HCJ 785/87

HCJ 845/87

HCJ 27/88

ABD AL NASSER AL AZIZ ABD AL AZIZ ABD AL AFFO ET AL
v.
COMMANDER OF I.D.F. FORCES IN THE WEST BANK

H.C. 785/87

ABD AL AZIZ ABD ALRACHMAN UDE RAFIA ET AL
v.
COMMANDER OF I.D.F. FORCES IN THE GAZA STRIP

H.C. 845/87

J'MAL SHAATI HINDI
v.
COMMANDER OF I.D.F. FORCES IN THE JUDEA AND SAMARIA REGION

H.C. 27/88

The Supreme Court sitting as the High Court of Justice
[April 10, 1988]
Before Shamgar P., Ben-Porat D.P., S. Levin J., Bach J. and Goldberg, J.

Editor's synopsis -

The military commanders of the various occupied territories, acting pursuant to the Defence (Emergency) Regulations, 1945, ordered the deportation of the Petitioners from the territories, on the ground that they are involved in hostile activities against the State of Israel, such as to endanger the security of the state and the public peace. The Petitioners contend that the deportation orders violate Article 49 of the Fourth Hague Convention of 1949. Sitting in a panel of five Justices, the court denied the petitions, holding:

1. Article 49 of the Fourth Geneva Convention must be interpreted against the background of the outrages perpetrated by the Nazis against civilian populations during World War II, the recurrence of which it was intended to prevent. Article 49 protects civilian populations from arbitrary conduct of the occupying power and from inhuman treatment. It does not apply to the deportation of individuals, under law, for

legitimate reasons, such as protection of the public peace. A literal interpretation of the Convention so as to forbid deportation of protected individuals absolutely and in all circumstances, would yield unreasonable results. For example, an illegal infiltrator could not be expelled after he has completed service of his sentence for the infiltration. Nor could the authorities extradite a wanted person to another country in order to stand trial for crimes charged.

2. Israeli law distinguishes between international customary law and international conventional law. International treaties that create new rights create such rights and obligations between states, but do not confer them upon individuals. Such treaties do not become part of the country's municipal law in the absence of legislation to such effect by the Knesset. On the other hand, the customary international law is part of the country's municipal law. Article 49 of the Fourth Geneva Convention is part of the international conventional law, not the customary law, and, therefore, is not part of Israeli municipal law.

3. The evidence supports the Respondents' findings that the Petitioners are engaged in hostile activities against the security of the state and the public peace.

Justice Bach joined in the court's decision, dissenting, however, from that portion of the opinion which interpreted Article 49 of the Fourth Geneva Convention so as to limit its application to the arbitrary deportation of protected persons for inhuman ends. Agreeing that the Convention was prepared against the background of the Nazi horrors perpetrated against civilian populations, he thought, nonetheless, that the broad language of Article 49 creates an absolute prohibition against expelling a protected person from occupied territory. He agreed, however, that Article 49 of the Geneva Convention is not reflective of international customary law but is rather part of international conventional law and, therefore, it is not part of Israeli municipal law.

Israel cases referred to:

[1] H.C. 606,610/78, *Ayub et al. v. Minister of Defenc*e 33P.D.(2)113.

[2] H.C. 97/79, *Abu Awad v. Military Commander of the Judea and Samaria Region* 33P.D.(3)309.

[3] H.C. 698/80, *Kawasma v. Minister of Defenc*e 35P.D.(1)617.

[4] H.C. 629/89, *Mustafa v. Military Commander of the Judea and Samaria Region* 37P.D.(1)158.

[5] H.C. 513,514/85, M.A.256/85, *Nazal v. Military Commander of the Judea and Samaria Region* 39P.D.(3)645.

[6] C. A. 31/63, *Feldberg v. Director for the Purposes of the Land Appreciation Tax Law*, 17P.D.1231.

[7] H.C. 442/71, *Lansky v. Minister of interior* 26P.D.(2)337.

[8] Cr. A. 94/65, *Turjeman v. Attorney General* 19P.D.(3)57.

[9] C. A. 165/82, *Kibbutz Hatzor v. Rehovot Assessment Officer* 39P.D. (2)70.

[10] C.A. 282/73, *Haifa Assessment Officer v. Arison* 25P.D.(1)789.

[11] H.C. 47/83, *Tour Aviv (Israel) Ltd. v. Chairman of the Restrictive Trade Practices Control Board* 39P.D. (1)169.

[12] Cr. A. 174/54, *Stampfer v. Attorney-General* 10P.D.5.

[13] Cr. A. 336/51, *Eichmann v. Attorney-General* 16P.D.2033.

[14] C.A. 25,145,148/55, *Custodian of Absentee Property v. Samara* 10P.D.1825.

[15] Cr. A. 131/67, *Kamiar v. State of Israel* 22(P.D.)(2)85.

[16] H.C. 69,493/81, *Abu Aita et al. v. Military Commander of the Judea and Samaria Region et al.* 37P.D.(2)197; S.J. vol. VII, p. 1.

[17] H.C. 393/82, *J'mait Askan ... Cooperative Society Registered with the Judea and Samaria Region Command Headquarters v. Military Commander of the Judea and Samaria Region* 37P.D. (4)785.

[18] H.C. 390/79, *Diukat v. State of lsrael* 34P.D.1.

[19] Motion 41/49, *"Shimson" Ltd. v. Attorney General* 4P.D.143.

[20] C.A. 65/67, *Kurz v. Kirschen* 21P.D.(2)20.

[21] H.C. 103/67, *"American-European Bet-El Mission" v. Minister of Welfare* 21P.D.(2)325.

[22] H.C. 102,150,593,690/82, 271/83, *Tzemel v. Minister of Defence* 37P.D.(3)365.

[23] H.C. 574/82, *El Nawar v. Minister of Defence* 39P.D.(3)449.

[24] C.A. 303/75, *State of Israel v. Raphael* 29P.D.(2)601.

[25] H.C. 609/82, *Fantomb Overseas (1981) Ltd. v. Investments Center* 38P.D.(1)757.

[26] C.A. 586,626/82, *Insurance Corporation of ireland Ltd. v. State of Israel - Ministry of Communications; El-AI lsrael Airlines Ltd. v. Insurance Corporation of Ireland* 41P.D. (2)309.

American case referred to:

[27] *Ex parte Quirin* 317 U.S.1(1942).

English cases referred to:

[28] *Reg. v. Governor of Brixton Prison. Ex parte Soblen* [1963]2Q.B.243(C.A.).

[29] *Porter v. Freudenberg* [1915]1K.B.857(C.A.).

[30] *West Rand Central Gold Mining Company v. Rex.* [1905]2K.B.391.

[31] *The Cristina* [1938]1 All E.R.719(H.L.).

[32] *Chung Chi Cheung v. The King* [1939]A.C.160(P.C.).

International cases referred to:

[33] *Re Rizo and Others* [1952]Int'l. L.R.478.

[34] I.M.T. Judgment [1946] Cmd.6964.

L. Tzemel for Petitioner no. 1, H.C. 785/87;

D. Kretzmer for Petitioner no. 2, H.C. 785,845/87;

D. Nasser for Petitioner no. 1, H.C. 845/87;

G. *Bulus* for Petitioner in H.C. 27/88;

D. Beinish, Deputy State Attorney, and *N. Arad,* Director of High Court Department, State Attorney's Office, for Respondents.

JUDGMENT

SHAMGAR P.: 1. These three petitions, which we have heard together, concern deportation orders under Regulation 112 of the Defence (Emergency) Regulations, 1945, which were issued with respect to each of the Petitioners by the Commander of I.D.F. Forces in his region (with respect to the Petitioners in H.C. 785/87 and H.C. 27/88, the Commander of I.D.F. Forces in the Judea and Samaria Region; with respect to the Petitioner in H.C. 845/87, the Commander of I.D.F. Forces in the Gaza Strip).

The Association for Civil Rights in Israel joined the petitions in H.C. 785/87 and 845/87.

This court has issued an interim order staying the execution of the deportation orders.

The parties have agreed to argue these petitions as if an order *nisi* had been given in respect of each of them.

On 13 March 1988 we decided to dismiss the petitions and to set aside the orders issued in consequence thereof. The following are the reasons for the judgment.

2. In these petitions general legal arguments were raised concerning the legality of a deportation order under public international law and under the law applying in the above-mentioned territories. Also, objections were raised regarding the substantive justification for issuing a deportation order in each of the cases upon which these petitions are based.

As for the order in which these submissions will be discussed, we shall first examine the general contentions which essentially negate the existence of a legal basis for the issue of a deportation order against a resident of the above-mentioned territories. For if the conclusion is that under the relevant law the issue of a deportation order is forbidden, then obviously there will be no need to examine whether a substantive justification exists for the issue of the specific order, through the application of this question to the factual data pertaining to each of the Petitioners. Therefore, we will now turn to the general contentions which are common to the three petitions.

3.(a) The Petitioners raised, as a central reason for their petitions, the argument that Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the Fourth Geneva Convention) forbids the deportation of any of the Petitioners from Judea, Samaria or the Gaza Strip, as the case may be. According to the argument, an absolute prohibition exists, with regard to a resident of one of the territories occupied by the I.D.F., against the application of Article 112 of the Defence (Emergency) Regulations, 1945 or of any other legal provision (if such exists) whose subject is deportation. This is due to the provisions of the above-mentioned international convention which, according to the contention, should be seen as a rule of public international law, binding upon the State of Israel and the Military Government bodies acting on its behalf and granting those injured the right of access to this court.

