportee was unable to see any evidence against him or her prior to the hearing. Indeed, at the hearing, only the broadest outlines were customarily given as to the reasons for the deportation. Full information was routinely denied on the grounds of national security. The Committee would simply advise the Military Commander, whose discretion was unfettered, as to whether or not the deportation order should be upheld or quashed. The Committee did not, therefore, have a final decision-making function.

After any upholding by the Military Commander of a deportation order following the hearing before the Advisory Committee, the deportee would have a period of 48 hours in which to appeal against the order, to the Supreme Court. Following the receipt of the Notice of Appeal, the Court would injunct the authorities from implementing the order. The deportee would not have the opportunity to see the fullness of any evidence against him or her at the Supreme Court, as was the case before the Advisory Committee.

In the case of the mass deportation of December 1992, no

deportation order has ever been served on any individual deportee. There were in fact only two general orders, one for the West Bank, and one for the Gaza Strip, with attached schedules of names. The *Temporary Provisions Orders* further eroded the right to due process as they provided for an appeal only *ex post facto.* There had originally been a 60-day limitation period for the lodging of an appeal, but this was revoked by the government on 13 January 1993. The appeal mechanisms were not in place at the time of the implementation of the deportation orders. The two composite deportation orders were dated 17 December 1992, the day after the government took the first steps to implement the orders. Retroactive legislation is strictly prohibited in international law. Article 65 of the Fourth Geneva Convention states that

> the penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

The government argued that the temporary nature of the deportation orders and the fact that the decisions of the Appeals Committee would be binding and not simply advisory amounted to a *quid pro quo* for the lack of prior hearing, the inability of the deportee to be personally present at the hearing, and for the lack of prior publication of the *Temporary Provisions Orders.* It also argued that the deportees would not be prejudiced in presenting written as opposed to oral evidence to any Appeal hearing. It cited other examples of cases where written arguments are presented, such as family reunification applications.

At the crux of the government's arguments about due process was the assertion that whilst, *prima facie,* all individuals are entitled to due process as a principle of natural justice, that principle, and indeed natural justice in general, must be regarded as subordinate to the stated needs of national security.

The Supreme Court held that the *Temporary Provisions Orders* were invalid. The reason for this decision was that whilst, in its view, there may be cases where the right to a prior hearing can be sacrificed to the needs of national security, it would be necessary to examine each individual case on its merits. The attempt to exclude the right to a prior appeal in a blanket fashion, thereby attempting to change legal norms, rendered the *Temporary Provisions Orders* invalid. However, this invalidity did not invalidate the deportation orders which had been made, in the view of the Court, under the 1945 Emergency Regulations, and were not, therefore, dependent on the invalid *Temporary Provisions* Orders.

The Supreme Court's response to the government's failure to afford a prior hearing to the deportees marks a departure from the stance it took in the case of *Qawasme.*[19] That case involved the deportation, without a prior hearing, of respectively, the mayor of Hebron, the mayor of Halhoul, and the Shar'ia judge of Hebron in 1980. The three deportees were not afforded a hearing prior to their deportation. In that case, the Court, in a majority decision, took the view that although the lack of due process did not strike at the very validity of

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[19] HC 320/80; HC 698/80; *Qawasme et al. v. Minister of Defence et al.* PD 35 [1] 617; PD 24 [2] 113.

the deportation orders, it was appropriate that the deportees be afforded the right to a hearing and should be brought back for that purpose. (Justice Landau, in a dissenting opinion, said that, in his view, the lack of a prior hearing did strike at the validity of the deportation orders.) [20] However, in the recent case, the lack of due process in the first instance (sanctioned by the Supreme Court on 17 December 1992) did not, in the Court's view, necessitate that the deportees be returned so that they could be afforded (albeit *ex post facto*) due process.

During the twelve years between the *Qawasme* case, and the hearing on the recent mass deportation, there have been no Supreme Court cases involving the denial of due process to a deportee. However, interestingly, the *al-Breij Refugee Camp* case, in 1990, involving house and shop demolition, entailed the same dialectic between the right to due process on the one hand, and the perceived urgent needs of security on the other, and set the precedent for the former being subordinated to the latter. In that case, the Supreme Court held that

> in the circumstances of the case before us, the principle of balance necessitates that the right of argument of the side before the court prior to the implementation of the order is overruled by the essential and vital interest of the immediacy of the military action and its immediate and

[20] In fact, the Advisory Committee convened at the Allenby Bridge, and subsequently upheld the deportation orders. The Supreme Court also upheld the orders, and the three were redeported to Jordan in November 1980.

undelayed implementation.[21]

The government was ordered by the Supreme Court on 28 January 1993, to set up appeal facilities close to the deportees' camp. These facilities were indeed set up. The deportees have announced that they will not use the appeal procedures as this would be tantamount to an acceptance of the legality of deportation as a practice. There has been no report of any deportees availing themselves of the appeal procedures.

The Supreme Court also held that since, by the time of the January 17 and 20 hearings, the deportations were *faits accomplis*, it was sufficient to allow *ex post facto* appeals. It was not thought necessary to order that the deportees be returned. It must be stressed that the Supreme Court, when, on 17 December 1992, it revoked the injunction order granted earlier that day, thereby allowing the deportation orders to be implemented, allowed those orders to become *faits accomplis*, thereby in some respects, tying its own hands at the further hearing.

Lastly, much has been said by the Israeli authorities about

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[21] HC 4112/90 *The Association of Civil Rights in Israel v. The Commander of the Southern Command*. The case involved the decision of the Military Commander of the Gaza Strip to widen the road near the entrance of the refugee camp, which would necessitate the demolition of houses and shops, following the killing of an Israeli soldier who had accidentally strayed into the area of the camp. It was stated that the area had been the subject of other disturbances, such as stonings and the throwing of Molotov cocktails. The owners of the shops and houses in question formed (rightly) the apprehension that their properties would be demolished, without their being afforded a prior hearing, the right to which had been set out in the previous case of HC 358/88 *The Association for Civil Rights in Israel v. The Commander of the Central Command.*. Argument centred on whether the right to an appeal could be dispensed with if the dictates of security are sufficiently grave.

the significance of the temporary nature of the deportation orders, which was central to the government's attempted justification of the lack of prior hearing. The *Temporary Provisions Orders* purportedly created a new species of deportation order providing for deportation periods of 9-24 months. (In fact, the deportation orders which were issued were all for 18 to 24 months.)[22]

Article 49 of the Fourth Geneva Convention makes no distinction between a short-term and an indefinite deportation order. Moreover, even if such a difference could be demonstrated, it would neither validate any deportation order, nor constitute a *quid pro quo* for denial of due process.

There is no qualitative difference between an indefinite deportation order and a deportation order for a finite period of time. The only difference is one of degree. This is particularly the case in view of the fact that applications have been made and accepted for the revocation of "indefinite" deportation

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[22] The concept of a temporary deportation order can be traced back to early 1992. Following the decision in January 1992 to deport 12 Palestinians from the Occupied Territories, the *Jerusalem Post*, on 8 January 1992, quoted Staff Lt.-Gen. Ehud Barak as telling the Knesset foreign and affairs and defence committee that "an idea, food for thought" was that

> More Palestinian activists could be deported, and international criticism blunted, if the duration of their exile was limited to a fixed term...One way to blunt international criticism might be to set an 18-month term, thus signifying that the exile was temporary. This would also offer additional options, such as deportations in greater numbers... let's say theoretically 12, or 120, or 1,200, this is not an operative proposal, and I'm not raising it for discussion anywhere. Expulsion would be seen as a punishment and not as an uprooting.

orders. The applications have usually been based on an assertion that the deportee was not politically active in any anti-Israel organization during his period in exile. A case in point is that of Majed Salameh, expelled in 1970 for alleged links with Fatah, and allowed to return, following an appeal hearing at the military court in Lod in October 1992. Latterly, the Israeli government has allowed a further 30 deportees to return to the Occupied Territories, on April 30 and May 3, as a "confidence-boosting measure" linked to the ninth round of the peace talks in Washington.[23]

2. The General Illegality of Deportation.

(a) The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.

The Fourth Geneva Convention was signed by Israel on 8 December 1949 and ratified on 6 January 1952. Article 49 provides that

> individual or mass forcible transfers, as well as deportations of protected persons... are prohibited, regardless of their motive.

As shall be discussed hereunder, the Israeli authorities do not accept the *de jure* applicability of the Fourth Geneva Convention, but purport to observe its "humanitarian

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[23] It should also be noted that the *Jerusalem Post* reported on 11 May 1993 that an announcement had been made, the previous day, by the Israeli government representative at the ninth round of the peace talks in Washington, that a decision had been made to return 25 of those deportees expelled on 17 December 1992.

provisions." However, the Israeli Supreme Court has seen fit, on occasions, to discuss deportation in the context of Article 49 without clear reference to this article as one of the "humanitarian provisions" that it will observe.

Deportations of Palestinians have, in the past, been judicially countenanced in the Israeli Courts, on the basis of a distinction (not accepted by al-Haq) between "individual and selective" and "mass" deportations, only the latter of which has been thought to fall foul of the Fourth Geneva Convention. As shall be seen below, despite the clear mass nature of the recent deportations, the government, supported by the Supreme Court, has been adamant that the deportations constituted a coincidence of individual deportations, and not a mass deportation.

The basis for this distinction was that it was allegedly the intention of the authors of Article 49 to prevent a repetition of the mass transfers of the kind practiced by the Nazis during the Second World War. Justice Shamgar has asserted that the legislative intent of Article 49 was to proscribe such mass transfers, and that consequently, "individual and selective" deportations do not fall foul of the Article.[24] The wording of the Article is however sufficiently clear not to admit of such an interpretation; *all* deportations are proscribed by the Article. It has been argued that Jean Pictet's Commentary has lent weight to this argument, since he wrote as follows

There is doubtless no need to give an account

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[24] HCJ 97/79, *Abu Awad v. the IDF Commander of Judea and Samaria.* Excerpted in Israel Yearbook on Human Rights, vol. 9 (1979), p. 343.

> here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. The thought of the physical and mental suffering... can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.[25]

It should be stressed that Pictet never states that the prohibition is limited to mass transfers. Indeed, he states that

> The prohibition is absolute and allows of no exceptions.[26]

It should also be emphasized that Article 1 states that the Convention should be respected "in all circumstances". This rebuts any argument to the effect that exceptions can be inferred from the Convention which do not specifically appear in its text. The international community's consensus as to the illegality of any deportation has been expressed in many United Nations Security Council Resolutions, as has been shown above,

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[25] Jean S. Pictet, *The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, Commentary* (Geneva: International Committee of the Red Cross, 1958), pp. 278-283.

[26] *ibid.*

the last of which was Resolution 799 of 18 December 1992.[27] The deputy head of the delegation of the International Committee of the Red Cross in Israel expressed the view that Article 49 was one of the "clearest articles" of the Convention and that deportations are "completely illegal".[28]

Mindful of the (untenable) distinction between individual and selective transfers on the one hand, and mass transfers on the other, the government sought to convince the Supreme Court on 17 January 1993 that the deportations which were implemented on 17 December 1992 did not constitute a mass transfer. Ori Orr, Knesset Defence and Foreign Affairs chairman, had said at a meeting at the Tel Aviv Law School that

> The expulsions were personal, involving individuals who, man by man, had GSS files with allegations against them.[29]

The government, in its written arguments dated 13 January 1993, argued that

> every candidate for deportation was judged and examined individually both by representatives of security elements and personally by the regional IDF Commander before the decision was taken

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[27] See *supra* note 18.

[28] *Jerusalem Post*, 6 February 1986.

[29] *Jerusalem Post*, 24 December 1992.

concerning deportation.[30]

The Court, in giving its judgment on 28 January 1993, held that the deportation orders had been individual and selective, despite the acknowledgment by the Israeli authorities of administrative "mistakes", and despite the composite form of the deportation orders, both of which factors point to a lack of individual scrutiny.