The legal premise underlying this argument has been raised time and again before this court and has been discussed either directly or partially and indirectly in a number of cases

- see principally: H.C. 606,610/78 [1], 121; H.C. 97/79 [2], 309; H.C. 698/80 [3] H.C. 629/82 [4], at 161; H.C.513,514/85 and M.A. 256/85 [5]. In order to complete the legal picture, see also Professor Y. Dinstein's article "The Rafiah Salient Judgment" 3 (1973) *Iyunei Mishpat* , 934.

This court's statement in H.C. 513,514/85 and M.A. 256/85 [5] mentioned above is apposite to the present matter, allowing for slight changes deriving from the material itself. It is said at pp. 649-650:

> As a sort of general introduction to an analysis of the Petitioners' arguments, it should be noted that the first argument mentioned above has been raised already - with slight variation - in a hearing before this court in H.C. 698/80 at p. 623 and was rejected. The repeated raising of this and other arguments regarding the legal validity of Regulation 112 and the force and nature of Article 49 of the Fourth Geneva Convention stems from the premise - *founded in error* - that this court has not already decided the issue whether it is possible to implement Regulation 112 in the Judea and Samaria Region, and that this court has not yet expressed itself on both the reasons based on the internal legislation of the Region and the those resting on rules of public international law. As was said, the proposition of the Petitioners 'learned counsel, that these issues have not been resolved, is founded in error. This court has dealt with the above legal questions at length both in H.C. 97/79, and in H.C. 698/80 mentioned above, which completed the examination of a series of contentions that had not been raised or discussed in H.C. 97/79. The decision in H.C. 698/80 was in fact rendered by the majority opinions of Landau P. and Kahan J. as against the dissenting opinion of Cohn D.P. But this of course does not detract from its validity, nor does it nullify the status of the judgment as a substantive decision on the arguments. We shall follow in its path as long as no weighty material reasons are presented to us justifying a change in the law. That is the difficulty. The decisive majority of the submissions heard by us were nothing more than a quasi-repetition of

what has already been argued before this court on the previous occasions mentioned above and which has already been dealt with explicitly and in detail. If we have listened patiently to a repetition of these long arguments, it is mainly because more than five years have passed since the authority to deport was last exercised, and we thought it proper to examine carefully whether in the meantime there has not been any legal development bearing on our case or any renewed argument affecting the matter before us, which would have, no doubt, far-reaching personal consequences for the Petitioners. To summarize, in the judgments of this court in H. C. 97/79 and H.C. 698/80 a clear position was taken on the validity of Regulation 112 in Judea and Samaria after the end of the Mandate, based on the later Jordanian legislation. All aspects of the issue were discussed and decided there.

(b) As was stated, the Petitioners' submission rests first and foremost on the provisions of Article 49 of the Fourth Geneva Convention. The court's attitude thereto was fully detailed in H.C. 97/79 [2] and in H.C. 698/80 [3], and has been already mentioned in H.C. 513,514/85 [5], the opinions expressed therein are acceptable to me on the issue before us and I see no reason to add to what has already been said by this court. As may be recalled, the statements of Landau P. in H.C. 698/80 [3] complement those of Sussman J. in H.C. 97/79 [2], so far as they concern certain legal aspects of the provisions of the 1952 Jordanian constitution, whereas the decision in H.C. 513,514/85 and M.A. 256/85 [5] touches on additional alternate objections, which were raised regarding the above-mentioned legal question.

Since there have been no developments of any possible bearing on the assessment of the legal situation, as expressed in various ways in the above-mentioned judgments, I would see no need to go back and deal with the varied reasons for the interpretation of Article 49 above, which have already been presented in the previously cited decisions, to which I subscribe. Nonetheless, I have read the remarks of my esteemed colleague, Bach J., and as he does not tend to follow the legal paths that were paved in H.C. 97/79 and H.C. 698/80, and as I disagree with his approach to this issue, I will present the gist of my view on this subject.

Afterwards I will also deal with the new argument raised by the Petitioners' learned counsel regarding the assimilation into our law of some of the rules of conventional international law.

(c) My comments will relate to the following areas:

(1) The accepted approach to interpretation under internal Israeli law;

(2) Principles of interpretation applicable to international conventions;

(3) Interpretation of the above-mentioned Article 49.

(d) **The accepted interpretation in our law.** We accept that the interpretive rules applied in a given legal system are peculiar to that system and are not necessarily identical with those applied in another legal system. In the words of Justice Barak in *Judicial Discretion* (Papyrus, 1987), at pp. 339-340:

> Every legal system has its doctrine of interpretation. The interpretive approach of English law (based in great measure on the language of the law, and where importance is attached to the purpose of the legislation, it can be discovered mainly from the language of the law), differs from that in American law (based on the purpose of the law, which may be learned also from sources outside the law itself)....Rules of interpretation are legal rules which are based on logic, but not solely on logic. Thus for instance, the answer to the question whether the purpose of the law is to be sought only through the language of the law, is not an answer which can be given based solely on logic.... Deciding from amongst the different possibilities is not a matter of logic, but of legal policy. At times this decision is made by the legislator himself, who determines the rules of interpretation that are to be followed. Generally legislators do not operate in this manner and entrust the formation of rules of interpretation to the judiciary.

The author also refers in this regard to W. Friedman, "Legal Philosophy and Judicial Lawmaking", 61 *Colum. L. Rev.* (1961) 821.

The method of interpretation which our courts have applied for quite some time is that which attributes to the wording of the law the meaning which realizes its purpose; this is the interpretative method based on the legislative purpose which has recently received a thorough and penetrating examination in Justice Barak's book cited above.

The formation of rules of interpretation is not effected in a vacuum; rather it is adapted, as stated, to the system of law in which and from which these rules stem. The application of the said rules, in any concrete case in which the court is asked to give content to an enactment warranting interpretation, is carried out, as is accepted here, by applying judicial discretion. Applying judicial discretion is necessary, mainly, where clarification of the wording of an enactment open to interpretation is required in the context of a decision regarding the weight to be given the words of the text, in determining the definition and scope of the legislative purpose. Justice Barak writes about this in his book (*supra* at pp. 341-342) :

> Any doctrine of interpretation must assume as its starting point the doctrine of linguistics ... however, and as we have seen, language is generally not unambiguous. It has multiple meanings, is unclear and consists of "open tissue". At times, words are given an accepted and regular meaning, an almost primary meaning. But for the most part words also have a special and exceptional meaning, a secondary meaning as it were. The doctrine of interpretation must set standards by which one meaning is chosen over another. From the standpoint of language, one meaning does not have preference over another. Any meaning which is possible in a semantic sense is also permissible semantically. It would be a mistake to base a doctrine of legal interpretation on dictates, as it were, of linguistics.

These conclusions are drawn from this court's consistent approach, which has been expressed in a series of judgments, of which those cited below are but a few.

Thus Cohn J. said in C.A. 31/63 [6], at 1235:

> ...the correct interpretation of a given provision in the law stems not only - though primarily - from the language of the provision, but also from the purpose of the law, *from the flaw which it comes to correct*, and from the circumstances surrounding it.

(Emphasis added - M.S.) See also the comments of Agranat P: on the same subject in H.C. 442/71[7], at p. 349:

> Each Law has its purpose, in the light of which the given phrase should be interpreted.

In other words, the same word can have different meanings in different laws. *

Sussman J. (as his title then was) stated in Cr.A. 94/65 [8], at p. 80:

> We have learned that the meanings of words are many, and they change from law to law and from issue to issue. We do not begin with the axiom that every word or text has but one fixed definition; rather when we deal with interpretation we address the question: What is the meaning of a given term in a law in the context in which it appears? Since we have thus phrased the question, it naturally follows that the judge interprets the words with the purpose of the legislation as his guiding light and only in this way can he faithfully serve the legislator. In a similar vein Judge Learned Hand said in *Borella v. Borden Co.* (1944):

* See also the remarks of Justice Holmes in *Towne v. Eisner* , 245 U.S. 418 (1918).

> We can best reach the meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion *how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time.*

(Emphasis added M.S.)

In other words, language does not govern the purpose, rather it serves it. The law is an instrument for realizing legal policy, and therefore interpretation needs to aim toward emancipating the wording from its semantic bonds, were these to distance it from the legislative purpose which the words are intended to realize. Thus, for example, the legislative purpose may be reflected in the description of the legal situation which existed on the eve of the legislation being introduced (C.A. 165/82 [9], at 74).

The following remarks of Asher J. in C.A. 282/73 [10] at p. 793 express the same approach; he says:

> The same word, which in every-day language, is defined in the this nuance is even apt to change from law to law, and from matter to matter within the same law. Therefore it is not sufficient as counsel for the appellant claims, to rely upon a clarification of the "regular" meaning of an expression; rather, the definition *must be determined from a variety of factors, including the context in which the legislator used the expression,* and the purpose behind the enactment being defined.

(Emphasis added - M.S.)

The approach which attaches central importance, both to the legal substance of the issue as tested by the lancet of the interpreter, and to the purpose which the legal provision aims to serve, is not satisfied with the apparently clear and simple meaning of the language of the law. Barak J. commented on this in words appropriate to our subject in H.C. 47/83 [11]. He states at p. 176:

> Every law, including that whose language is "clear", requires interpretation. The law is "clear" only after the interpretation has clarified it. It is not clear without interpretation. Words by themselves are not "clear". In fact there is no less clear a statement than that words are "clear".

In a nutshell, what has been said until now may be summarized thus: We have referred to the guidelines used in establishing the relation between the literal meaning of the written word and the correct legal interpretation, as far as this applies to our legal system. Interpretation in this sector seeks, as was said, to pave the way to a revelation of the legislative purpose. Setting the purpose in this form is directed to the sources which one may turn to in order to ascertain the purpose. It is customary in this matter to examine more than the text and, *inter alia* , also the legislative history; the legal and substantive context, and the meanings stemming from the structure of the legislation (see *ibid*., at 175).