It should also be stressed that the time period in which the deportations were carried out did not logistically allow for anything but the most summary consideration of each case. The Cabinet decision to deport was made in the evening of 16 December 1992, and the deportees were moved in a matter of a few hours to the Lebanese border. The earliest that any potential deportation could have been considered was on 12 December 1992, *i.e.* following the kidnapping of Sergeant Major Toledano. Potentially, there were 1600 detainees to consider for deportation *i.e.*, all those who were arrested. It seems unlikely that in a maximum period of four days, anything but the most perfunctory consideration of 1600 detainees could have been carried out. It is even less conceivable that the "process" could have been carried out except in the most cursory fashion, in the few hours between the issuing of Proclamation No. 97 and the herding of the deportees to Metulla in buses. Al-Haq stresses that in any event, regardless of whether the deportations are thought to be mass or otherwise, they are irrefutably illegal in terms of the Fourth Geneva Convention. In the view of al-Haq, the only proper

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[30] Respondent's Arguments dated 13 January 1993 (unofficial translation).

adjudication would in any event have been a fair trial, *i.e.*, with due process guarantees.

Despite the fact that it has signed and ratified the Convention, Israel refuses to acknowledge its applicability to the Occupied Palestinian Territories, although it does purport to observe its "humanitarian provisions", as was mentioned above.[31] The State Attorney has on some occasions in the past agreed to the Court examining the State's actions in the light of the Fourth Geneva Convention, but has only generally done so when convinced that the government's actions were unlikely to have contravened the Convention. The Convention was in fact drafted specifically in anticipation of such situations of occupation as those which obtain in the West Bank and Gaza Strip. It should be stressed that all of the articles of the Convention constitute humanitarian provisions, and accordingly, such distinctions are nugatory.

It is noteworthy that Israel had originally agreed to be bound by the IV Geneva Convention in Article 35 of Proclamation No. 3 of 7 June 1967, and then repealed this agreement in Military Order 144 of 22 October 1967.[32] As shall be seen below, several different arguments have been advanced to support the contention that the Convention is not

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[31] For a full discussion on the applicability of the Fourth Geneva Convention, see Marc Stephens, *Enforcement of International Law in the Israeli-Occupied Territories*, Al-Haq Occasional Paper No. 7 (Ramallah: Al-Haq, 1989).

[32] See Mazen Qupty, "The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel", *International Law and the Administration of Occupied Territories*, ed. Emma Playfair (Oxford: Clarendon Press, 1992), pp. 88-124.

applicable to the Occupied Territories.

The first and second paragraphs of Article 2 of the Convention provide that

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Article 4 of the Convention provides that

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of the Party to the conflict or Occupying Power of which they are not nationals.

The Israeli authorities have in the past argued that the Convention does not apply to the Occupied Palestinian Territories, because the West Bank and Gaza Strip were not the "territory" of a High Contracting Party, as set out in the second paragraph of Article 2. Meir Shamgar, now Chief

Justice of the Supreme Court, who presided over the recent hearings, argued in 1971 that

> Israel never recognised the rights of Egypt and Jordan to the territories occupied by them until 1967.[33]

Al-Haq is of the view that this argument is not tenable because the main paragraph which defines the Convention's sphere of applicability is the first paragraph, whilst the second paragraph is merely supplementary. Both paragraphs, it is clear, are intended to cover all cases of occupation regardless of reasons or levels of belligerence. This view is supported by *opinio juris*. For instance, Adam Roberts has recently pointed out:

> To refer to the terms of the *second* paragraph of Article 2 is of limited relevance, because it is in fact the *first* paragraph that applies when a belligerent occupation begins during a war. As shown above, this paragraph says nothing about the "territory of a High Contracting Party", referring simply to "all cases of declared war or of any other armed conflict" arising between two or more of the High Contracting Parties.[34]

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[33] Meir Shamgar, "The Observance of International Law in the Administered Territories", *Israeli Yearbook on Human Rights*, Vol.1 (1971), pp. 263 and 266.

[34] Adam Roberts, "Prolonged Military Occupation in the Israeli-Occupied Territories 1967-1988", in Playfair *op. cit.*, p.47.

The Israeli authorities have also argued that the Fourth Geneva Convention is not binding upon Israel as a result of the fact that no statute similar to the British Geneva Convention Act of 1958 (by dint of which the Fourth Geneva Convention was made part of British law) has been made which assimilates the Convention into Israeli law.[35] However, Professor Rubenstein has argued that since the Convention is concerned with Israel's external relations and not with its internal affairs, there is no necessity for there to be such enabling domestic legislation. He asserts that

> One can argue that in such cases, the need for such absorption vanishes, destroying the logical foundation which justifies it: no alteration of internal law is required by the adoption of the convention and there is no need to bring the matter before the Knesset. In the network of international obligations of the state, the approval of the convention suffices by itself. It would be hard to comprehend how the Knesset could, even if so desired, legislate a convention, as the Knesset employs its authority, by virtue of its nature, in regard to persons and territories

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[35] Justice Barak said in HC 393/793 *Teachers Housing Co-operative Society v. Military Commander of the Judea and Samaria Region* that

> ... the IV Geneva Convention - which, even if applicable to Israel's belligerent occupation of Judea and Samaria- a question which is extremely controversial and which we will not address- constitutes above all else a constituitive convention which does not adopt existing international customs, but generates new norms whose application in Israel demands an act of legislation.

under its control.[36]

It can also be argued that since Jordan had acceded to the Fourth Geneva Convention on 29 May 1951, the Convention accordingly formed part of local law which was in force on the eve of the Israeli occupation. Consequently, pursuant to Article 43 of the Hague Regulations of 1907, the Israeli authorities were under a duty to operate in accordance with it.

The Security Council of the United Nations has on several occasions declared that the Convention is applicable on a *de jure* basis to the Occupied Palestinian Territories. It went further in Resolution 681 of 1990, of 20 December 1990, by urging Israel to accept the *de jure* applicability of the Convention.[37] Such Resolutions, like Resolution 799, have passed unheeded by Israel.

Not only does the Fourth Geneva Convention proscribe deportation, but it also expresses the international community's particular and absolute condemnation of this practice by defining "unlawful deportation" in Article 147 (together with, *inter alia*, wilful killing and torture) as a grave breach of the Convention. Article 146 imposes on the High Contracting Parties to the Convention a duty to search for and prosecute those culpable of grave breaches in their domestic jurisdiction. The status of deportation as a grave breach underlines the

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[36] A. Rubenstein, "The Changing Status of the Occupied Territories" (in Hebrew), *Eyunai Mishpat (Tel Aviv University Law Review)* 11 (1986) pp. 439, 446.

[37] For instance, Security Council Resolution No. 446 (1979) of 22 March 1979 "Calls once more upon Israel, as the Occupying Power, to abide scrupulously by the 1949 Fourth Geneva Convention..."

irreducible nature of the prohibition.

The Israeli Supreme Court has on 28 January 1993, and consistently in the past, endorsed the deportations of Palestinians, refusing to even consider this practice in the context of the Fourth Geneva Convention.

The only legitimate options open to the Israeli authorities would have been to impose measures of assigned residence or internment.[38] Assigned residence and internment both involve the internee being obliged to live in a place other than his or her usual place of abode. Internment is regarded as the more severe of the two measures because it generally involves internees living together in a camp. Article 78 of the Fourth Geneva Convention provides that

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Jean Pictet, in his authoritative Commentary, stresses that, since Article 49 of the Convention proscribes deportation, the only measures available to an Occupying Power are internment

[38] Indeed, Boutros Boutros Ghali, UN Secretary-General, was reported in the *Jerusalem Post* on 31 December 1992 as advocating the use of internment as a basis for the deportees being brought back to the Occupied Territories:

> I hope we can find a solution which takes the deportees to Israel, even if they are placed in internment camps and sentenced, if they have committed crimes under Israeli law.

and assigned residence:

> It will suffice to mention here that as we are dealing with occupied territory, the protected persons concerned will benefit by the provisions of Article 49 and cannot be deported; they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself. In any case, such measures can only be ordered for real and imperative reasons of security: their exceptional character must be preserved.[39]

Not only, of course, would an Occupying Power only be in a position to avail itself of either of the two measures in the case of "imperative reasons of security", but in addition, the Fourth Geneva Convention sets out detailed safeguards for the wellbeing of the internees, together with due process guarantees for selection, appeal etc.

(b) Customary Law.

Notwithstanding Israel's unsatisfactory arguments to the effect that the Fourth Geneva Convention does not apply to the Occupied Palestinian Territories, deportation is in any event proscribed by international customary law which is automatically binding on all states. International customary law was defined in Article 38 of the Constitution of the International Court of Justice to be

[39] Jean Pictet, *Commentary, op. cit.*, p. 368.

international custom, as evidence of general practice applied by law.[40]

The 1945 Charter of the International Military Tribunal at Nuremberg, widely considered to be declarative of international customary law, explicitly condemned deportation. The tribunal defined deportation for "slave labour or any other purpose" as a war crime, and deportation as a "crime against humanity." In the judgment of the Tribunal delivered on 30 September 1946, the Tribunal agreed that deportation was illegal.[41]

Jean Pictet argues that the reason why deportation does not appear in the Regulations Respecting the Laws and Customs of War on Land which are annexed to the Fourth Hague Convention of 1907 (considered universally to be declarative of customary law) is that the practice had fallen into abeyance to the extent that it was not thought necessary to make a specific provision in relation to the measure.[42] However, the use of deportation during the Second World War revived the necessity for this measure to be specifically outlawed.

Further, it is the firm opinion of al-Haq that Article 49 is one of the Articles of the Fourth Geneva Convention which are declarative of customary law. This view is supported by Theodor Meron:

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[40] D.J. Harris, *Cases and Materials on International Law*, (London, Sweet & Maxwell, 1983), p.777.

[41] *Ibid*, pp. 555-561.

[42] Jean S. Pictet, *Commentary, op. cit., pp.* 277-283.

> I believe that at least the central elements of Article 49(1), such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories stated in Article 49(1), are declaratory of customary law even when the object and setting of the deportations differ from those underlying German World War II practices which led to the rule set forth in Article 49. Although it is less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law.[43]

Support has also been given to this view by Yoram Dinstein,[44] and by Yingling and Ginnane, who wrote in 1952 that

> The new civilian convention is an extension and codification of earlier rules and practices governing the treatment of alien enemies in a belligerent country and in the treatment of the inhabitants of territory under military occupation.[45]

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[43] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), pp. 48-49.

[44] Yoram Dinstein, "Deportation from the Administered Territories", *13 Tel Aviv University Law Review 403(1988)*, and "Expulsion of Mayors from Judea", *8 Tel Aviv University Law Review 158 (Hebrew 1981).*

[45] R. T. Yingling and R. W. Ginnane, "The Geneva Conventions of 1949", *American Journal of International Law* 46 (3) (1952), pp. 393- 411.

Further, in his dissenting opinion in *Qawasme*, Justice H. Cohn argued that

> the prohibition of deportation in Article 49 ...reiterates a rule of customary international law.

and

> I did not find in... international law... of war any indication or hint that in time of war a State is permitted to expel its own citizens, or that the prohibition of the law of nations against expelling a citizen is not applicable in times of war.[46]

A school of thought also exists which argues that in relation to the laws of war as they relate to Israel, the usual distinction between customary international law and conventional law should not apply. The basis of this contention is that the role of a military commander was fashioned by international law. As Binyamin Rubin has argued

> This feature of the role of an area commander makes it obligatory for his actions to be examined in accordance with the laws of war which he is required to uphold, and in this respect, there is no difference between

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[46] HC 698/80 *Qawasme et Al. v. Minister of Defence et Al.*

customary law and contractual law.[47]

It is the grave concern of al-Haq that the Israeli Supreme Court has never recognised the illegality of deportation in either conventional or customary international law. Disappointingly, but not suprisingly to al-Haq, in its judgment handed down on 28 January 1993, no mention was made of deportation in the context of international law.

(c) Domestic Law.

Israel invokes the British Defence (Emergency) Regulations of 1945 as the enabling legislation for the deportation of Palestinians from the Occupied Territories. These Regulations were invoked by the British against Palestinians and Jews.[48]

The authority to deport was set out in Regulation 112(1) of the Defence Regulations as follows:

> The High Commissioner shall have power to make an order under his hand (hereinafter in these regulations referred to as "a Deportation Order") for the deportation of any person from Palestine. A person in respect of whom a Deportation Order has been made shall remain out of Palestine so long as the Order remains in force.

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[47] Binyamin Rubin, "The Adoption of International Conventions by Israel in Israeli Courts" (Hebrew), *Meshpatiem* 13 (1983), p. 210.

[48] In fact, Justice Shamgar was himself deported to Eritrea in 1944.

The implementation of the authority to deport is dependent upon the existence of the conditions defined in Regulation 108 which states that

> An Order shall not be made by the High Commissioner or by a Military Commander under this Part in respect of any person unless the High Commissioner or the Military Commander, as the case may be, is of the opinion that it is necessary or expedient to make the Order for securing the public safety, the defence of Palestine, the maintenance of public order or the suppression of mutiny, rebellion or riot.