(e) **Interpretation in Public International Law.** Now the second question arises, i.e. what are the rules of interpretation relevant to our matter that are used in public international law?

Israel has not yet ratified the Vienna Convention of 23 May 1969 on the Law of Treaties, which came into force in 1980 for those who joined it (hereinafter: the Vienna Convention). As an aside, what is said in Article 4 of the above Convention regarding non-retroactivity, in any case fundamentally limits the provisions relative to the question before us. Nonetheless, there is value, even if only for the sake of comparison, in an examination of the provisions of the Convention regarding interpretation.

On the issue of interpretation, Articles 31 and 32 of the said Convention state :

> 31. General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes :

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

It seems that from the first part of Article 31(1) one could conclude that the Convention sought to support that school of interpretation which emphasizes the text, as opposed to the alternative school of interpretation, no less accepted, which focuses on the intentions of the draftsmen of the Convention (see I. Brownlie, *Principles of Public International Law* (Oxford, 3rd ed., 1979) 624). Yet, the second part of Article 31(1) and Article 32 form the bridge to the other theories of interpretation, also familiar to us from the earlier examination of our municipal law. That is, the provisions of the Convention leave ample space to enable examination of the purpose which led to its making. It is even

possible to reflect upon the preparatory work describing the background to the making of the Convention, as material which can complement the plain understanding of the text, its purpose and scope of application.

The accepted view is, as was stated, that one of the contributions of the Vienna Convention in this context was expressed in the creation of a closeness and link between the two alternative theories of interpretation. In any event, an examination of the legislative purpose - which is one of the applicable methods of interpretation, unrelated to treaties - is among the recognized principles of interpretation. In the words of J. G. Starke *(An Introduction to International Law* (London, 8th ed., 1977) at p. 510):

> The related rules concerning the intention of the parties proceed from the capital principle that it is to the *intention of the parties at the time the instrument was concluded*, and in particular *the meaning attached by them to words and phrases at the time*, that primary regard must be paid. Hence, it is legitimate to consider what was the 'purpose' or 'plan' of the parties in negotiating the treaty.

(Emphasis added - M.S.)

See also: *Re Rizzo and Others* (1952) [33] at p. 481.

Starke stresses the issue of the intention of the parties to the treaty at the time of its conclusion and refers in particular to the meaning of words and phrases, as intended at the time of the treaty's conclusion.

The Vienna Convention did not purport to list comprehensively and describe all rules of interpretation, which, at times, suggest, in the words of Brownlie *(supra,* at 624), different and varying solutions which are, as he describes them, "general, question-begging and contradictory".

Starke explains that in order to set out a method of interpretation *(supra,* at 511):

> treaties should, it is held, be given an interpretation in which the *reasonable meaning of words and phrases is preferred,* and in which *a consistent meaning is given to different portions of the instrument.* In accordance with the principle of consistency, treaties should be interpreted *in the light of existing international law.* Also applying both reasonableness and consistency, since it is to be assumed that states entering into a treaty are as a rule *unwilling to limit their sovereignty* save in the most express terms, ambiguous provisions should be given a meaning which is *the least restrictive upon* a party's sovereignty, or which casts the least onerous obligations...

(Emphasis added - M. S.)

The aim, according to Starke, is to interpret restrictively any provision in a treaty which limits the authority of the states.

Furthermore, it is perfectly clear that any treatment of the subjects of international law, which earn such multifaceted and even contradictory interpretations, cannot be accomplished with the same exacting standards for which we strive in municipal law.

The *caveat,* by which one is to distinguish between the interpretive approach used in municipal law and that practised in public international law, was presented in an especially detailed and instructive way in the research of Professor Mustafa Kamil Yasseen on interpretation of treaties found in volume 151 of the writings of the Academie De Droit International (M. K. Yasseen, "L'Interpretation des Traites d'apres La Convention de Vienne Sur Le Droit des Traites", 151 *Recueil Des Cours,* (1976) 1, 10). He writes:

> 7. La methode d'interpretation peu ne pas etre la meme, elle peut varier selon une serie de considerations; elle est commandee surtout par la conception qu'on a de l'interpretation, la nature de l'instrument a interpreter et les caracteristique de l'ordre juridique dont il s'agit.
>
> 8. Aussi, en ce concerne les traites la methode d'interpretation doit viser a exercer une fonction declarative et non creatrice, elle doit

> prendre en consideration que le traite est une acte de volonte qu'il n'est pas un acte unilateral, que les parties au traites sont des Etats souverains qu'il ne s'agit ni d'une contrat entre individus, ni d'une, loi de droit interne. Enfin cette methode doit tenir compte des caracteristiques de l'ordre juridique international, ou, le formalisme n'est pas de rigueur, ou les Etats jouissent d'une grande liberte, ou ils sont aussi bien les auteurs, que les destinaires des traites, ou le choix des moyens pacifiques des reglements des differends depend en principe de la volonte des Etats. Il ne serait donc pas etonnant que la methode d'interpretation du traite differe de celle de la loi et de celle du contrat.

And freely translated: The method of interpretation cannot be uniform and identical and it may change in accordance with a series of factors. It is fundamentally dictated by the approach of the interpreter to interpretive methodology, by the substance of the instrument being interpreted, and by the characteristics of the particular field of law (i. e. public international law- M. S.) with which one is dealing. This and more, as far as treaties are concerned, a method of interpretation must see itself as a declarative act and not as a formative one (i.e. not judicial legislation - M.S.). The method must take into account that the treaty is an act stemming from the free will of the treaty-makers, and that it is not a one-sided act; that the parties to the treaty are sovereign states, and that it is not a contract between individuals, nor the internal law of the state. Lastly this method must keep in mind the characteristics of the international legal order, a field in which formalism does not have the upper hand, a field in which states enjoy a great deal of freedom of action, a field in which states are not only parties to a treaty, but also the ones to whom the treaty is directed (i.e. the states must be its executors - M.S.), and a field in which the preference for peaceful means to settle disputes depends upon the free will of states. Therefore, it is not surprising that the method of interpreting a treaty is different from that applicable to a law or a contract.

Professor Yasseen's approach is not unique; in the essays of scholars in the field of international law, one can find more than one instance of a tendency to stress the cognitive image of the rules of public international law, and mixing the desirable with the

actual is not uncommon. Yet it is also possible to find a sober and realistic viewpoint, such as that of Professor Yasseen, running through the legal literature. In this context O'Connell states in *International Law* (London, vol.1, 1965) XII:

> The legal practitioner who is unaware of the theoretical structure of the subject is likely to be misled into supposing that the rules of international law are more concrete and more absolute than they really are.

As a footnote to these remarks, one can cite an obvious example of the diverse and non-uniform application of those rules of international law that should theoretically apply in an identical manner in identical situations: The victorious Allies in World War II, at the time justifiably viewed the Annex to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (hereinafter: the Hague Regulations) as binding customary international law (see *IMT Judgement* (Nuremberg,1946) Cmd. 6964 at 65). At the same time they saw themselves free of the obligation to act in accordance with those same Regulations following the occupation of Germany. They based themselves on the Debellatio (subjugation) claim (see G. Schwarzenberger, *International Law* (London, vol. 2,1968) 167, 467; L. Oppenheim, *International Law* (London, 7th ed. by H. Lauterpacht, vol. 2, 1952) 603). I see of course no reason to take a stand here regarding these approaches to the application of the Hague Regulations. I mentioned the interpretation which adapts itself to changing circumstances only as a supplement to the above-mentioned theories of Starke. To broaden the picture on the diverse application of these norms, I will add that the German jurists tended not to accept the above legal interpretation of the Allies on the effect of the subjugation in 1945 on the application of the Hague Regulations. Yet it has become evident that during the Allies' military rule of the Rhineland (1920-30), it was the German jurists of that generation who in their essays held that the Hague Regulations were not applicable to the Allied military rule of the said territory (see Fraenkel, *Military Occupation and the Rule of La*w (London, 1944) 188,189).

(f) The treatment of the questions of interpretation in our internal law and in public international law may be summarized by mentioning the conclusion, that not for naught has the subject before us been examined in H.C. 97/79 [2] in the light also of its legislative purpose. This approach was necessitated by the method of interpretation customary in our

legal system and by the doctrines of interpretation customary in public international law. As was already mentioned, the two systems do not maintain the exclusiveness of the literal method of interpretation, nor even a preference for it. Moreover, when for the purpose of the issue before us we adopt the interpretive approach as expressed in the specific area of law here discussed, namely public international law, we should recall Professor Yasseen's interpretive guidelines and the remarks of Starke mentioned above, from which emerges, *inter alia*, a stand rejecting the constriction of state authority and rejecting formalism, or an approach which ignores the special qualities of the field of law that we are discussing.

We shall now proceed to the application of the rules of interpretation to the issue before us.

(g) **Article 49 of the Fourth Geneva Convention.** What is the dispute regarding the interpretation of the above-mentioned Article 49.

The relevant portions of the Article state:

> 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.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand....
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

In H.C. 97/79 [2] cited above, Sussman P. comments (at pp. 316-317) regarding the argument that the application of Regulation 112 of the Defence (Emergency) Regulations is contrary to Article 49 of the Fourth Geneva Convention:

Neither have I found any substance in the argument that the exercise of the above-mentioned Regulation 112 contradicts Article 49 of the Fourth Geneva Convention of August 1949 Relative to the Protection of Civilian Persons in Time of War. It is intended, as Dr. Pictet in his commentary on the Convention (p.10) writes, to protect civilians from arbitrary action by the occupying army, and its purpose is to prevent acts such as the atrocities perpetrated by the Germans in World War II, during which millions of civilians were deported from their homes for various reasons, generally to Germany to serve the enemy in forced labour, along with Jews and others who were deported to concentration camps for torture and extermination.

It is clear that the above-mentioned Convention does not detract from the obligation of the Occupying Power to preserve public order in the occupied territory, an obligation imposed by Article 43 of the 1907 Hague Convention, nor does it detract from its right to employ the necessary means to ensure its own security; see Pictet, *Humanitarian Law and the Protection of War Victims,* at p. 115...

It has nothing whatsoever in common with the deportations for forced labour, torture and extermination that were carried out in World War II. Moreover, the intention of the Respondent is to place the Petitioner outside the country and not to transfer him to the country, to remove him because of the danger that he poses to public welfare and not to draw him nearer for the purpose of exploiting his manpower and deriving benefit from him for the State of Israel.

Landau P. again referred to this subject in H.C. 698/80 [3] mentioned above (at pp. 626-628). The following are the relevant passages:
In H.C. 97/79 at p. 316, Sussman P. explained the background to the enactment of Article 49: to prohibit the acts of arbitrary deportation, based on the experience of the atrocities in the mass deportation of Jews to labour camps and death camps during the Holocaust of European

Jewry. It goes without saying that there is no similarity between these atrocities and the deportation of people who endanger security in an occupied territory. Article 49 does not detract from the obligation of an Occupying Power to preserve public order in the occupied territory, as required by Article 43 of the 1907 Hague Convention, nor does it detract from its right to take necessary measures to preserve its own security (*ibid.*, at 316).

With the dismissal of the submission founded on Article 49 of the Fourth Geneva Convention in H.C. 97/79 , the Petitioners herein were not granted an order nisi on those grounds during the first stage in their matter in H.C. 320/80. This time Ms. Langer has more forcefully repeated that same argument. In her opinion, the court in H.C. 97/79 ignored the difference between the first and second paragraphs of said Article 49: Whereas the prohibition against evacuating civilian populations generally carried out by displacement within the occupied territory is permitted for purposes of the population's security or for imperative military reasons, as is stated in the second paragraph of the Article, the prohibition against deportation beyond the border is absolute, "regardless of their motive" as is stated in the latter part of the Article. The book *The Geneva Convention of 12 August 1949, Commentary* (Geneva, ed. by J.S. Pictet, vol. IV, 1958) 279 is cited. Regarding the prohibition against deportations, it states:

> The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2.

Further, in the commentaries on Article 78 which deal with assigned residence and internment of persons endangering public security, it states (*ibid.*, at 368):

> 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.

It has been argued before us that one must distinguish between the reason for the prohibitions in Article 49 of the Convention, which was, as was said, founded in the memory of those atrocities, and between that which stems from the unambiguous wording of the prohibition in the first paragraph of the Article, which applies, according to its language, not only to mass deportation, but also to deportation of individuals. As opposed to this, one can say that the deportation of individuals was also carried out occasionally under the Hitler regime for the realization of the same policy which led to mass deportation, and therefore none of the provisions of Article 49 are in any way applicable to the deportation of persons who endanger public welfare - as this court has ruled in H.C. 97/79. In the words of J. Stone in his lecture entitled "No Peace No Law in the Middle East" (Sydney, 1969), at p. 17:

> ...It seems reasonable to limit the sweeping literal words of Article 49 to situations at least remotely similar to those contemplated by the draftsman, namely the Nazi World War II practices of large-scale transfers of populations, whether by mass transfer or transfer of many individuals, to more hostile or dangerous environments, for torture, extermination or slave labour.

But whatever the correct interpretation of the first paragraph of Article 49 of the Convention may be, the Convention, as Article 49 in its entirety, does not in any case form a part of customary international law. Therefore, the deportation orders which were issued do not violate internal Israeli law, nor the law of the Judea and Samaria Region, under which this court adjudicates... Ms. Langer recalled to us a passage from G. Schwarzenberger's book, *International Law as Applied by*

International Courts and Tribunals (London, vol. II, 1968) 165-166, which was cited in the above-mentioned H.C. 606,610/78, at p. 121. The learned writer expresses the belief that the prohibition against the deportation of residents of an occupied territory is but "an attempt to clarify existing rules of international customary law". I assume that here too, the reference is to arbitrary deportations of population, akin to the Hitler regime. If the author was also referring to deportation of individuals in order to preserve the security of the occupied territory, then that is the opinion of an individual author, stated in vague terms with no substantiation whatsoever.

After a detailed analysis of the Petitioners' arguments, Landau P. decided, as quoted above, to accept the more far reaching argument of the State regarding the applicability to our legal system of Article 49, which falls within the realm of conventional law, and therefore saw no need for additional comments on the content of the Article.

At the time no basis was given for the argument that Article 49 expresses a customary rule of international law; and given the material presented to us, the armed conflicts that have occurred since 1949 (India-Pakistan, Cyprus and others) have not brought about legal decisions that would shed a different light on the issue. In any case if there are any, they were not brought to our attention by the parties. We will return to the commentary of Dr. J. Pictet on the reason for the inclusion of Article 49 in the Convention; but regarding his interpretation of the scope of the applicability of the Article, I will already note that it has not been explained why we are to prefer the remarks of Dr. Pictet over, for example, those of Prof. J. Stone.

The background which the draftsmen of the Convention had in mind is clearly reflected in the deliberations of the Geneva Conference. The relevance of the background is twofold: It describes the flaw which the Convention seeks to rectify (H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties" 26 Brit. Y.B. Int'l L. (1949) 48, 53 and compare with C.A. 31/63 [6] above); and the purpose that the draftsmen had in mind (O'Connell, *supra*, at 271; Cr. A. 94/65 [8] cited above and the remarks of Learned Hand J. as there quoted, at 80). It even sheds light

on the legal situation for which they strove (C.A. 165/82 [9]). This is also the reason that compelled Landau P. in H.C. 513,514/85 and M.A. 256/85 [5] cited above, to turn to the question of whether the prohibition against deportation is within the realm of law rooted in custom or a conventional innovation.

(h) **What were the considerations guiding the draftsmen of the Convention?** An examination of *Actes de la Conference Diplomatique de Geneve de 1949* (Berne, tome 2) 648, 649, 743, 744, 810, 811, shows unequivocally that in using the term "deportations", the participants in the deliberations referred to deportations such as those carried out during World War II. Thus it is stated for example at p. 810:

> Bien qu'on se soit prononce a l'unanimite pour condamner les deportations *comme celles qui eurent lieu pendant la derniere guerre, la* phrase qui se trouve au debut de l'article 45 [In the draft the current Article 49 bore the number 45 - M.S.] a suscite quelques difficultes, car il etait peu aise de concilier les idees exprimees dans des termes divers, en francais, en anglais et en russe. Finalement, le Comite a decide d'adopter un texte qui interdit les transferts individuels ou collectifs obligatoires ainsi que les deportations de personnes protegees, d'un territoire occupe dans un autre pays, mais qui autorise les transferts volontaires.

(Emphasis added - M.S.)

The Convention draftsmen referred to deportations such as those that took place during the last war and in the framework of the deliberations sought a text that would reflect the ideas that were expressed in different ways and in different languages.

So did Pictet in his article "Convention de Geneve - Protection de Civil" 76 *Recuiel des Cours* (1950) 1, 96. He pointed to the accomplishments of the Convention in contrast with the situation that prevailed before it, cited the futile attempts of the International Committee of the Red Cross in 1921 to prohibit the execution of hostages and deportations, and described the suffering of the civilian population during World War II:

> Des centaines de milliers d'entre eux ser virent exposes aux deportations aux prises d'otages, a l'internment dans les camp de concentration, au pires services et a la mort.

In translation: Hundreds of thousands of them were exposed to deportations, to the taking of hostages, to internment in concentration camps, to the most severe brutality and to death.

Article 49, which prohibited deportations was connected therefore with such provisions. As Pictet describes at pp. 109-110:

> Quand an songe aux millions de personnes transferees de force au cours de dernier conflit et a leurs souffrances physique et morales on ne peut que saluer avec reconnaissance un texte mettant fin a ces pratique inhumaines.

In his words: When one thinks about the millions of people who were forcibly transferred from place to place during the last conflict [i.e. World War II - M.S.], and about their suffering, both physical and moral, one cannot but thankfully bless the text [of the Convention - M.S.] which put an end to these inhuman practices.

Here then deportations, concentration camps and the taking of hostages were linked together and the word "deportations" was used in the context described above.

Incidentally, parallel to this, Article 34 of the Convention prohibits the taking of hostages, something which Pictet calls "an innovation in international law" ("constitue une innovation dans le droit internationale").

One is not speaking in this regard, not even by inference, about the removal from the territory of a terrorist, infiltrator or enemy agent, but rather about the protection of the entire civilian population as such from deportation, since the civilian population has more and more frequently become a direct victim of war, despite its civilian character and despite its lack of involvement in active fighting.

M. H. Coursier ("Droit Humanitaire: Protection des Personnes Civiles en Temps", 99 *Recueil Des Cours* (1960) 397, 399) cited the mass attacks against civilians in the context of the situation preceding the development of humanitarian law, when unless expressly prohibited, everything was permitted. He mentions in this context the words of Grotius, according to which:

> Le massacre des femmes et des enfants est compris dans le droit de la guerre.

(Translation as found in Pradier-Fodere, III ch. 419.) Namely: The massacre of women and children was permissible under the laws of war at the time.