It is clear that the onus is upon the High Commissioner or Military Commander to determine whether the relevant conditions obtain or not. As is referred to hereunder, in the recent case of mass deportation, it is also clear that the Military Commanders of the West Bank and Gaza who signed the orders were only acting as amanuenses for the Cabinet's decision, and were not exercising independent discretion.

Israel continues to invoke the 1945 Regulations despite the fact that they were effectively revoked by the King of England by virtue of the Palestine (Revocations) Order of 12 May 1948, two days prior to the termination of the British Mandate.[49]

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[49] British Foreign Minister Timothy Renton confirmed in a letter to al-Haq dated 22 April 1987 that the Regulations had been effectively revoked. *cf.* Martha Roadstrum Moffett, *Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, In the Occupied Territories* (Ramallah: Al-Haq, 1989), pp. 83-84.

Further, it has been argued by Attorney Aziz Shehadeh that the extension, in 1948, of the Transjordanian Defence Laws of 1935 to the West Bank in any event effectively revoked the 1945 Regulations, as they applied to the West Bank.[50] The 1935 Defence Laws provide similar emergency provisions to the 1945 Regulations, but differ in many details, and are accordingly inconsistent with them. It should also be stressed that the Jordanian authorities never once invoked the 1945 Regulations between 1948 and 1967. Further, Article 9/1 of the Jordanian Constitution of 1952 states that a Jordanian cannot be deported from Jordan.

Although Jordan annexed the West Bank, the Gaza Strip was, between 1948 and 1967, only administered by Egypt and was not annexed. Accordingly, Egypt did not extend any of its laws to the Gaza Strip. However, despite the fact that similar arguments to those made in relation to the West Bank cannot be made in relation to the Gaza Strip, the fact remains that the Regulations of 1945 were in any event effectively revoked by the King of England in 1948, as has been discussed above.[51]

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[50] See Martha Roadstrum Moffett, *Perpetual Emergency op. cit.*, pp. 69-78.

[51] See also letter from Taysir Na'na', The Legal Commander in Charge of Military Justice, dated 25 June 1988, in Appendix F2, pp. 91-92, of Martha Moffet, *Perpetual Emergency op.cit.*, which stated that the Jordanian Defence Laws of 1935 were extended to the West Bank on 13 May 1948, and that the Jordanian military commander declared, on 15 May 1948 that the Jordanian authorities would respect all those laws in operation in Palestine at the time of the cessation of the British mandate, save for those which were inconsistent with any of the provisions of the Defence Laws of 1935. It was felt that the Jordanian legislator who extended the 1935 Defence Laws to the West Bank, in 1948, intended to thereby cancel the 1945 Defence Regulations, since the two sets of Regulations would otherwise have been in conflict with each other. It was also pointed out that the defence laws and orders which

Despite the irrefutable revocation of the 1945 Regulations, the Israeli government has continued to invoke them. The Israeli Supreme Court has consistently held that they constitute good law, as was the case in their judgment of 28 January 1993.

Further, it may be pointed out that, subject to reservations about the standing of the 1945 Regulations, Regulation 108 requires that the Military Commander must decide on the necessity or expediency of the proposed deportation orders. In the present case, as has been referred to above, it is quite clear the the Military Commanders signed the relevant orders at the behest of the government, following a governmental political decision, and were not accordingly exercising the requisite independent discretion.

3. Further Human Rights Abuses Committed in Relation to the Recent Mass Deportation.

As we have seen above, the deportations which were implemented on 17 December 1992 were illegal, like all deportations of Palestinians since 1967, by dint of customary and conventional international law which proscribe deportation. Further, serious questions can be raised as to their basis in domestic law. The recent mass deportation entails further instances of illegality because: it constitutes a collective

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were issued during the period of Jordanian rule were issued in accordance with the 1935 Defence Laws, and not in accordance with the 1945 Regulations. Lastly, had the 1945 Regulations been regarded as operative, then they would, in the opinion of the Legal Commander, have been reflected in the 1952 Jordanian Constitution.

punishment, because, as has been seen above, it involves an even greater denial of due process than had hitherto been the case, and because it entails a breach of the right to freedom of expression and of religious conviction.

(a) Collective Punishment.

The Israeli authorities have never specified that any one deportee is responsible for the killing of Sergeant Major Toledano or for any one of the other attacks outlined in the government's written arguments of 13 January 1993.[52] In its factual supplement which was delivered following the conclusion of oral argument on 20 January 1993, the Israeli government confirmed that the minimum criterion for "temporary deportation" was

> Involvement in the framework of Hamas or the Islamic Jihad at the level of someone with responsibility for the overall system, neighbourhoods, incitement, enlisting, guiding, providing means to Hamas activists in the same neighbourhood.

And:

> Not included in the order for the deportations

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[52] In fact the *Jerusalem Post* reported on 6 June 1993 that the Israeli government had announced the previous day that 120 Hamas activists had been arrested, and that these included persons who had confessed, *inter alia*, to the killing of Sergeant Major Toledano. The 7 June 1993 edition of the *Jerusalem Post*, however, reported that those responsible for the killing of Sergeant Major Toledano were members of the "Secret Squad of Izadin Kassem", which was an "independent organization without any link to Hamas".

were members whose activities were on the level of disrupting the order only- stone throwing, distributing leaflets, writing slogans, etc.[53]

As has been discussed above, al-Haq is sceptical as to whether the Israeli authorities could have carried out any considered investigation, in the time available, to ascertain the extent of any deportee's involvement in Hamas or in the Islamic Jihad.

Article 33 of the Fourth Geneva Convention provides that

> No 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.

Jean Pictet confirms that

> This does not [only] refer to punishments inflicted under penal law, *ie.*, sentences pronounced by a court after due process of law, but penalties or any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.[54]

Collective punishment has always been proscribed by

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[53] Government's factual supplement dated 24 January 1993 (unofficial translation).

[54] See Jean Pictet, *Commentary, op. cit.*, p. 225.

international customary law. Article 50 of the Hague Regulations annexed to the Fourth Hague Convention of 1907 provides:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.

The principle of personal responsibility is pre-eminent in penology; it is accepted that one person should not bear responsibility for the criminal acts of another. The *actus reus* and the *mens rea* are personal to the perpetrator of a crime, as should be the sentence meted out. In the instant case, Palestinians have been punished simply because they are thought to belong to either the Islamic Jihad or to Hamas, one or more members of which (as yet to be convicted) are thought to be responsible for the killing of Sergeant Major Toledano, and for the killings and other attacks outlined in the government's written arguments submitted on 13 January 1993. Indeed, of 399 deportees' cases documented by the Israeli human rights organization, B'Tselem, 85 were already in detention at the time of the death of Sergeant Major Toledano, either as administrative detainees, sentenced prisoners, or in custody awaiting trial.[55]

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[55] B'Tselem's figures derive from their trip to the deportees' camp. The figures are based on those deportees currently in Lebanon (395), plus the six who were returned due to sickness. The figures do not include the two who are still in Southern Lebanon and whose deportation orders have been cancelled, but who have preferred to stay with the other deportees, refusing to return. The figures do not include the other fourteen who were deported by "mistake" who have returned. Of the 85 who were in detention at the time of the deportation orders, three (one from the West Bank and two from the Gaza Strip) were sentenced prisoners, 37 (17 from the West Bank and 20 from the

The Israeli authorities have recognised that those deported are unlikely to have been actively involved in the killing of Sergeant Major Toledano, and that rather they allegedly represent the less active sections of Hamas.[56]

The deportations entail a collective punishment of the families of the deportees. Of the 415 cases documented by al-Haq, 198 of the deportees were married. The deportees had 642 children between them.

b. Freedom of Conscience/Thought

The freedom to hold and express religious and political beliefs has come to be regarded by the international community as so fundamental as to attain the status of customary law.

Jean Pictet, in his commentary to the Fourth Geneva Convention, underscores the primacy of this principle as follows:

> The principle of freedom of thought is the basis of the great movement for the Rights of Man which invaded and transformed politics and law. It is therefore inscribed at the beginning of the

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Gaza Strip) were in administrative detention, 17 (11 from the West Bank and six from the Gaza Strip) were in custody pending trial, and another 17 (six from the West Bank and 11 from the Gaza Strip) were detained pending charges.

[56] See government's written arguments, 13 January 1993.

> traditional proclamations of essential rights and fundamental liberties.
>
> The right to respect for religious convictions is part of freedom of conscience and freedom of thought in general. It implies freedom to believe and not believe, and freedom to change from one religion or conviction to another. This safeguard relates to any system of philosophical or religious beliefs.[57]

This fundamental principle has been reflected in several treaties and conventions. Article 27 of the Fourth Geneva Convention, for instance, states that

> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion...
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 46 of the Hague Regulations, considered to reflect international customary law, provides that occupying forces are

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[57] Jean S. Pictet, *Commentary op. cit.*, p. 203.

bound to respect "religious convictions and practice".

As we have seen on page 45, the stated criterion for the selection of deportees was proven involvement in the machinery of the Islamic Jihad or Hamas. As we have also seen, however, it was only logistically possible for there to be the most scant consideration of any such involvement. Accordingly, therefore, the ineluctable conclusion to be drawn is that the only real basis for selection was the religious or political persuasions of the deportees.

C. THE QUESTION OF HUMANITARIAN ASSISTANCE.

Those Palestinians deported on 17 December 1992 have found themselves in the most invidious position: stranded at a makeshift camp at Marj al-Zuhour, in the most severe weather conditions, they have been refused entry to the area controlled by the Lebanese army, and have also been forcibly prevented from returning to Israel. This is the first time that a country to which Palestinians have been deported has refused entry (although there has at times been some initial resistance). The situation in which the deportees have found themselves is unprecedented, and has meant that the question of humanitarian assistance, both in relation to the flow of food and medical aid to the deportees, and as regards access to the deportees by the International Committee of the Red Cross, has been an important and a vexed one. It is characteristic of the case in general that the absolute right to humanitarian assistance which is guaranteed by international law, has been reduced to a bargaining instrument. Prime Minister Rabin offered, as a component of the "deal" which would, *inter alia*, allow 100 deportees to return, that those remaining would be assured humanitarian aid. It must be stressed that the deportees, who are protected persons, have an absolute right to humanitarian aid, and that the Fourth Geneva Convention, which guarantees that right, does not define any exceptions where that right does not apply.

As will be discussed below, Israel is subject to a duty to both provide and facilitate the passage of aid, whilst Lebanon is subject to a duty to facilitate the passage of aid. Both Israel and Lebanon have failed in relation to their humanitarian assistance obligations.

Since deportation is proscribed by the Fourth Geneva Convention, that Convention does not anticipate the situation in which the deportees currently find themselves. It is clear, however, that Israel is responsible for the deportees, as they are protected persons.

Article 59 of the Fourth Geneva Convention provides that

> If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal...All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

Article 143 provides that, save for reasons of "imperative military necessity", the International Committee of the Red Cross shall have permission to go to "all places where protected persons are, particularly to places of internment, detention and work".

Article 25 states that

> All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be.

Israel has in the past stated its readiness to observe the "humanitarian provisions" of the Fourth Geneva Convention. Whilst all the provisions of the Convention are humanitarian in nature, it is difficult to think of any provisions which are of a more "humanitarian" nature than the Articles referred to in this section. And yet, on 25 December 1992, the Israeli cabinet voted to disallow the passage of aid to the deportees. Statements were made by the government which made Israeli compliance with the passage of aid contingent on a similar agreement from the Lebanese authorities.

The ICRC was not able to visit the deportees to collect vital information prior to 9 January 1993, and no family messages were conveyed to the deportees until 23 January 1993. Further, as a result of the delay in the release of the names of the deportees, the families of those 1600 Palestinians arrested following the kidnapping of Sergeant Major Toledano were for an extensive period of time in the dark as to whether their relatives had been deported or not.

To summarize the history of the passage of food and medical supplies to the deportees, it should be stressed that between 17 and 20 December 1992, a delegation of the Lebanese Red Cross was able to provide basic material assistance, in the form of food, clothing, tents, heaters, blankets, fuel, etc. However, from 21 December 1992, they were prevented from providing further assistance by the Lebanese authorities. On 25 December 1992, the Israeli cabinet voted that it would not allow the passage of aid via Israel. On 28 December 1992, Israel refused to allow French doctors to cross the security zone to reach the deportees. Lebanon also refused to allow the doctors access via Lebanese territory.