He saw the Convention as a necessity stemming from the numerical increase in civilian victims. In World War I half a million civilians were killed as opposed to nine million soldiers. In World War II a kind of numerical parity was created as 24 million civilians and 26 million soldiers were killed. Coursier mentions the deportations in the context of forced labour, but makes no reference to the broad interpretation which would also apply the deportation prohibition to terrorists or enemy agents, whose deportation is necessary to protect the civilian population, for which the military authority is responsible.

That is also the case in B.M. Jankovici's book "Public International Law" (New York, 1984) 375, 376. In discussing the prohibition against deportation, he refers to the millions of people who were tortured and killed in the concentration camps.

Also F. F. Spangenberg in "Die Zwangsarbeit der Bevolkerung Kriegsbesetzter Gebiete und das Volkerrecht" (Kiel, 1961) (Forced Labour of the Population in an Occupied Territory and The Law of Nations) describes the forced transfers and deportations in the war in connection with Article 49 and points out that -

> Die "Deportation" als solche ist somit erstmalig absolut verboten.

The reference is to the manner and form of deportation in World War II, about which he writes in his book.

This is also the meaning of the text found in Schlochauer, *Worterbuch des Volkerrechts,* De Gruyter (vol. 3, 1962) 560; see the entry entitled "Vertreibung" (Deportation).

R.I. Miller, *The Law of War* (Lexington) 88, creates the like link between the various tribulations that mankind underwent in World War II, which he details, and the prohibition in Article 49:

> In World War II at least 5 million persons were deported from occupied territories to Germany as part of the Nazi program of slave labor, persecution and death. Although HR-1907 does not prohibit deportation *per se,* its articles with respect to the safety and order of the inhabitants and requisitioning of supplies and services lead to the conclusion that forcible deportation is beyond the legitimate activities of an occupying power. The International Military Tribunal and Nuremberg and the Military Tribunals under Control Council Order no. 10, pursuant to their charters that defined "deportation to slave labour or for any other purpose" to be war crimes, held the Nazi deportations to be unlawful.... Nevertheless, forcible deportation alone was held in the Krupp Trial to be a violation of customary law, as well as deportation for an illegal purpose (for example, forced labour in the territory of the occupying power) and deportation that disregards recognized standards of decency and humanity.
>
> *Accordingly,* GC-949 provides that "individual or mass forcible transfers" and deportations of protected persons from occupied territory to the territory of the occupying power, or any other country, are prohibited regardless of motive. The total or partial evacuation of a given area is permitted if the security of the population or imperative military reasons demand.

(The emphasis pointing to the causal link is added - M.S.)

On the developing trend in the laws of war to protect the civilian population as such and to try to distinguish effectively between it and the fighters, see also Prof. F. Kalshoven, *The Law of Warfare* (Leiden, 1973), 28.

W. O'Brien, *The Conduct of Just and Limited War* (New York, 1981) presents the subject in a similar context, that is, in connection with the harm caused to a civilian population by transferring it from its location and in connection with the exception regarding evacuation of civilians on security grounds or for imperative military reasons:

> The last specific prohibition of the positive international law *jus in bello* to be considered, is that against forced displacement of civilians. With respect to international conflict, Article 49 of the 1949 Geneva Civilians Convention flatly prohibits massed forcible transfers or deportations of protected persons to the territory of the occupying power or to any other country, "regardless of their motive". Article 49 then provides that "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand".Conditions for such a transfer are to be limited to what is unavoidable.

It was also pointed out that the 1949 Geneva Convention was in this respect an improvement on and an extension of the agreement on the protection of civilians signed in Berne on 25 April 1918 between Germany and France, which also included provisions on deportation and forced labour (See Coursier, s*upra*, at 397).

I would add that joining the subject of "evacuation", as it appears in the second paragraph of Article 49, to the subject of "deportations", where the matter of "evacuation" is given as an exception to the "deportation" prohibition and both are linked by the conjunction "nevertheless", also affects the interpretation of the first paragraph of Article 49. In other words, tying the *evacuation* of a civilian population or portions thereof, which

is permissible under certain circumstances, with *deportation* of the population, which is prohibited, teaches us also about the substance of the subject in the first paragraph. That is, *inter alia,* an example of an interpretation "based on the context", to which the Vienna Convention refers.

The placing of the subjects of the mass evacuation of a civilian population as such and the prohibition against deportation, side by side, is also discussed in the works of P. la Pradelle, *La Conference Diplomatique Et Les Nouvelles Conventions de Geneve Du 12 Aout 1949* (Paris, 1951) 66-67, 185 and E. Castren, *The Present Law of War and Neutrality* (Helsinki, 1984). See also J.A.C. Gutteridge, "The Geneva Conventions of 1949", 26 *Brit. Y. B. Int'l L.* (1949) 294, 323 n. 3.

The conclusion from everything said above, is that the purpose which the draftsmen of the Convention had in mind was the protection of the civilian population, which had become a principal victim of modern-day wars, and the adoption of rules which would ensure that civilians would not serve as a target for arbitrary acts and inhuman exploitation. What concerned the draftsmen of the Convention were the mass deportations for purposes of extermination, mass population transfers for political or ethnic reasons or for forced labour. This concern is the "legislative purpose" and this is the material context.

It is reasonable to conclude that the reference to mass and individual deportations in the text of the Article was inserted in reaction also to the Nazi methods of operation used in World War II, in which mass transfers were conducted, sometimes on the basis of common ethnic identity, or by rounding up people in Ghettos, in streets or houses, at times on the basis of individual summonses through lists of names. Summons by name was done for the purpose of sending a person to death, to internment in a concentration camp, or for recruitment for slave labour in the factories of the occupier or in agriculture. Moreover, it seems that the summons to slave labour was always on an individual basis.

(i) The gist of the Petitioners' argument is that the first paragraph prohibits any transfer of a person from the territory against his will.

The implications of this thesis are that Article 49 does not refer only to deportations, evacuations and transfers of civilian populations, as they were commonly defined in the period of the last war, but also to the removal of any person from the territory under any circumstances, whether after a legitimate judicial proceeding (e.g. an extradition request), or after proving that the residence was unlawful and without permission (see, for instance, *Reg. v. Governor of Brixton Prison Ex parte Soblen* (1963)[28], which uses the term deportation, and also Starke, *supra*, at 386), or for any other legal reason, based upon the internal law of the occupied territory.

According to the said argument, from the commencement of military rule over the territory there is a total freeze on the removal of persons, and whosoever is found in a territory under military rule cannot be removed for any reason whatsoever, as long as the military rule continues. In this matter there would be no difference between one dwelling lawfully or unlawfully in the territory, since Article 49 extends its protection to anyone termed a "protected person", and this expression embraces, according to Article 4 of the Convention, all persons found in the territory, whether or not they are citizens or permanent residents thereof and even if they are there illegally as infiltrators (including armed infiltrators), as also follows from Pictet's remarks *(The Geneva Convention of 12 August 1949, Commentary,* (Geneva, ed. by J.S. Pictet, vol. 4, 1958) 47).

The Petitioners' submission rests essentially on one portion of the first paragraph of the Article, i.e. on the words "...transfers ... deportations ... regardless of their motive". That is, according to this thesis, the reason or legal basis for the deportation is no longer relevant. Although the Petitioners would agree that the background to the wording of Article 49 is that described above, the Article must now be interpreted according to them in its *literal and simple* meaning, thus including any forced removal from the territory.

(j) I do not accept the thesis described for a number of reasons:

It is appropriate to present the implications of this argument in all its aspects. In this respect we should again detail what is liable to happen, according to the said argument, and what is the proper application of Article 49 in the personal sense and in the material sense.

Ratione personae is appropriate in reference to the term "protected person", while *ratione materiae* relates to the following two foundations: "deportation" and "regardless of their motive".

From the personal aspect, Article 49 refers-as was already mentioned, and as is universally accepted - to all those falling under the category of protected persons. This term is defined in Article 4 of the Convention, which in the relevant passage states:

> 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 a Party to the conflict or Occupying Power *of which they are not nationals.*

(Emphasis added - M.S.)

The definition employs a negative test, i.e. for our purposes, anyone who is not an Israeli national and is found in a territory occupied by our forces, is "ipso facto a protected person. This includes an infiltrator, spy and anyone who entered the territory in any illegal manner. This interpretation is presented by Pictet in *Commentary, supra,* at 47, who in reference to this matter states:

> The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travellers, tourists, people who have been shipwrecked and even, it may be, *spies or saboteurs.*

(Emphasis added - M.S.)

The acceptance of the argument that the prohibition in Article 49 applies, whatever the motive for its personal application, means that if someone arrives in the territory for a visit of a limited period, or as a result of being shipwrecked on the Gaza coast, or even *as*

an infiltrator for the purpose of spying or sabotage (and even if he is not a resident or national of the territory, for that is not a requirement of Article 4), it is prohibited to deport him so long as the territory is under military rule. In other words, the literal, simple and all-inclusive definition of Article 49, when read together with Article 4, leads to the conclusion that the legality of a person's presence in the territory is not relevant, for his physical presence in the territory is sufficient to provide him with absolute immunity from deportation. According to this view, it is prohibited to deport an armed infiltrator who has served his sentence.

In order to demonstrate the implications of the Petitioners' thesis, let us presume a set of theoretical circumstances: In *Ex parte Quirin* [27], the U.S. Supreme Court heard the appeals of six Germans, former residents of the United States, who landed on the American coast during World War II in order to carry out acts of sabotage and spying. They were all sentenced to death in 1942.

The event took place in the territory of the United States; but had a similar incident occurred in an occupied territory (e.g. one of the islands held by the United States following World War II as occupied territory) after 1949, and it was decided not to execute the terrorists but to deport them back, whether in the framework of an exchange or in some other way, this would constitute, as it were, a serious violation of the Fourth Convention (Article 147). It is superfluous to add that the return of a deportee to his country of origin is not always done in accordance with his wishes, and the post-World War II examples of this abound. There is no need to go as far as the United States in order to bring examples of infiltration for sabotage purposes, and that example was intended only to illustrate the point. In any event from the thesis offered by the Petitioners, it would follow that an infiltrator for sabotage purposes could not be deported before or after serving his sentence. The same would be true, according to this approach, of a person who came for a visit over the open bridges, yet stayed beyond the expiration of his permit. The literal and simple interpretation leads to an illogical conclusion.

(k) From here we shall proceed to the essence of the concept "deportation", used in the Article. It is my opinion that, in accordance with the applicable rules of interpretation, one should not view the content of Article 49 as anything but a reference to such arbitrary

deportations of groups of nationals as were carried out during World War II for purposes of subjugation, extermination and for similarly cruel reasons.

If, on the other hand, one accepts the proposed interpretation of the Petitioners, according to which deportation means any physical removal from the territory, then the above would apply, for instance, to deportation for the purposes of extradition of the protected person, for this too requires removing a person from the territory. Laws, judicial decisions and legal literature use, in the context of extradition, the term deportation to refer to the stage of carrying out the extradition or the rendition. A murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction. As we have already shown, in light of what is said in Article 4 of the Convention, no relevance is attached to the nationality or domicile of a protected person, and the mere presence in an occupied territory of one who is not a national of the occupying state is enough to qualify him as a protected person. (The subject of the applicability of conventions in a territory under military rule is discussed, *inter alia,* in T. Meron's illustrative article, "Applicability of Multilateral Conventions to Occupied Territories" in *Military Government in the Territories Administered by Israel 1967-1980* (Jerusalem, vol. 1 ed. M. Shamgar, 1982) at 217, 218 no. 8. The idea that a broad definition of Article 49 could prevent extradition is discussed in *New Rules for Victims of Armed Conflicts* by M. Bothe, K. J. Partsch, W. A. Solf (Hague, 1982) 693, in an examination of the Geneva Protocols of 1977.)

(l) Regarding the issue before us, the Petitioners have directed our attention to the remarks of Pictet in *Commentary, supra,* at 368, who adopts the literal interpretation, according to which all deportations are prohibited no matter what the reason. One should see this interpretive view, which would apply Article 49 to as broad a group of circumstances as possible, in its context and within its limits. The desire for a literal and simple meaning, which may find expression in scholarly opinions in professional literature, does not bind the courts. Not only are there other and contradictory viewpoints (see in this matter the remarks of Stone, which were quoted in Landau P.'s judgment in H.C. 698/80 [3]), but, more essentially, the court deals with the law as it exists and clarifies the meaning of a law or of a treaty, as the case may be, by adopting accepted rules of interpretation (see in this respect Lauterpacht, *supra,* at 80).

Were we to adopt the rules of interpretation used in our law*, we could not accept the thesis proposed by the Petitioners. The Court would consider the flaw which the Convention was intended to correct (C.A. 31/63 [6] cited above); would examine the material context and the structure of Article 49, which in its other provisions refers clearly and openly to evacuations and transfers of population (Cr.A. 94/65 [8], C.A. 282/73 [10], and H.C. 47/83 [11]), would attempt to lift the veil from over the legislative purpose in order to adopt it as a standard of interpretation (C.A. 165/82 [9] cited above); and would be wary of and refrain from the adoption of a literal interpretation which is, so to speak, simple but in law and in fact so simplistic that it leads the language of the law or the Convention, as appropriate, to a range of applicability that confounds reason (Barak, in his above book, at p. 349), e.g. the absolute prohibition against the deportation of an infiltrator or spy, since deportations are prohibited, as it were, "regardless of their motive".

Essentially, even reference to the rules of interpretation of international conventions does not help the Petitioners' argument: For even the Vienna Convention does not submit to the literal interpretation, but rather sees the words of the convention "in their context and in the light of its object and purpose" (Article 31(1) of the Vienna Convention). The Convention permits us to examine the preparatory work and shies away from an interpretation whose outcome is "manifestly absurd or unreasonable", and this description would apply at once to a prohibition against the deportation of an infiltrator (Lauterpacht, *Brit. Y. B. Int'l L., supra,* at 89).

Here it is appropriate to add that one may not adopt a broad interpretation conditionally, that is, an interpretation which invokes the broad application selectively on the basis of the results, and chooses between an outcome which is acceptable to the claimant and one which is not. Whoever accepts the literal and simple interpretation, according to which the term deportation includes any removal from the territory, and who sees the words "regardless of their motive" as a catch-all, forgoes thereby the possibility of selection, as this would lead to a contradiction; one who adopts an interpretation that

* That is, they are not to be applied unless they express general principles of law recognized by civilized states: O'Connell, *supra,* at 276.

precludes discretion based on differentiating the motives, cannot then at his convenience accept only part of the prohibition and reject the rest.

Thus, one cannot remove the sting by saying that the language of Article 49 prohibits deportation, under Regulation 112 of the Defence (Emergency) Regulations, and which also based on the implementation of a valid municipal law, but allows, on the other hand, the deportation of infiltrators, spies and various enemy agents, or the extradition of criminals.

(m) Arising out of this answer to the Petitioners' contention, is the opposite question, namely, what then is the alternate interpretation of the words "regardless of their motive"?

If we interpret the term "deportation" as referring to the mass and arbitrary deportations whore descriptions are familiar to us, then the words referring to the motive do not change the essence; the reference to some possible motive simply serves to preclude the raising of arguments and excuses linking the mass deportations to, as it were, legitimate motives. In other words, whatever the motive, the basic essence of the prohibited act (deportation), to which the words of Article 49 are directed, does not change. The opposite is true: there is ground for the claim that the reference to "some motive" is also among the lessons of World War II.

The words "regardless of their motive" were intended to encompass all deportations of populations and mass evacuations for the purposes of labour, medical experiments or extermination, which were founded during the war on a variety of arguments and motives, including some which were but trickery and deceit (such as relocation, necessary work, evacuation for security purposes etc...). Furthermore, the draftsmen of the Convention took into account the existing right of the military government to utilize manpower during wartime (see Regulation 52 of the 1907 Hague Regulations which deals with compulsory services, and Article 51 of the Fourth Geneva Convention which even today permits the subjection of protected persons to forced labor), but sought to clarify that mass deportation, as it had been carried out, is prohibited even when the

motive is seemingly legitimate, except in the event of evacuation in accordance with the qualifications set out in the second paragraph of Article 49.

It would be correct to read these words in the light of the remarks of Starke *supra*, at 510, according to whom one must refer to the "intention of the parties" and to the "meaning attached by them to words at the time". In the light of these principles, one can attribute to the words a reasonable interpretation that accords with the other parts of the Article. It would not be superfluous to quote Starke again (at p. 511):

> Treaties should, it is held, be given an interpretation in which the reasonable meaning of words and phrases is preferred, and in which a consistent meaning is given to different portions of the instrument. In accordance with the principle of consistency, treaties should be interpreted in the light of existing international law. Also applying both reasonableness and consistency, since it is to be assumed that states entering into a treaty are as a rule unwilling to limit their sovereignty save in the most express terms, ambiguous provisions should be given a meaning which is the least restrictive upon a party's sovereignty, or which casts the least onerous obligations...

Moreover, even the above-mentioned guiding remarks of Professor Yasseen on the subject of interpretation, are incompatible with a literal, plain and expansive interpretation of the relevant paragraph.

To summarize, this court was competent to choose the interpretation resting upon the principles explained above, over the literal interpretation urged by the Petitioners. This court has done so in H.C. 97/79 [2], and I see no grounds for altering that conclusion, as its approach is acceptable to me. I also see no reasonable cause to deviate from the conclusion that served this court in H.C. 698/80 [3], and which treated the matter as conventional law.

Further on, I will address the supplementary argument raised by the Petitioners on this last issue.

4.(a) This court has indicated in its judgments that the above-mentioned Article 49 is within the realm of conventional international law. In consequence of this determination, the Petitioners have now raised a new thesis which holds that this court's approach, which also forms the basis for the decisions in H.C. 97/ 79 [2] and H.C. 698/80 [3] is founded in error. This approach holds that the rules of conventional international law (as opposed to customary international law) do not automatically become part of Israeli law, unless they first undergo a legal adoption process by way of primary legislation.

This argument of the Petitioners does not directly relate to the interpretation of Article 49; but it does seek to attack that part of the reasoning in our previous decisions in which this court indicated that it saw no reason to delve into the question of the substantive interpretation of the above-mentioned Article 49, since the Article only reflects conventional international law, and as such, has not been assimilated into our country's law.

(b) The Petitioners submit that not only does customary international law automatically become part of the municipal law (barring any contrary legislation), but that there are also parts of conventional international law which are automatically incorporated, without the need for adoption by way of legislation as a substantive part of Israeli municipal law. These are those parts of conventional international law which are within the realm of "law-making treaties". In this argument the Petitioners based themselves on the statements of Lord McNair in two of his works (A.D. McNair, *The Law of Treaties* (Oxford, 1961) 89; A.D. McNair and A.D. Watts, *The Legal Effects of War* (Cambridge, 4th ed., 1966) 371); on a judgment of the *Court of Appeals in the matter of Porter v. Freudenberg* [29]; on statements in B. Rubin's article, "The Incorporation of International Treaties into the Country's Law by the Courts", 13 *Mishpatim* (1983-4) 210 and on Professor A. Rubinstein's article, "The Changing Status of the Territories...", 11 *Iyunei Mishpat* (1985-86) 439, 446 [see English version in 8 *TeI-Aviv University Studies in Law* (1988), 59]. They have also referred to portions of two articles which they believe lend support to the above-mentioned thesis: Professor H. Lauterpacht, "Is International Law A Part of the Law of England?" 25 *Transactions of the*

Grotius Society (1939) 51; Professor F.A. Mann, "The Enforcement of Treaties By English Courts", 44 *Transactions of the Grotius Society* (1958-59) 29.