Statements were made by the Israeli authorities to the effect that their agreement to allow the free passage of aid would be contingent on Lebanon's cooperation.

The ICRC delegation based in Israel has been able to visit the deportees on two occasions; on 9 January 1993, it conducted a fact-finding visit and evacuated one medical emergency and one "mistakenly" deported 16-year old, and on 23 January 1993, four delegates including one doctor flew again to the camp and performed medical and tracing activities. The ICRC, on the latter occasion, delivered 850 messages to the deportees. On 13 January 1993, the Israeli authorities prevented a convoy sent by an *ad hoc* group of Non-Governmental Organizations, from transporting food, medicine and fuel to the deportees.[58]

Lebanon, in accordance with Article 59 of he Convention, is, like Israel, subject to a duty to allow the free passage of aid. The duties incumbent on Lebanon and Israel are absolute and cannot be made contingent on the agreement of another party. In not allowing the deportees to cross into territory controlled by the Lebanese army, Lebanon was in fact declining to buttress Israel's breach of international law. However, in its obstruction of the passage of humanitarian aid, Lebanon was itself in contravention of international law. It must be borne in mind that the undertakings entered into by the High Contracting Parties (including Lebanon and Israel) are unilateral unless stated to be otherwise in a specific provision of the Convention, and compliance with those undertakings cannot be made contingent on compliance by another Party.

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[58] Reported in the *Jerusalem Post* on 14 January 1993.

Both Lebanon and Israel have attempted to make their obligations to the Convention contingent on the observance of the obligations of another State. This is contrary to the very unilateral nature of the undertakings in question.

Attorney Shai Porath petitioned the Supreme Court for a declaration that the Government was not competent when, on 25 December 1992, it refused the request of the ICRC to transfer aid and supplies. The Supreme Court, in giving its judgment on 28 January 1993, said that consideration of the additional petition had become superfluous, as the government had by that time entered into negotiations in relation to the passage of aid.[59] Al-Haq is concerned that the Supreme Court, faced with a clear breach of an absolute legal duty (set out in an incontrovertibly "humanitarian" provision of the Fourth Geneva Convention) on the part of the Israeli government, chose not to clarify the State's legal obligations, preferring to cede the question to negotiation. This effectively detracts from the absolute nature of the obligations in relation to humanitarian assistance to which the government is subject.

It should also be stressed that the deportees are currently reliant on food which is "smuggled" to them by residents of Lebanese villages. The transportation of the food sometimes involves four-hour walks through the mountains at night.[60] At the time of publication , the ICRC was not able to provide any food or medical supplies to the deportees. It has asked the Israeli authorities for access to the deportees by road. This has

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[59] See Appendix B.

[60] Information provided by B'tselem in February 1993, and confirmed by the East Jerusalem Office of the ICRC on 15 June 1993.

been denied, the Israeli government insisting that any access to the deportees be by helicopter only. The International Committee of the Red Cross has expressed concern that the water supplies in Southern Lebanon may soon run out.[61]

[61] Information provided by East Jerusalem office of the ICRC on 15 June 1993.

D. THE CONTINUING ROLE OF THE SUPREME COURT IN RELATION TO PALESTINIANS FROM THE OCCUPIED TERRITORIES.

The role played by the Israeli Supreme Court in endorsing the mass deportation of December 1992 has heightened existing doubts as to the advisability of Palestinians availing themselves of the jurisdiction of that Court. It should be stressed that the Supreme Court has never overturned one deportation order.

The composition of the Supreme Court bench that heard the recent mass deportation case is noteworthy, in terms of the politicization of that Court. The two High Court Judges who are known to be liberal, Justices Bach and Hishem, were not selected.

In agreeing to revoke the interim injunction of 17 December 1992, the Court was ceding to the claim, made in oral evidence by Chief of Staff Ehud Barak that the security needs of the hour justified the immediate implementation of the deportation orders, thereby denying the right to a prior hearing. It then proceeded to say in its judgment of 28 January 1993 that it was not pertinent for the Court to decide whether security needs were such that each deportation could be justified. It said that that decision could be made by the *ex post facto* appeals committees. It did however rule that there were circumstances in which the right to a prior hearing could be relinquished to security needs. The Court, in its judgment given on 28 January 1993, quoted *inter alia* from the judgment in the case *Shapiro v. The State of Israel:*

> An administrative authority can make a decision

> without hearing the interested party and the decision can remain in force. This will happen when the interest which the decision protects in a specific case weighs more in the context of all the general interest than the interest of the right of hearing. With all the importance of the principle of the right of hearing, it should not be forgotten that it is only one of all the interests which have to be balanced and respected.[62]

The recent case is another clear example of the Israeli Supreme Court bowing to a plea of security needs made by the Israeli government, without there being any real adjudication as to whether a particular measure can be justified by the specific security needs prevailing at a given time. It would appear that the Supreme Court is powerless, when confronted with such a plea of security needs, to act independently from the executive.

The Israeli authorities have often emphasized that it is unprecedented that an occupying power should open the doors of its highest court to those under its occupation. It is open to discussion, however, as to whether Palestinians should continue to avail themselves of this facility. The Supreme Court, which will only, in any event, entertain petitions based on alleged procedural flaws and not based on the merits of any case, rarely fails to endorse the actions of the Israeli authorities when they plead that the perceived security needs of the hour necessitate the denial of natural justice and basic human rights

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[62] Crim. App. 768/80 *Shapiro v. The State of Israel*, PD 36 (1) pp. 337, 365. See Appendix B.

to Palestinians.

The statistics of Dr. Ronen Shamir have shown how fruitless it has generally been for Palestinians to petition the Supreme Court.[63] Barouch Kimerling has recently suggested that although the Supreme Court may act as a "scarecrow" to curb the excesses of the government, and although the time delay involved in taking cases to the Supreme Court allows petitioners the time for valuable publicity, the continuing role of the Supreme Court in the adjudication of the rights of Palestinians from the West Bank and Gaza Strip cannot be justified. Kimerling accepts that if Palestinians no longer have recourse to the Supreme Court, the government may feel completely unfettered in its excesses but "this is exactly the essence of occupation and the Supreme Court of Justice should not be a partner to the beautification of its face by way of judicial cosmetics."[64]

The Supreme Court's approach to the question of security needs in relation to the December 1992 mass deportation was in keeping with established practice and merits some discussion here. Many administrative and legislative measures implemented by the Israeli authorities, including, *inter alia*, the expropriation of land, the creation of Jewish settlements, and the occupation itself, have been justified on grounds of security. International law allows an occupier to carry out measures which would, if not justified by the needs of security,

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[63] cf. Dr. Ronen Shamir, "Landmark Cases and the Reproduction of Legitimacy, The Case of the Israeli High Court of Justice", *Law and Sociology Review*. Vol 24. No 3. 1990.

[64] *Ha'aretz*, 29 January 1993.

be illegal.[65] Security needs, however, should not give occupying powers *carte blanche.* According to Jean Pictet:

> [W]hat is essential is that the measures of constraint [the occupier] adopt[s] should not affect the fundamental rights of those concerned.[66]

No clear definition exists of the concept of security needs, despite the fact that it appears in many instruments. References to the concept include, for instance, Article 43 of the Hague Regulations of 1907 which provides that

> the authority of the state having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.

Article 64 of the Fourth Geneva Convention allows the occupier to enact new penal provisions if these are

> essential...to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of

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[65] For a full discussion of the use of security by the Israeli government, see Emma Playfair, "Playing on Principle?", in Playfair, op.cit., pp. 205-240.

[66] Jean S. Pictet, *Commentary, op. cit.*, p. 207.

communication used by them.

Article 78 of the Fourth Geneva Convention permits internment or assigned residence "if necessary for imperative reasons of security"; Article 41 provides that the maximum measure of constraint that can be placed on someone who is considered a threat to security is internment; and Article 27 states that "[t]he Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war" whilst respecting the occupied population.

Humanitarian law embraces a dialectic between security on the one hand, and humanitarian protection on the other. The Fourth Geneva Convention is therefore the product of a fusion of the two principles, and contains considered examples of exceptional and specific instances in which considerations of security can compromise human rights. Article 1, which is common to all four Geneva Conventions, states that the Conventions apply "in all circumstances". Accordingly, it is not open to an Occupying Power to claim security/necessity save where expressly provided in the Convention. As Alain Pellet has recently asserted:

> Necessity cannot figure either *contra* nor *praeter legem*; it is taken into account only if the law makes express provision, while, on the contrary, the principle of humanity, which infuses all the law of occupation, is to be a guide to

interpretation.[67]

In basing its decision of 17 December 1992 to allow the implementation of the deportation orders on the basis of the perceived needs of national security and then subsequently declining to submit itself to any adjudication of the degree of the perceived security needs, the Supreme Court was acting in accordance with estabished practice. The Court has repeatedly said that it is not fitting for it to question the decisions of the Military Commander as he is better qualified to adjudge what steps should be taken to ensure that security is preserved. In *Sheikh Suleiman Hussein Odeh v. The Govt. of Israel et al.*, the Court held that

> The court is not the proper place to decide whether a military-security operation... if grounded in law and undertaken for reasons of security, was indeed warranted by the security situation or whether the security problem could have been resolved by different means...(I)ssues related to the army and defence, similar to issues of foreign affairs, are not among the subjects fit for judicial review.[68]

Judge Landau in the *Amira* case said that

> In such a dispute as this, involving questions of a

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[67] Allain Pellet, "The Destruction of Troy will not take Place". *in Playfair op. cit.*, p. 169.

[68] HC 302/72 *Sheikh Suleiman Hussein Odeh Abu Hilu et al. v. The Govt. of Israel et al.*

military-professional character in which the Court does not have its own founded knowledge, it will presume that the professional arguments...of those actually responsible for security in the occupied areas and with the Green Line are valid. This presumption may only be rebutted by very convincing evidence to the contrary.[69]

In its judgment handed down on 28 January 1993, the Supreme Court indicated that in its view, the needs of security could justify a denial of due process, *viz.* a denial of the right to a prior hearing. As has been seen above, this constitutes a grave breach of the Fourth Geneva Convention, and since there is no express exception for security needs, the government cannot justifiably resile from its duty to ensure that due process is observed.

Seldom has there been any judicial scrutiny of any plea of security proffered by the government. In such cases, the onus of proof rests on the Petitioner to rebut the government's security arguments. It suffices, it would appear, for the government to simply plead security as a justification for a particular measure, without there being the need for it to set out a *prima facie* case. A rare example of a case where there was judicial scrutiny and a rejection of this plea was the *Elon Moreh* case. In that case, there was, unusually, disagreement between high-ranking military experts as to the extent to which a proposed Jewish settlement would serve security needs.

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[69] HC 258/79 *Amira et al. v. Minister of Defence et al.*

In the past, the government has declined to give particulars of any alleged security threat, arguing that the very disclosure of the information concerned would itself pose a threat to security.

The concept of proportionality, a concomitant of the fusion of the principles of necessity and humanity, is routinely lost sight of by the Supreme Court. J. Pictet asserted that

> The principle of humanitarian law...is a relationship of proportionality.[70]

In the case of *Jabarin v. Commander of the IDF Forces in the Judea and Samaria Region*, the Court said that

> There must be an appropriate proportion...suitable proportionality... between the forbidden action of the individual and the measures taken by the authorities.[71]

Not only did the Supreme Court, in accordance with established practice, shirk from adjudicating the assertion that the alleged needs of security justified deportations, but, in addition, there was at no stage any examination of whether the number of deportations was justified.

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[70] Jean Pictet, *Humanitarian Law and the Protection of War Victims.* (Leiden, 1973), p. 31.

[71] HCJ 5667/91 *Jabarin v. Commander of the IDF Forces in Judea and Samaria Region.*

Thus, the Israeli Supreme Court, consistent with established practice, has cloaked a fundamentally illegal practice in an illusion of legality. It has again, in the case of the mass deportation of December 1992, sanctioned a grave breach of the Fourth Geneva Convention and has provided a legal justification for further violations of the right to due process and other fundamental human rights. The Supreme Court's position is based on an inappropriate and obfuscating interpretation of the question of "security needs", made in contravention of the Hague Regulations and the Fourth Geneva Convention.