5. (a) My conclusions, in answer to these arguments, have a threefold thrust:

(1) The suggested thesis does not accord with the accepted legal approach in Israel.
(2) One discerns no reasonable ground for changing or deviating from the existing legal situation, which in the light of the existing constitutional structure, is also the desired legal situation.
(3) The legal situation in England, to which the Petitioners sought to refer us (whether, in the Petitioners' words, as a binding prototype or for purposes of comparison and persuasion), is not unequivocal, and does not necessarily coincide - certainly not in everyone's opinion - with the view that the Petitioners suggested we adopt. There is much literature pointing to a lack of clarity on this subject. Even in the above two articles (those of Professor Lauterpacht and Professor Mann), the scholars' dispute on the subject is presented.

Let us examine the subject in the above order.

(b) *The legal situation in Israel.* Israeli law on the relationship between international law and internal law - that is in order to decide whether a given provision of public international law has become part of Israeli law - distinguishes between conventional law and customary law (Prof. Y. Dinstein, *International Law and The State* (Schocken and Tel-Aviv University, 1971) 143). Prof. Dinstein refers in this matter mainly to Cr.A. 174/54 [12]; Cr.A. 336/61 [13]; C.A. 25,145,148/55 [14], Cr.A. 131/67 [15].

The view that reflects the accepted opinion in this court's decisions on the subject, was also presented in H.C. 69,493/81 [16], at p. 233 ff.; in the remarks of Barak J. in H.C. 393/82 [17], 793 and in the remarks of Witkon J. in H.C.390/ 79 [18], 29. See also: M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government - The Initial

Stage", *Military Government in the Territories Administered By Israel 1967-1980, supra,* at 13, 47, 64, 69 and the above-mentioned article of Professor Dinstein, at 937, the last paragraph.

According to the consistent judgments of this court, customary international law is part of the law of the land, subject to any contradictory provision in Israeli legislation.

In Cr.A. 174/54 [12], mentioned above, Cheshin J. with whom Witkon J. concurred, spoke about "the customs of international law [i.e. customary international law -M.S.], as part of the law of the land" (*ibid.*, p 17). In Cr.A. 336/61 [13] - following Motion no. 41/49 [19] at 145-6, and the English cases in the matters of *West Rand Gold Mining Co. v. Rex* [30], at 406-7, and *The Cristina* [31] - the application of rules of international law accepted by the international community was recognized, and the rules were proved to be thus accepted. As Professor Dinstein has written in his above-mentioned book (at p. 146) regarding the meaning of what was said in that judgment:

> The ruling is that rules of (customary) international law are automatically assimilated into Israeli law and become a part thereof; however, in cases of a frontal collision between such rules and the statutory law, the statutory law takes precedence.

Lord Alverstone expressed the same idea in the *West Rand* case mentioned above when he said that in order to be considered a part of English law, a rule of international law must:

> ...be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised or acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it.

That is, in fact, a standard similar to the one adopted in the definition appearing in Article 38(1)(b) of the Statute of the International Court, which deals with international custom.

In the *Cristina* case mentioned above, Lord MacMillan demanded - as a condition for the adoption of a rule of international law-that it should have-

the hall-marks of general assent and reciprocity.
These too are accepted indicators of customary international law.

(c) The status of conventional international law *vis-a-vis* our law is examined in C.A. 25,145,148/55 [14], where, Berenson J. states at p. 1829:

> The Rhodes agreement is a treaty between the State of Israel and another state. Whatever the validity of such an agreement may be in terms of international law, it does not constitute a law to which our courts will have recourse or to which they will ascribe validity. The rights that it confers and the duties that it imposes are rights and duties of the states that entered into the agreement and its implementation is solely in their hands through the special means of implementing international treaties. This type of treaty is not in any way subject to the jurisdiction of the domestic courts, unless and to the extent that it, or the rights and duties deriving from it, have been refined in the melting pot of the state's legislation and have been shaped into binding law. In this sort of case, the court does not, in actual fact, require the agreement as such, but rather the Law which affixes its imprint on the agreement and breathes into it legal life in terms of our municipal law. From this it also follows that where the Law and the agreement are incompatible, even though it is clear that the Law is intended to activate and implement the agreement, the courts will prefer the Law, which alone binds them, and by which alone a judgment can be given. Furthermore, even when it is stipulated in an interstate or international agreement that defined rights are to be conferred upon certain people, the

> obligation under the agreement remains in the realm of an international obligation of the state and no more. The persons concerned do not acquire for themselves any actual right based on the agreement and cannot enforce this kind of a right in court, either as direct beneficiaries of the agreement or in any other way.

And further at p. 1831:

> On the face of it, it seems that in the United States the practice is otherwise (and in other countries with a similar constitutional framework), but in fact that is not so. In the United States Constitution there is an express provision which bestows the status of "supreme law of the land" upon any treaty lawfully concluded in the name of the United States. For this reason federal and state courts uphold treaties and even give them precedence over other laws of the country, where those laws do not accord with the treaties. That is a direct result of the above-mentioned constitutional situation. In essence then, U.S. courts also act according to those same universal principles noted above. They also execute treaties benefiting individuals, where rights are granted to them that are realizable in court, but only in accordance with a provision of their own law; however,: because of the existence of that general provision in the U. S. Constitution, there is no need for a special provision for each individual treaty. See *Edye v. Robertson,* (1884), 112 U.S. 580; 5 S.Ct. 247, 254.

The clear meaning of these remarks is that the adoption of international treaties - in order to incorporate them as part of internal law and in order to render them enforceable through the national tribunals - is conditional upon a prior act of the legislator. As we shall see, international treaties may constitute a statement of the valid customary law - but then their content will be binding by virtue of the said customary status of the rule stated therein and not by virtue of its inclusion in the treaty. We shall return to this subject later in the discussion.

Based on what was said in C.A. 25,145,148/55 [14], Prof. Dinstein remarks in his book, *op. cit.*, p. 147:

> ...The rules of conventional international law are not automatically incorporated into Israeli law, rather there is a need for special and explicit complementary legislation in order for them to become part of Israeli law.

In Cr. A. 131/67 [15] Cohn J. reiterates (at p. 97) that-

> ...No international treaty has legislative force so long as such status has not been granted in an explicit Law of the Knesset....

(d) From the remarks of Cohn J. in C.A. 65/67 [20] (see also H.C. 103/67 [21]), one might surmise that there are rules of *conventional* international law which are expressed in law-making treaties and which *automatically* become part of municipal law without the requirement of any prior legislation. Such a conclusion is founded in error. We accept the relevant classification between declarative and constitutive treaties, and one must be exact and distinguish between them. To hold the fact that an international conference or the United Nations General Assembly approves the wording of a proposed treaty and invites states to join it, is proof of the treaty's declarative nature, is less than accurate. This is clarified by Prof. N. Feinberg in "Declarative Treaties and Constitutive Treaties in International Law", 24 *Hapraklit* (5728 - 1967/8) 433, 435:

> This thesis [according to which a general norm of international law is created in the above-mentioned way - M.S.], is very far-reaching, as it sees the work of codification in the area of international law, conducted today in the framework of the United Nations, to be declarative codification. It is possible that Justice Cohn was influenced here by the British approach to codification...however, this is not valid in international law, in which there is a basic distinction between a declarative treaty that transfers existing norms from the realm of customary law to that of conventional law, and a constitutive treaty that creates entirely new norms that are indeed founded in the conduct of

> states, yet the latter remains for the time being in the nature of a usage or practice, not yet having crystallized into a customary norm.

And, at p. 437:

> Every "accepted rule of international law" or, in other words, "every general norm of international law", is rooted in international custom.

Accordingly, Professor Dinstein summarizes his examination of C.A. 65/67 [20] by stating *(op. cit.* at p. 148):

> In anything concerning declarative law-making treaties, the rules of international law will be automatically incorporated into the internal law, not because it is stated in the treaty, but in spite of it being stated in the treaty. They will be automatically incorporated, since the treaty reflects only existing customary international law... Even if the Supreme Court erred in the specific application of the above general principle [the reference is to C.A. 65/67 [20] - M.S.], that does not detract from or flaw the principle itself.

To summarize, according to the law applying in Israel, an international treaty does not become part of Israeli law unless -

(1) its provisions are adopted by way of legislation and to the extent that they are so adopted; or,

(2) the provisions of the treaty are but a repetition or declaration of existing customary international law, namely, the codification of existing custom.

This is the way in which Israel has approached the provisions of international treaties which are indicative of "law-making treaties" - as in the enactment of the Crime of Genocide (Prevention and Punishment) Law, 5710-1950, which was passed pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide; the Air

Navigation (Security in Civil Aviation) Law, 5737-1977, which was passed pursuant to the 1970 Hague Conventions against the seizure of aircrafts and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the Sale (International Sale of Goods) Law, 5731-1971, enacted pursuant to the 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods; and the Immunity and Rights (International Organisations and Special Missions) Law, 57431983, regarding which I would refer to the explanatory notes in the International Organisations (Status) Bill, 5740-1980 (enacted as the International Organisations (Status) Law, 5740-1980 and subsequently replaced by the above-mentioned Law of 1983). I mention these laws merely as oft-cited examples of lawmaking treaties (see for instance Starke, *supra,* at VII, 2).