E. CONCLUDING OBSERVATIONS.

As has been shown above, the mass deportation which was carried out on 17 December 1992 was illegal because it contravened international customary and conventional law, because it constituted a collective punishment and breach of the right to hold and express religious and political beliefs, and because its implementation entailed a denial of due process to an unprecedented degree. Further, in the wake of the mass deportation, both Israel and Lebanon were culpable of breaches of their respective obligations to provide for and facilitate humanitarian assistance.

The episode has starkly demonstrated how human rights which have been regarded as sufficiently absolute to attain the status of customary international law are reduced in accordance with market-place principles of compromise. As has been seen above, the Israeli Supreme Court has consistently failed to apply international customary and conventional law to the practices of the Israeli government *vis-a-vis* Palestinians from the Occupied Territories. The arguments that have been put forward to substantiate this refusal are convolutedly legalistic and contrary to the spirit of humanitarian law.

The rule of law, which is properly respected and applied to Israeli petitioners is held in low esteem and disregarded in relation to Palestinian petitioners to the Supreme Court. An eloquent example of this is the remark made by Ehud Barak in oral evidence on 17 December 1992 that "temporary and reversible damage to the rights of...the deportees" could be justified by the alleged prevailing security needs. Al-Haq is concerned that such a purportedly independent judicial

authority as the Israeli Supreme Court should be a forum for arguments that law can be dispensed with in favour of political considerations.

Prime Minister Rabin said on 18 December 1992:

> this [measure] means the least damage in life or property to the Hamas figures involved. Let's not forget the mood out there and the demand for the implementation of the death sentence, for more curfews, and for less strictures for security personnel to open fire.[72]

To argue that one form of human rights abuse is preferable to other abuses is unacceptable. Al-Haq finds it most alarming that the Prime Minister referred to the potential use of the death penalty in the case of Palestinians who were conceded not to have been guilty for the death of Sergeant Major Toledano.

As has been discussed above, the UN Security Council, in Resolution 681 of 1990, urged Israel to respect the *de jure* applicability of the Fourth Geneva Convention, and yet Israel will only acknowledge a voluntary observance of its "humanitarian provisions". As has also been discussed above, the Fourth Geneva Convention is humanitarian in nature, and there is therefore no scope to distinguish between "humanitarian" and "non-humanitarian" provisions.

Article 1 of the Fourth Geneva Convention provides that

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[72] *Jerusalem Post*, 19 December 1992.

> The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all its circumstances.

The undertaking set out in Article 1 is a grave and solemn one. As Jean Pictet pointed out:

> It is clear that Article 1 is no mere empty form of words, but has been deliberately invested with imperative force.

The words "to ensure respect" impose an obligation on each High Contracting Party to not only respect the Convention itself but to also act proactively in relation to the breaches of other High Contracting Parties. As Jean Pictet stressed:

> It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied, or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.

Not only, therefore, is Israel subject to a duty to respect the Convention, but in addition, the onus is on the other Contracting Parties to ensure that Israel respects the

Convention.

As has also been seen above, Article 147 has defined unlawful deportation and denial of due process as being grave breaches of the Convention. Article 146 places on the High Contracting Parties a duty to search for persons alleged to have committed, or to have ordered to be committed, grave breaches and to prosecute them in their local courts. This particular duty reinforces the duty contained in the words "to ensure respect" in Article 1.

Resolution 799 of 18 December 1992 demanded that Israel ensure the return of the deportees and also accept the *de jure* applicability of the Convention. That resolution was consequently in keeping with the solemn undertakings entered into by the High Contracting Parties to ensure respect for the Convention. As a result of a "deal" which was facilitated by the government of the United States of America based on the stated willingness of the government of Israel to partially comply with Resolution 799, the deportation issue was removed from the agenda of the UN Security Council. (Israel has not taken any steps to comply, even partially, with Resolution 799.) The thwarting of any follow-up action in accordance with the UN Charter is a direct contravention of the Charter itself, and contrary to the spirit and the letter of Article 1. It not only entails a dereliction of responsibility on the part of the government of the United States of America, but it also involves the shackling of the collective will of the international community to ensure respect for Article 1, and for international law in general.

As this Study has shown, the Israeli Supreme Court has

shifted disturbingly in its stance in relation to the denial of due process to a proposed deportee. Similarly, the government of the United States of America has also changed its position in relation to Israeli deportation. It is noteworthy that the position of Washington in January 1992, at the time of the proposed deportation of 12 Palestinians, *i.e.*, less than a year prior to the deportations of 17 December 1992, was more condemnatory, and certainly did not involve any attempt to compromise the UN Security Council Resolution No. 726 which was dated 6 January 1992.[73] The government of the United States of America was, in that instance, instrumental in ensuring that the proposed deportations were never carried out.

The 395 Palestinians deported on 17 December 1992 are still in the Southern Lebanon area known as Marj al-Zuhour, between the Lebanese and Israeli armies and their allied militias. These 395 individuals are Protected Persons under the Fourth Geneva Convention, and are, at the time of publication, still waiting for their rights to be restored. The primary responsibility for their return to their homes in the Occupied Territories falls on Israel's shoulders. However, the entire community of High Contracting Parties also shares a joint and several responsibility to ensure that Israel complies with its obligations.

A just and lasting peace in the Middle East cannot be achieved until Israel is effectively called to account by the international community for its abuses of the human rights of

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[73] Indeed the *Jerusalem Post* on 8 January 1992 reported that Israeli diplomats found the active role of the US in the drafting process of the UN Security Council Resolution No. 726 dated 6 January 1992 to be "worrisome".

Palestinians, and until such time as absolute human rights are not reduced to commodities which can be traded in the spirit of the market-place. The mass deportation which was carried out on 17 December 1992 was illegal in every respect. Measures are built into the Fourth Geneva Convention and in the United Nations Security Council remit which should afford protection to Palestinians. These protections have been rendered meaningless by a private deal between Israel and the United States of America. Not only are such deals inimical to the human rights of Palestinians living under occupation, but they abase humanitarian law itself, threatening to rob it of all meaning. They also call into question the credibility of the United Nations as a symbol and tool of international cooperation and as guardian of international law, the respect for which should form the basis of any such cooperation.

APPENDIX A Text of UN Security Council Resolution 799 of 18 December 1992.
UNITED NATIONS.

Security Council. Distr. GENERAL.

S/RES/799 (1992)
18 December 1992

RESOLUTION 799(1992)

Adopted by the Security Council at its 3151st meeting, on 18 December 1992

The Security Council,

Recalling the obligations of Member States under the United Nations Charter,

Reaffirming its resolutions 607 (1988), 608 (1988), 636 (1989), 641 (1989), 681 (1990), 694 (1991), and 726 (1992),

Having learned with deep concern that Israel, the occupying Power, in contravention of its obligations under the Fourth Geneva Convention of 1949, deported to Lebanon on 17 December 1992, hundreds of Palestinian civilians from the territories occupied by Israel since 1967, including Jerusalem,

1. Strongly condemns the action taken by Israel, the occupying Power, to deport hundreds of Palestinian civilians, and expresses its firm opposition to any such deportation by Israel;

2. Reaffirms the applicability of the Fourth Geneva Convention of 12 August 1949 to all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and affirms that deportation of civilians constitutes a contravention of its obligations under the Convention;

3. Reaffirms also the independence, sovereignty and territorial integrity of Lebanon;

4. Demands that Israel, the occupying Power, ensure the safe and immediate return to the occupied territories of all those deported;

5. Requests the Secretary-General to consider despatching a representative to the area to follow up with the Israel Government with regard to this serious situation and to report ot the Security Council;

6. Decides to keep the matter actively under review.

APPENDIX B

Judgment of the Supreme of Israel handed down 28 January 1993. (Beit Agron translation, edited by al-Haq.)

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE.

HCJ 5973/92 HCJA 5990/92
HCJ 5974/92 HCJA 6043/92
HCJ 5975/92 HCJA 6047/92
HCJ 5976/92 HCJA 6064/92
HCJ 6023/92 HCJA 6077/92
HCJ 6114/92 HCJA 6089/92
HCJ 6170/92 HCJA 6097/92
HCJ 6263/92 HCJA 6129/92
HCJ 6298/92 HCJA 6167/92
HCJ 29/93 HCJA 6213/92
HCJ 32/93 HCJA 6245/92
HCJ 97/93 HCJA 6247/92
HCJ 107/93 HCJA 217/93
HCJA 248/93
HCJA 249/93
HCJA 266/93
HCJA 278/93
HCJA 285/93
HCJA 454/93

[The names of the Petitioners have, for the sake of brevity,

been deleted.]

JUDGMENT

Introduction

1. (a) These petitions and the applications ancillary thereto concern the expulsion to Lebanon on 17th December 1992 of 415 of the residents of Judea and Samaria and the Gaza Strip, in respect of whom, according to the Government authorities, information had accumulated according to which they were active in the Hamas organisation or the Islamic Jihad.

According to the Respondents' reply, those expelled merely comprised persons whose activities were at the level of responsibility for district machinery and above (including training, operations, and incitement), and not those who were merely involved in the incitement of disorder, the distribution of proclamations or the writing of slogans.

(b) The families of Nissim Toledano deceased and Iris Azoulay deceased, both victims of the said organisations, and the Society of Terror Victims were joined as additional respondents to the petitions. They applied, in their own words, for the measures taken by the State to remain in force. The family of the missing soldier Yehuda Katz also joined as a petitioner and applied for the Government to declare its willingness to act to exchange Israelis missing in Lebanon for the persons expelled. Adv. Shai Porath also joined [the petitions], claiming that the Government was not competent, on 25 December 1992, to refuse the request of the International Red Cross to transfer aid and supplies to the persons expelled where they were staying in Lebanon.

We would explain our position in respect of these additional petitions at the outset:

(1) Insofar as relates to the petitions of the Toledano and Azoulay families and the Society of Terror Victims, their positions are identifiable with that of the State, and therefore everything stated by us in this context below will also apply to those petitions.

(2) As the Attorney-General has stated to us, the application of the Katz family is being considered by the Government and we did not believe that at this stage more can be required.

(3) We were dubious as regards the legal basis of Adv. Porath's petition; however, it has meanwhile become apparent that the question of medical aid for the deportees needing it is in any event amongst those matters which the Government is presently acting upon with the International Red Cross, and at this stage, therefore, consideration of the said additional petition has become superfluous.

Our statements will be divided into the following sections:

(a) Factual background, including a description of the Hamas organisation and the Islamic Jihad organisation.

(b) The expulsion orders which were made and the legal basis of the expulsion orders according to the Respondents.

(c) The Petitioners' arguments.

(d) The conclusions on the legality of the expulsion.

The Hamas and the Islamic Jihad.

3. (a) On 13 December 1992, the Hamas carried out a brutal kidnapping and murder of Nissim Toledano, deceased. The same week, the said organisation caused another five deaths, as the climax of acts of murder which had preceded it. Acts of kidnapping and murder expressed the central and dominant objective of the said organisation, and of the Islamic Jihad organisation and its factions, to bring about the liquidation of the State of Israel through Jihad (a holy war). Those acting on behalf of these organisaions have in recent years murdered and wounded, by stabbings, axes, strangulation or shooting, citizens and soldiers who have fallen in the way of the perpetrators; amongst the victims are a 15 year old girl and old people of 70 years or more. These organisations have also murdered many tens of the Arab residents of the occupied territories who, according to them were suspected of having contact with Israeli entities or of infidelity to the personal norms of conduct for which they were obliged according to the said organisations' philosophy.

(b) According to an expert's opinion which has been submitted to us, based to a great extent on the open publications of these organisations, i.e. statements quoted from them, the Hamas is a secret organisation which combines the most extreme Islamic fundamentalism with absolute opposition to any arrangement with Israel or recognition of it and preaches the destruction of the State of Israel ("Israel will arise and exist until Islam wipes it out, just as it wiped out its predecessors"- from Hamas Covenant).

The object of the organisation is the reinstatement of an

Islamic state in the whole area of Palestine "from the Sea to the River" ("the Hamas believes that the Land of Palestine is a Muslim charitable endowment until the end of time. Neither it nor any part of it should be surrendered... it is the principle of the Islamic Sharia (Islamic law) and holds good as regards any country conquered by force by the Muslims"- from the third chapter of the Hamas Covenant dated 18 August 1988). The Holy War (the Jihad), in the form of an armed struggle, including murder, is the sole and immediate means to achieve the said goal; any arrangement with an Israeli entity amounts to a surrender of the principles of the Islamic religion.

In its propoganda the organisation relies on local religious personalities who add religious decisions and interpretations as a conceptual foundation and as religious legitimation for the acts of terror. Its members include members of the free professions who guide the organisation's activities and arrange for the resources necessary for its activities to be supplied. The organisation is aided by front organisations which serve as sources for mobilising manpower and for camouflaging cover action (the transfer of funds, etc.).

The acts of murder and terror are in a constant process of escalation, and opportune kidnapping for the purpose of murder, as already mentioned, is a striking characteristic of the organisations's activities.

The main objectives of the organisation emerge from its proclamations. In Proclamation 91 of 5 October 1992 it was *inter alia* said:

"Hamas calls upon the masses of our Arab and

Islamic people to express their position: the rejection of the device of autonomy and the rejection of the normalisation of relations with the Zionist enemy. Hamas requires the leadership of the PLO and of all Arab countries concerned in the negotiations with the Zionist enemy to resign from the negotiations and stand alongside the Palestinian people in its Jihad against the conqueror.

Hamas congratulates the daring *Halal As Eladin* Elkassem Brigade for their success in attacks in Gaza and Jerusalem against soldiers of the Zionist conqueror and calls for more heroic attacks."

In Proclamation 93 of 5 December 1992, the following passage appears:

"Only iron will rout iron and only the strong will overcome the weak, a firm decision is a firm decision and the Jihad is a Jihad until Allah proclaims the victory.

Your movement, the Hamas, renews its promise to continue the Jihad, despite the surrender of the docile or the violence of the conquerors and calls as follows:

(a) *On the foreign plane:*

Hamas emphasizes its requirement of the Arab

countries, which are participating in the negotiating process, to retire from it and not to accept the demands of the Zionist enemy and stop the economic boycott and normalisation of relations with it."

The Proclamation of 14 December 1992, following the kidnapping and murder of Nissim Toledano deceased, included the following:

> "*We emphasize that the Jihad and the death of the holy ones which hamas has adopted as a method and strategy is the only means for the liberation of Palestine*, and it alone is what will bring about the collapse of our enemy and shatter his arrogance. We have undertaken to Allah to continue our Jihad, to escalate it, develop it and constantly surprise the enemy by our blessed military activities. We call upon our brethren in all the Palestinian (Islamic and national) factions to escalate the activities of the Jihad and concentrate all our people's potential in the front which is fighting the enemy and to turn our stolen land into a volcano which will destroy the conquering invaders by fire.
>
> The capture of the officer is in the context of the state of war in which Palestine, our people and our brigades are with the Zionist enemy, and it was not the first act, as our people is well aware, and will not be the last, with the held of G-d"

(The emphasis is in the original)

Expression of the spiritual image of the Hamas activists can also be seen from the congratulatory statements about the murder at the end of December of Haim Nahmani, deceased, which were made by the chief spokesman of the deportees, Dr. Elaziz Rantisi, on 4 January 1993.

(c) The Islamic Jihad movement, in all its factions, is no different in its character and objects. As emerges from the statements of its leaders and its publications, this movement views the "Zionist Jewish entity" embodied in the State of Israel as a *prime* enemy, and action to liquidate it should be taken immediately; this movement has also given expression to its ambitions in dozens of acts of murder and terror.

The Expulsion Orders

4. (a) Against the background of increasing Hamas activity in the first weeks of December 1992, the Government, on 16 December 1992, decided as follows:

Security matters

In the Ministerial Committee for National Security Matters which is empowered to make emergency regulations for the issue of immediate expulsion orders for the expulsion of persons inciting acts of terror it is decided (by a majority, one abstention):

a. In view of the existence of a state of emergency

and in order to safeguard public security - to instruct the Prime Minister and the Minister of Defence to order and empower the military commanders of Judea and Samaria and the Gaza Strip to issue orders in accordance with vital, immediate security needs relating to the temporary expulsion, without prior notice, of those of the residents of the territory who are, by their action, endangering human life or inciting such action, for such period as determined by the military commanders, but not exceeding two years.

b. Whoever is expelled as aforesaid may, within 60 days, appeal against his expulsion to a special committee through a member of his family or his advocate in accordance with such rules as shall be laid down in the orders".

Following the said decision, the Commander of Central Command, who is the Commander of the IDF Forces in Judea and Samaria, and the Commander of the Southern Command, who is the Commander of the IDF Forces in the Gaza Sprip, published orders relating to temporary expulsion (temporary provisions). The wording of the order in respect of Judea and Samaria is set out below:

"The Israel Defence Forces

Order for Temporary Expulsion (Temporary Provision)

By virtue of my power as Commander of the IDF Forces,

having been satisfied due to the special circumstances presently existing in the territories, that decisive security reasons so oblige, I hereby order, as a temporary provision, as follows:

Definitions

1. In this Order -

"regulations" means the Defence (Emergency Provisions) Regulations, 1945;

"temporary expulsion order" means an order pursuant to Regulation 112(1) of the Regulations, the force of which is limited to a period not exceeding two years.

Implementation of temporary expulsion order

2. A temporary expulsion order may be implemented immediately after it is issued.

Appeals committee

3.a. Notwithstanding as provided in Regulation 112(8) of the Regulations, appeals committees shall be established for the purpose of this order, whose members shall be appointed by me or a person empowered by me.

b. A lawyer judge of a military court shall serve as the chairman of an appeals committee.

c. An appeals committee shall have the power to hear an appeal made to it and may approve the temporary expulsion order, revoke it or curtail the period specified therein.

Appeals

4.a. An appeal against a temporary injunction order may only be made to the appeals committee within 60 days of the temporary injunction order being issued.

b. The proceedings of the appeals committee shall be conducted in camera.

c. Should the temporary expulsion order be implemented, the appeals committee shall consider the appeal in the absence of the deportee.

d. The deportee shall be entitled to be represented before the appeals committee through an attorney - an advocate or relative.

5.a. This Order commences on the date of its signature.

b. This Order shall remain in force until other instruction is given by me.

6. This Order shall be called: The Temporary

Expulsion (Temporary Provision) (Judea and Samaria) Order No. 5753 of 1992.

16th December 1992

Danny Yatom, Brigadier
Commander of the IDF Forces in Judea and Samaria"

The wording of the Order in respect of the Gaza Strip is similar, with some insignificant modifications, to the Order published in Judea and Samaria.

b. The said Order relating to temporary expulsion is based on the provisions of Regulation 112 of the Defence (Emergency Provisions) Regulations, 1945, which were made by the British Mandatory Government and are still part of the domestic law in the said territories.

The relevant provisions of Regulation 112 as aforesaid provide as follows:

"Expulsion [74]

112.(1)The Commander of the IDF Forces in the territory (In the original - the Supreme Commissioner) shall be empowered to make an order under his hand (which is hereinafter referred to in these Regulations as an "expulsion order") for the

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[74] This is a free translation from the Hebrew and does not purport to reflect the original English wording of the regulation.

expulsion of any person from the occupied territory (in the original - from Palestine). Any person in respect of whom an expulsion order is made shall remain outside the occupied territory so long as the order is in force.

....

(8) Any consultative committee which is appointed under the provisions of sub-regulation (4) of Regulation 111, if so requested by any person in respect of whom an expulsion order is made under these Regulations, is empowered to deliberate and make recommendations to the commander of the territory in connection with the expulsion order".

No-one has disputed to us the fact that the Defence (Emergency Provisions) Regulations, 1945, and Regulation 112 as aforesaid, are part of the valid domestic law in each of the said occupied territories (as regards Judea and Samaria, see also the summary of the legislative history in HCJ 513/85 - *Nazal v. The Commander of the IDF Forces in Judea and Samaria*, PD39 (3) 645). In the Gaza Strip, the British Mandatory law still applies in full, and Regulation 112 is thereby in any event, contained therein.

(b)In legal terms, in such circumstances, the prior hearing of an appeal could be dispensed with, because the order of the commanders laid down an express legislative provision on this issue permitting expulsion without prior hearing; in the alternative, the law of the State of Israel, as expressed in the

precedents of this Court, also recognises exceptions which, in extreme security circumstances, permit departure from the observance of an inherent right, including that of a hearing.

In this connection the Respondents *inter alia* referred to the judgement of President Agranat and of Judge Zussman in EA 1/65 (*Yardor v. The Chairman of the Sixth Knesset Central Elections Comittee*, PD 19(3) 265) and to the judgement in HCJ 680/88 *Schnitzer v. the Chief Military Censor*, PD 42 (4), 617, 630, opposite the letter B).

The Petitioners' Arguments

a.The central argument of the Petitioners is that the expulsion orders are void for a dual reason, being both because the empowering order (namely the Temporary Provisions Orders) is void *ab initio* and because of various defects which occurred in the course of issuing the individual orders.

With regard to the first reason, the Petitioners referred in particular to the absence, according to them, of a sufficient legal basis for denying the expulsion candidate of the right of prior hearing, according to which he can raise his objections to the expulsion, *before* its implementation, before a committee operating under Regulation 112(8) of the Defence (Emergency Provisions) Regulations, 1945, and if he so desired thereafter also to the High Court of Justice (with regard to the spheres delineated in that respect by this Court in HCJ 1361/91 (*Mesalem v. The Commander of the IDF Forces in the Gaza Strip,* PD 45 (3) 444, 453, opposite the letter F).

(b) The act of expulsion is contrary to both public international law and to Israeli administrative law, jointly and severally:

(1) Article 49 of the Fourth Geneva Convention on the protection of Civilians during War prohibits expulsion generally and mass expulsion in particular.

(c) From the above quotation, it emerges that the temporary expulsion order referred to the special circumstances which had arisen and to the decisive security reasons, and it provided the following main arrangements:

1) The force of the temporary expulsion is for two years at the most.

2) The temporary expulsion order under Regulation 112 of the said Regulations could be implemented *forthwith*, namely immediately after its issue.

(3) The right of hearing should only exist *after* the expulsion's implementation, namely it would be possible to file an appeal for up to 60 days from the date of the order's issue. The 60 day limitation *was revoked* in an amendment of the 13th January 1993.

(4) The appeals committee for the purposes of such an appeal would have power to make a binding decision and not merely consultative power.

(5) The appeal would be heard in the absence of the deportee, and he could be represented by an attorney, namely counsel or a member of family.

(d) Following the orders, the commanders in practice exercised the power which had been vested in them:

In Judea and Samaria, 284 expulsion orders were issued, of which 39 were for a period of 18 months and the rest for a period of 24 months. In the Gaza Strip, 202 orders were issued, of which 100 were for a period of 18 months and the rest for a period of 24 months. Of the said total number, 78 were subsequently withdrawn, but others were added, to the effect that in total 415 persons were expelled.

On the 16th December 1992, the expulsion began. It was temporarily stayed because of the first petitions, by interim orders of this Court, which were set aside on 17th December 1992, together with the issue of *orders nisi.*

(e)The criterion applied by the military authority which decided on the expulsion's implementation was individual, namely, the choice was personal, based on the information regarding each of the candidates for expulsion. As stated in the State's reply which was filed with us:

"Involved are people, some of whom took part in the organisation and support of acts of violence or in the guidance, incitement or preaching of such acts. The others assisted the activities of the said organisations in the sphere of economic or organisational infrastructure, the mobilisation of personnel, the raising and distribution of funds and also in the wording of proclamations and organising the dissemination thereof".

(f)After the expulsion, it transpired that the deportees included, in error, six people against whom an order had not

been made, another person in whose identity an error had been made and nine persons under legal process or persons against whom court proceedings were being conducted, whom it was not intended to expel without first exhausting the legal proceedings already being taken.

The Government announced its willingness to return the said persons, and 14 of them who agreed thereto have already been returned.

Respondents' Position

The position of the respondents is that an expulsion order may be duly implemented pursuant to the emergency provisions, without giving an opportunity to file an appeal prior thereto pursuant to Regulation 112(8), which was quoted above, because -

(a) In practical terms there is a necessity, namely there are pressing emergency conditions which obliged immediate expulsion; and

(2) Israeli law grants the right of argument *before* expulsion (HCJ 320/90, *Kawasame v. The Minister of Defence*, PD 35 (3) 113; HCJ672/88, *Lavadai v. the Commander of the IDF Forces in the West Bank,* PD 43 (2) 227, 235, and HCJA 454/88, quoted therein). This right, which is laid down in Israeli law, should not be denied by security legislation in an occupied territory.

(c) Following HCJ 7/48 (*El Karboteli v. The Minister of Defence*, PD 2 (5), it was pleaded by the Petitioners that the

expulsion orders are void on a further ground: being that the committees under the Temporary Provisions Order were only set up after the expulsion, namely they did not exist before the expulsion was implemented.

We would mention even at this stage that we have not seen fit to accept this last argument. As we shall detail below, the right to apply for a hearing (an appeal) is based on the provisions of Regulation 112 as aforesaid. Sub-regulation (8) thereof, which the Petitioners continue to view as the determining provision as regards the appeal, refers to the committees set up under Regulation 111(4), and they exist all the time, including on the date of implementing the order.

The Legal Conclusions

7.These are the matters requiring examination:

(a) The validity of Regulation 112 of the said Regulations as part of domestic law.

(b) When may Regulation 112 be implemented.

(c) The right of hearing pursuant to the Regulation.

(d) The exceptions to the right of hearing and the validity of the temporary provisions.

(e) The validity of the expulsion orders.

(f) The realisation of the right of hearing.

b. Regulation 112 of the Defence (Emergency Provisions) Regulations, 1945, which deals with expulsion, is a provision of law which is valid in Judea and Samaria and in the Gaza Strip, since it is part of the law applicable in the teritory ("the laws in force in the country", in the words of Regulation 43 of the Hague Regulations, 1907). The continued force of the Regulations, which was made during the British Mandate, originally derived from the provisions of Jordanian law, and since the entry of the IDF Forces it has derived from the *Manifesto on the Procedures of Law and Government (No.2) of Judea and Samaria and of the Gaza Strip* (see also HJC 1361/91, ibid. at p. 455). The implementation of Regulation 112 as domestic law is, since the entry of the IDF forces, with the power and authority of the territory commander.

The orders which were made in the case herein were based on detailed information in respect of each deportee, namely on individual considerations which, according to the Respondents, indicated the existence of a basis in respect of each single one of the deportees. Namely, a *collective* order was not involved, but a collection of personal orders, each of which stands on its own two feet, and meets the requirements of Regulation 108 of the said Regulations, which is discussed below.

9. The arguments made to us did not justify a departure from the legal conclusion that the discretion standing behind the implementation of Regulation 112 was based upon considerations contained in Regulation 108 of the said Defence Regulations (as stated therein, "if necessary or desirable to grant the order for the security of the public, the defence of the State of Israel, the maintenance of public order or the suppression of uprising, rebellion or riots"), provided that the

individual data relating to a deportation candidate, as adduced to the Commander of the IDF Forces before making the order, give foundation for such an act. The evidence relating to each expulsion candidate should be clear, unequivocal and persuasive (HCJ 513/85, *ibid.* (The *Nazal* case), p. 655).

10.(a)Regulation 112 (8) lays down as aforesaid that a consultative committee, appointed under Regulation 11(4) for the purposes of hearing appeals against an administrative detention order, is empowered to examine and make recommendations in connection with an expulsion order if so requested by a person in respect of whom an expulsion order has been made.

(b) The said Regulation does not specify whether the appeal hearing should be held before or after the expulsion's implementation. The British Mandatory powers which made the Regulations believed, as emerges from the way in which the Regulation is implemented, that there is *no* duty to hear an appeal before the expulsion order is implemented, and the then consultative committee heard appeals (they too, in the absence of the deportee) only *after* the expulsion order had been implemented. The committee under Regulation 111 (4) and, just as it heard appeals after detention rather than pending it, so it also heard appeals against expulsion after, rather than before, its implementation.

As can be seen and inferred from the case law of the early years of the State, then too it was not the practice to grant the right of hearing, in the scope of an appeal, prior to the implementation of the expulsion order (this is for example

implied in HCJ 25/52, *Jell v. The Minister of the Interior,* PD 6 110; HCJ240/51, *Taha Abed Elrahman v. The Minister of the Interior*, PD 6 365; HCJ 174/52, *Abu-Dahud v. The Superintendant of Acre Prison,* PD 6 902; HCJ 8/52, *Mustafa Sa'ad Badar v. the Minister of the Interior,* PD 7 366).

(b) However, the developments which have occurred in constitutional and administrative law in recent decades have afforded the right of hearing as a rule - including an appeal to the consultative committee which operates under Regulation 112(8) - which exists in *advance* the status of a basic principle and an essential means for the prior examination of the justification for the Commmander's making an expulsion order. The courts have viewed the prior hearing in the field of administrative law as one of the rules of natural justice (HCJ 3/58, *Bernian v. the Minister of the Interior*, PD 12, 1493, 1503, HCJ 290/65, *Elhager v. The Mayor of Ramat Gan*, PD 20 (1) 29, 33; HCJ 645/38, *Gingold v. the National Labour Tribunal*, PD 35 (2) 649, 654; Crim. App. 768/80, *Schapira v. the State of Israel*, PD 36 (3) 337, 363); and as regards the right of prior hearing, it was stated in HCJ 4112/90, *The Association for Civil Rights in Israel v. The Commander of the Southern Command*, PD 44 (4) 626, at pp. 637-638, that -

The right of hearing:

> "Its source and foundation is in the Jewish heritage from days of yore, and the wise men of Israel saw it as civilisation's most ancient right" (Genesis, Chapter 3, verses 11-12; Chapter 4, verses 9-10; 18, 21; Deuteronomy, Chapter 1, Verse 16) "and even if it is clear to the judge

that the defendant will be condemned, his case should first be heard in any event" (the Rama's response, Article 500).

As regards the case herein, it was stated in HCJA 497/88 (*Shakashir v. The Commander of the IDF Forces in the West Bank,* PD 43 (1) 529, 537 -

"In cognisance of the grave far-reaching damage occasioned to the person affected by reason of an order expelling him from his place of residence, the legislature laid down a special procedure, which is not known in criminal law, through Regulations 111(4) and 112(8) of the Defence Regulations, according to which a Consultative Committee, headed by a lawyer, was established, amongst its powers being to examine all the information existing against the expulsion candidate, including all the open and privileged information held by the Defence authorities. This committee gives the expulsion candidate an opportunity to adduce to it his testimony and his arguments and it must also allow the person to call other witnesses on his behalf, if those witnesses might affect the results of the hearing. After examining the evidence and hearing the arguments of the parties or their attorney, the consultative committee makes its recommendation to the Military Commander as regards the outcome of the relevant order .....if the Commander decides,

after obtaining opinion from the consultative committee, not to cancel the expulsion order and to insist upon its implementation, it is open to the expulsion candidate to file a petition to the High Court of Justice".

(c) The legal interpretation according to which Regulation 112(8) grants a right of appeal *before* implementation of the expulsion was considered at length in HCJ 320/80 (*Kawasame & Others v. the Minister of Defence*, PD 35 (3) 113).[75]

The Kawasame case involved the expulsion of the mayors of Hebron and Halhoul and of the Imam of El Ibrahimi Mosque, Rajahb El-Tamimi, following the murder in Hebron of six jews who, on 2nd May 1980, were returning from prayers at the Cave of Machpela. Immediately upon the expulsion order being made by Brigadier-General Benjamin Ben Eliezer, the three were taken from their homes, supposedly for the purpose of talks with the Territory Commander. They were then told that they were going to meet the Minister of Defence and instead they were flown by helicopter to the Lebanese border and there expelled over the border. Their spouses petitioned the Court against the validity of the expulsion order.

An *order nisi* was issued pursuant whereto the authorities were required to show cause "why the expulsion orders should not be set aside .... since they (the deportees) had not been given a fair opportunity to state their objections to the expulsion

[75] The original translation spells this case Kawasame, whereas elsewhere it has generally been spelt Qawasme. For the avoidance of doubt, it should be stressed that the two different spellings refer to the same case.

orders for consideration by the committee mentioned in Regulation 112(8) ... and were not allowed to appear before that committee before the expulsions were implemented.

In the *Kawasame* case the State Attorney explained in his arguments that those responsible for the expulsion knew what the law prescribed with regard to Regulation 112(8), although they had decided, without consultation with legal entities, to implement the deportation forthwith without service of an order or notice of its contents, because "a situation had arisen which obliged the immediate expulsion of the said three leaders in order to prevent a dangerous escalation in the security situation in the territory". The State also stated in court, after the expulsion has been implemented, that it would be willing to hold a hearing before an appeal committee.

President Landau held that, according to the rules of natural justice and in view of the wording of Regulation 112(8), the reasonable meaning of the regulation was that there is a duty to grant an opportunity of applying to the committee *immediately* after the expulsion order is made and *before* it is implemented. After the expulsion has been implemented a new situation arises, when the deportee is already over the border and he is thereby deprived of his ability to object to the order and put his case to the committee.

So too was the regulation understood - as emerged from the Minister of Defence's reply in the said case - in another case, being that of the expulsion order in respect of Bassam Shakha, the mayor of Nablus. In the words of President Landau, "even if it had been most desirable in the eyes of the respondents, for pressing reasons of security, that the expulsion be implemented

without any delay, that did not justify their disregard .... it is essential to observe the law" (*ibid.*, p. 119).

Neverthless, President Landau *did not* see fit to set aside the expulsion order. The consultative committee was already in existence at the time of the expulsion and it was therefore not appropriate to conclude that the order was void on the ground that this Court applied in the case of *Karboteli (ibid.*, HCJ 7/48), in which a detention order was revoked because a committee under Regulation 111(4) did not exist at the time the detention was implemented.

In president Landau's opinion, the main point is that the denial of the right first to apply to the committee *does not* oblige the retroactive cancellation of the order, but the correct remedy for the wrong is reinstatement, namely placing the petitioners in the situation in which they would have been had they not been deprived of the right to apply to the committee. In view of the evidence of open incitement against the State by Imam

the result which President Landau reached, but

added that although Regulation 112(8) *does not* contain express provision that an application should be allowed to the committee before expulsion, in his opinion the law is that generally a person should be allowed to apply to the consultative committee before the order is implemented. The

law is not founded on statute, but on principles laid down by the courts which oblige every authority to act fairly. The denial of the right to apply to the committee is similar to denying a person's right to a fair hearing. However, according to him, there could be emergency situations in which the right of hearing must bow to a contrary vital interest, which should be given priority. We shall discuss this below.

Judge Haim Cohen, dissenting, believed that the order should be made absolute, since the expulsion orders should be viewed as void because of the manner in which the expulsion had been dealt with.

The court therefore, by a majority, decided *to set aside the order nisi*, namely to dismiss the petition, making the following recommendation:

> "(that) if the committee (namely the consultative committee appointed under Regulation 111(4) of the 1945 Regulations) finds that the content of the first and second petitioners' application to it, if made, is substantive *prima facie* and that it contains a clear stance by the petitioners that they intend to observe the laws of the administration in their activities as public personalities and it also contains unequivocal reference to the statements of incitement published in their name in the media - then in the next stage the petitioners should be allowed to appear personally before the committee to enable the committee to obtain an impression of their oral explanations, in the manner which should have been adopted initially" (*ibid.*, pp. 124-125).

The two deported mayors indeed applied to the committee through the Red Cross in affadavits which met the requirements. Following this, they were returned for the hearing through the Allenby Bridge and were arrested on the spot. The consultative committee held its hearing by the Bridge. The petitioners' counsel appeared before it and their arguments were heard, and the information was submitted on behalf of the Army about their activities. The committee heard the appeal and dismissed it, and the expulsion order was upheld. The petitioners applied to this court with a new

petition which too was dismissed. The expulsion order was then implemented again.

11.(a) In the present case, the Respondents have sought to modify the legal infrastructure by enacting the orders regarding the temporary provisions which expressly permitted immediate expulsion, by allowing the possibility of applying to the consultative committee *after* expulsion.

(b) We have explained in the past, on more than one occasion, that the Court will review the legality of an act of Military administration and the validity thereof in accordance with the principles of Israeli administrative law, in order to decide whether the norms binding an Israeli public officer have been observed (HCJ 69/51, 493, *ibid. (Abu Ita*, PQ 37 (1) 197,. 231).

It was stated there:

> "So far as this Court is concerned, the officer does not generally perform his duty if he has only performed that obliged by the norms of international law, because more is required of him, as an Israeli authority, amd he should also act in the sphere of military administration in accordance with the rules which delineate fair and proper administrative procedures. For example, that laws of war do not disclose any principle, whether solid or at least formulated, according to which there is a duty to observe the right of hearing, but an Israeli authority will not fulfill its duty ... if it does not respect that duty in circumstances where the right should be

granted in accordance with our norms of administrative law".

Israeli administrative law obliges, as aforesaid, the grant of a right of hearing, and we have already stated the more serious and irrevocable the results of the Government decision, so the more vital that the person affected can state his objections and put his answer to the allegations against him in order to try and rebut them (see HCJ 358/85, *The Association for Civil Rights v. The Commander of the Central Command* PD 43 (2) 529, 540).

(c) Moreover, stating a case through an intermediary rather than the person concerned is *a fortiori* deficient in value and practicality. Statements made by counsel lose some of their force when the person making the statements on behalf of the other *cannot* first meet with the person concerned in order to obtain from him information, guidance and instructions and continue consulting with him routinely in respect of the factual allegations raised against him which are the basis of the hearing and in respect of which the party concerned's reply is sought, as only he knows what his real version is. The personal appearance before the committee of the person in respect of whom the expulsion order is made is fundamental to the right of hearing.

The cases of mistaken identity and of the choice of the deportee which have been discovered in the case before us after the event have of course made more acute the conclusion as regards the importance of giving an opportunity to state a case directly before the committee. There is a possibility - if only theoretical -that there are other cases in which it could

become apparent that there was a mistake in or non-justification for the expulsion if the person concerned appeared before the committee and stated his case.

12.(a) The Respondents have put forward the argument that, according to the principles of administrative law, there are circumstances in which the vital interest of State security prevails over the duty to hold a prior hearing, before the expulsion order's implementation. In other words, in the balance between these competing interests, namely the right of hearing versus the security need, and when the security circumstances are of social weight, the prior right to a hearing should not be maintained, except after the exercise of the power, and the immediacy of the power's exercise then constitutes an incontestable constraint. The State's argument was:

"31.Moreover, the opinion of the security entities was, and still is, that any attempt to implement the expulsion of hundreds of people in its prior format (rather than by way of immediate expulsion), whilst the candidates for expulsion were still in the territiories, was likely to give rise to a very grave wave of incitement and violence, *inter alia* aimed at creating pressure (both domestic and international) on the State of Israel to cancel the intention to expel.

32.In this context, it could also be appraised, on the basis of past experience, that the wave of incitement was also likely to spread beyond the Palestinian street into the detention centres and prisons in Israel, in Judea and Samaria and the Gaza Strip".

In order to lay foundation for his argument of the existence, sometimes, of a right to depart from the major principles of the right of prior hearing, the Attorney General inter alia referred to HCJ 531/79 (The Likud Party in *Petach Tikva Municipality v. The Petach Tikva Municipal Council*, PD 34 (2) 568, 578), where it is stated:

> "Principles of necessity of constraints of time can deny the application of the rules of natural justice".

Crim. App. 768/80 (*Shapiro v. The State of Israel*, PD 36 (1) 337,365) was also mentioned, in which it was held:

> "An administrative authority can make a decision without hearing the interested party and the decision can remain in force. This will happen when the interest which the decision protects in a specific case weighs more in the context of all the general interests than the interest of the right of hearing. With all the importance of the principle of the right of hearing, it should not be forgotten that it is only one of all the interests which have to be balanced and respected".

In delineating the bounds of the said exception to the existence of the principle of a hearing in truly security-operational matters, it was said in HCJ 358/88 as aforesaid:

> "There are indeed operational military circumstances in which judicial review is inconsistent with the place or time or with the

> nature of the circumstances; for example, when a military unit carries out an operational act, in the scope of which it must remove an obstacle or overcome opposition or respond on the spot to an attack on the Army's forces or on civilians which is then occurring, or like circumstances in which the competent military authority sees an operational need for immediate action. By the very nature of the matter, in such circumstances it is inappropriate to delay the military act, the performance of which is obliged on the spot".

In HCJ 4112/90 as aforesaid, we went on to say on this issue:

> "Such circumstances existed in the case before us, where the Military Commander for a lengthy period tried many different measures until it became apparent to him that none of them could prevent an act of murder because of the narrow and winding conditions of the location which did not allow the life of the murdered victim to be safeguarded. This grave and uncontrollable situation of risk to human life obliges an action on the spot to safeguard human life and immediately prevent the recurrence of such cases, as the Military Commander directed in the order. Giving a right of argument in the said circumstances, before implementing the order, meaning a delay in taking action for the period necessary to hold the hearing in this Court, as described and requested in the petition, constitutes a substantive risk to human life and

> substantive concern to the possibility of taking the necessary action, as detailed in paragraph 7 of our judgement. In this example the supreme value of preserving human life takes priority over the value of a right of hearing. This balance between these two values is the supreme value in our legal system".

(b) The existence of the exception was also considered by Judge I. Cohen in his separate opinion in HCJ *Kawasame* as aforesaid (*ibid.* p. 134). He referred to the statement of Judge Vitkon in HCJ 549/75 (*Noah Film Company v, The Cinema Film Review Board*, PD 30 (1) 737, 760), according to which:

> "There are of course situations in which the need to cancel a licence or permit granted in error or without due consideration is so great and urgent that even if the rule of *audi alteram partem* was not complied with, the court will hesitate to disqualify the cancellation decision".

Judge I. Cohen further stated:

> "In the work of the learned author, HWR Wade, *Administrative Law* (Oxford, 4th ed. 1977, p. 451) the following was stated in this regard:
>
> > "Sometimes urgent action may have to be taken on grounds of public health or safety, for example to seize or destroy bad meat exposed for sale or to order

> the removal to hospital of a person with an infectious disease. In such cases, the normal presumption that a hearing must be given is rebutted by the circumstances of the case. So it is also, for obvious reasons, where the police have to act with urgency, e.g. in making arrests".

An example of a case in which, for reasons of safeguarding public security - the court in England justified infringing the rules of natural justice, can be found in the judgement in *R. v. Secretary of State for Home Department, ex parte Honsenball,* (1977) (16). In that case a deportation order was issued against an American journalist who had resided in England for a substantial period of time, and the Home Secretary refused to disclose all the details of the material in consequence of which the deportation order was made. In the judgement, which was awarded by the Court of Appeal, the petition was dismissed and the court did not order the Minister to disclose details of the reasons for deportation. I am not sure that we would have adjudicated as the English Court of Appeals did in that case, but this instance does show that even in peaceful England, which does not face the danger of war, the court is willing to prefer a public interest of national security to the principles of natural justice. One may certainly do so when a state of emergency is involved which obliges immediate action. As the learned auther, J.F. Garner states in *Administrative Law* (London 5th ed./ 144 (1979):

> "The full panoply of natural justice does not have to be observed in a case where this would be

contrary to national security'.

In our opinion these temporary provisions in the present case neither add or subtract anything, whichever way one looks at it. If there is an exception to the right of a prior hearing, action can be taken in accordance with that exception and there is *no* need for a temporary provision and if there is no exception to the right of hearing, the Temporary provision is in any event invalid. As regards the question whether the exceptions exist to the rules relating to the right of hearing, the Temporary Provision is in any event invalid. As regards the question whether exceptions exist to the rules relating to the right of hearing in expulsion proceedings, as we have already stated, case law is that such exceptions do exist, and they are the result of the balance between the needs of security and the right of hearing.

We have not seen fit here to take a view on the question of whether an exception to the right of hearing existed in the circumstances herein, since we accept - according to the rule in *Kawasme* (Judges Landau and I. Cohen) - that if there was no prior hearing, a subsequent hearing should be held, serving the object of giving an opportunity to the person concerned to present his case in detail, and the absence of a prior hearing does not per se disqualify the individual expulsion orders.

13. Is amending legislation in the present form valid, namely can the security legislation of a military commander prescribe that there was no legal duty to observe the right of hearing before the expulsion order was implemented?

In view of that stated in paragraph 12 above, the question of the validity of the *Temporary Provisions Order* becomes *devoid* of practical meaning: the power to find that there is an

exception in a specific concrete case, in which the compulsion of reality obliges immediate action before granting the right of hearing, is any event inherent in the authority to exercise the power in respect whereof the right of hearing is sought.

However, for the sake of completing the picture, we shall also answer the question of the validity of general legislation, such as the Temporary Provisions.

If the Order purported to determine a new normative arrangement, without connection to or dependence on special concrete circumstances, the existence whereof must be examined in advance in any event, than it was thereby *ultra vires* the powers vested in the Military Commander. Security legislation cannot bring about the modification of general established norms of administrative law, which our legal system views as the fundamentals of natural justice. If the Temporary Provision sought to determine *as a rule*, that henceforth any expulsion order can be implemented for a limited period without granting the right to a prior hearing, then that does not grant legality to the said new arrangement. Only concrete exceptional circumstances can create a different balance between the conflicting rights and values, and such circumstances were not detailed in the wording of the Temporary Provisions. The Order laid down a *general* arrangement which will remain in force for so long as the Temporary Provision is in force. In other words, the Order laid down a limitation of force as regards the duration of the expulsion, although it prescribed nothing in connection with defining the exceptional concrete circumstances in which the right of hearing can be restricted. It thereby sweepingly and in an overall way cancelled the right of hearing and such power

is not vested in the Military Commander.

To conclude this point, since the *Temporary Provisions* sought to convert a valid general norm into another, without restriction or delineation for defined exceptional cases, the *Temporary Provisions Order* cannot be viewed as valid.

As already explained, that is no significance as regards the power to make expulsion orders. The expulsion orders were expressly made on the basis of the provision of Regulation 112(1) and in reliance on the powers vested pursuant thereto. The said Order relating to the Temporary Provisions did not *create* the power to make an expulsion order but referred to Regulation 112. For the purpose of the case herein, it merely sought toyy determine arrangements with regard to the right of hearing: that and nothing more. We have found that the Temporary Provision is neither here nor there. The power to depart from the grant of a right to a prior hearing is ancillary to the provisions of Regulation 112 in accordance with that explained in paragraph 12 above, without specific empowering legislation. We are therefore per se returned to the provisions of Regulation 112 in all its parts, including sub-regulation 112(8) thereof. This means that the power to make an expulsion order exists and the hearing, by way of an appeal against the expulsions order which will be after the expulsion order's implementation- should be conducted in accordance with Regulation 112(8), as interpreted in precedents of this Court.

14. The Petitioners have argued before us that the individual expulsion orders are void by reason of defects in obtaining them, apart from the lack of a right of hearing. The Respondents have disputed this.

We believe that in the present case the place for such arguments is before the consultative committee, to which the deportee may address his appeal. So long as the consultative committee has not otherwise decided, each individual order remains in force.

15. The Respondents should now make practical arrangements for the realisation of right of appearance before a consultative committee operating under Regulation 112(8) of the said Regulation in respect of anyone who so requests; that is to say that if a written application is made by a deportee through the International Red Cross or otherwise, according to which the committee is asked to hear his appeal, then the applicant sould be allowed to appear personally befor the committee to enable it to obtain an impression of his oral explanations and to examine his case and the justification for performing the expulsion order in respect of him. Pending the appearance before the committee, he should also be allowed a personal meeting with counsel who applies to represent the deportee before the committee.

The committee may hold its hearings *wherever the IDF Forces can guarantee the propriety of its hearings.*

For the purpose of all the aforegoing, the Respondents should make practical arrangements, the details of which shold be decided by the authorities charged therewith. The beginnings of the arrangements were described in the State's notice which was filed with us on 25th January 1993, although they should be supplemented along the lines stated here.

We have also taken note of the Attorney-General's notice of

25th January 1993, according to which further consideration of the security information concerning every deportee who files an appeal will be given within a reasonable time at the initiative of the Respondents.

16. We shall conclude by referring to what was said by Judge Olshan (as he then was) in HCJ 7146 as aforesaid:

> Whilst it is correct that the security of the State which necessitates a person's detention is no less important than the need to safeguard the citizen's right, where both objectives can be achieved together, neither one nor the other should be ignored.

17. In conclusion, we have unanimously reached the following conclusions:

(1) We find that as regards the personal expulsion orders, the absence of the right of prior hearing does not invalidate them. We order that the right of hearing should now be given as detailed above.

(2) *The Temporary Expulsion (Temporary Provision) Order* is void on the ground mentioned in paragraphs 12(d) and 13 above. This conclusion does not invalidate the individual expulsions orders.

(3) The arguments against the validity of the personal expulsion orders, which were issued by virtue of Regulation 112 of the Defence (Emergency Provisions) Regulations, 1945, should as aforesaid, be made to the consultative committee.

Subject as aforesaid, we dismiss the petitions and set aside the orders nisi.

Given this 6th day of Shevat 5753 (28th January 1993).