(e) When applying our above remarks to the issue before us, we must remember that Article 49 has been categorized in our judgments as conventional law which does not express customary-international law. Thus it was held by Landau P. in H.C.698/80 [3] that (p. 627)-

> ...Article 49(1) of the Geneva Convention (which) is for now regarded only as a provision of conventional international law, upon which the individual cannot found his petition in a court adjudicating according to the positive law of the forum country.

As regards Article 49 not reflecting customary law, Landau P. adds at p. 629:

> In fact the occupation forces in the Rhineland in Germany, after World War I, used the sanction of deportation from the occupied territory against officials who broke the laws of the occupation authorities or who endangered the maintainance, security or needs of the occupying army: Fraenkel, *Military Occupation and the Rule of Law*, Oxford University Press, 1944. Under this policy the French deported during the armistice following that war 76 officials and the Belgians - 12, and during the dispute over the Ruhr (1923) no less than 41,808 German officials were deported (*ibid*., at 130-131). In the face of these facts, it

> is clear that the prohibition against the deportation of civilians did not constitute a part of the rules of customary international law accepted by civilized states, as if the Geneva Convention simply gave expression to a pre-existing law.

According to Fraenkel, to whom Landau P. refers above, the deportee had no right of appeal whatsoever, neither before a committee nor before a court.

6. (a) I have read the interesting articles, cited above, of Rubin and of Prof. Rubinstein at p. 446, to which we were referred by the Petitioner, but I have not been convinced that we should deviate from the existing and accepted law, as expressed in the rulings of this court, on the methods of incorporating various rules of public international law into our legal system. Moreover, the existing law adequately reflects not only the prevailing, but also the desired situation, in terms of the power of the state to shape its law through its own independent legal tools. Adoption of the viewpoint suggested in the Petitioners' arguments, according to which there is no need for Knesset legislation to assimilate into our law a rule of conventional public international law which finds expression in an international treaty joined by Israel, and which is not in the nature of codification of an existing customary rule, would, in fact, grant the government legislative power, since according to our constitutional structure, the government concludes and ratifies international treaties without any approval from the Knesset. In light of such outcome of the suggested thesis, a twofold doubt arises as to whether the described interpretive innovation is indeed desirable from the viewpoint of sound administration and the rule of law.

For that reason Prof. Feinberg, in his above-mentioned article (at p. 442 n. 77), links the change in the status of law-making treaties to a corresponding change in the ratification methods. This is what he says:

> In fact, there is no chance of an arrangement under which the courts in Israel would be empowered to apply self-executing international treaties without the need for an act of adoption or inclusion, as long as there is no solution to another question, which is inseparably linked,

> and that is the question of the status of the Knesset regarding the entire subject of international treaty ratification. For in any such arrangement, if at the same time the power of ratification were to remain under the sole authority of the executive, the result would be a delegation of a quasi-legislative power to the executive and a blow to the principle of separation of powers. And perhaps, there is room to assume that in this field too, the tradition that has developed until now will end and the Knesset will be given the special place that the legislature is entitled to claim for itself in a proper democratic government.

Prof. Dinstein writes on this aspect in his book cited above (at p. 147):

> The power to make treaties in Israel - as in England - is given to the executive authority ... and were there to be automatic incorporation of conventional international law into the existing law in Israel, it could confuse the complicated matter of separation of powers. The existing situation allows the Knesset (the legislative authority) to check the government (the executive authority) and to prevent a mixing of authorities.

(b) To summarize this point: the system suggested by the Petitioners would grant the executive the power to infuse binding legal provisions into our legal system, without recourse to the legislator. This can even be learned from what was written in the above-mentioned article of Prof. Lauterpacht (in 25 *Transactions of the Grotius Society, supra,* at 51). The Petitioners, basing themselves on his remarks, tried to convince us of the existence, as it were, of an accepted English thesis, uniform and clear, by which law-making treaties automatically become part of the law of Britain. Prof. Lauterpacht states in the above article at p. 74:

> If a treaty ratified and internationally valid is without force within the State unless supplemented by legislative action, then, it is asserted, International Law embodied in that treaty is not part of the law of the land. This is entirely true. The rule is obviously in the nature of an

exception to the principle of incorporation. But the reasons for it lie not in any subtle intention of English Courts to take away with one hand what they grant with the other, but only and exclusively in the exigencies of British constitutional law and the division of powers within the State. It is a rule of British constitutional law that the conclusion and ratification of treaties are a prerogative of the executive. In other countries, such as the United States, the concurrence of the Legislature, or of a part thereof, is necessary for the valid ratification of a treaty. This is not the case in Great Britain. A treaty becomes binding for this country as soon as it has been finally ratified by the Crown. This being so, it might be possible for the Crown to impose burdens upon the subject, and to legislate for him, indirectly, without the concurrence of Parliament, by means of concluding a treaty (X). The existing rule which requires in such cases an enabling Act of Parliament removes that possibility.

And in footnote (x):

(X) The case of *State of Missouri v. Holland, United States Game Warden,* decided in 1920 by the Supreme Court of the United States, is an interesting example of a government arming itself, by means of a treaty, with powers which it did not apparently otherwise possess. In 1915 the Congress of the United States passed an Act concerning the protection of migratory birds. That act was declared unconstitutional on the ground that it interfered with the rights reserved to the member states. Thereupon the United States concluded a treaty with Great Britain for the protection of migratory birds. The Supreme Court held that a statute providing for the enforcement of that treaty was constitutional: 252 *U. S.* 416; *Annual Digest,* 1919-1922, Case No. 1. The decision of the Judicial Committee of the Privy Council in *Att. Gen. for Canada v. Att. Gen. for Ontario and Others,* 53 *T.L.R.* 325, is also of interest in this connection. The question was, essentially, how far can Canada enact labour legislation, in pursuance of international

labour conventions, in matters reserved by the constitution to the provinces?

(c) Another reason for the objection to the automatic adoption of a treaty which does not reflect customary international law, lies in the substantive and basic difference between international law and municipal law, a matter which more than once has eluded the scrutiny of jurists interpreting rules of international law. Moreover, dependence on the automatic application of law-making treaties would subordinate Israeli law to provisions which had not been adapted to the conditions of the country, its interests, and its residents. In this context one must consider the fact that among the treaties presented in the professional literature by those jurists adhering to this thesis, and brought as leading examples of law-making treaties having immediate application, are treaties adopted by the United Nations and the International Labour Organization. While wanting to refrain from generalizations, the idea that the majority in these international bodies could automatically impose upon us provisions of binding law, which would be in force unless expressly annulled by the Knesset, is not attractive.

Also the attainment of clarity in determining the substance and limits of the law will necessarily be obstructed if we adopt the suggested approach. It is generally agreed that an *a-priori* classification of the treaties is necessary in order to distinguish between those which apply automatically and those which require enabling legislation. Rules of differentiation and distinction are not defined clearly and simply. If we return , for example, to the remarks of Prof. Lauterpacht, he determines that the said division is "not clearly defined" (*ibid.*, at 75), and that is one of the reasons that the subject is marked by vagueness, dissention and a lack of new and clear distinctions. In any event, the inclusion of an uncertain and unclearly defined element in our legal system does not seem desirable.

(d) The problematic nature of the issue, partially presented above, did not elude the English courts, and a striking, even blunt expression thereof is found in the remarks of Lord Atkin in *Chung Chi Cheung v. The King* [32], when he said (at 167-168):

> It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules on our own code of substantive law or procedure.

Professor Lauterpacht called this approach of the courts in his country "judicial hesitancy" and sought to criticize it; however, we are not engaged here in an academic examination of the relative merits and faults of the different legal approaches, but only with the search for specific answers required for our issue, namely :

> (1) Is there a basis for the argument raised before us that England today is governed by a different legal approach than that to which Israeli courts have turned and referred in developing our legal outlook; and -
>
> (2) Is there indeed room today for a change, by way of legal interpretation, in the legal principles that we apply.

What we have said above will suffice to answer these questions in the negative.

7.(a) The third question which we posed above, at the outset of our discussion of the Petitioners' stated argument, concerns *the legal situation in England.* This subject has been largely covered above, and therefore we will deal with it here only in a nutshell.

The two articles - that of Professor Lauterpacht and that of Professor Mann - do not point to the existence of a uniform and accepted thesis regarding the automatic adoption of law-making treaties. The main substance and purpose of these articles is the learned writers' confrontation with the various views, which give expression to the approach that contradicts the one suggested to us.

The lack of a uniform approach, as evidenced in Professor Lauterpacht's article, has already been referred to above. Professor Manns's point of departure, as presented in his article above, is expressed in the following remarks (at pp. 3031):

> It is a commonplace that a treaty as such cannot be a source of English law or, in other words, impose duties or confer rights on anyone except the Crown in its international relations. Were this not so the Crown would have the power of legislation. Consequently, *in order to become binding upon subjects a treaty must be incorporated into the law of England by parliamentary legislation* [Emphasis added - M.S.] What is sometimes loosely referred to as "ratification" will not be sufficient. Parliament may approve the conclusion of a treaty and it may even pass legislation connected with a treaty, but a treaty cannot become part of English law otherwise than by the strictly legislative process. Thus the various treaties which are known as "Documents relating to the Termination of the Occupation Regime in the Federal Republic of Germany: were ratified and approved by Parliament after they were signed at Bonn in May 1952 and Paris in October 1954, yet they do not form part of English law except in so far as the German Conventions Act, 1955 adopts certain of their provisions. The legal position is sumarised by a dictum of Lord Atkin which must today be regarded as *locus classicus:*
>
> > Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligation, *if they entail alteration of the existing domestic law,* requires legislative action.

And at p. 45:

> Internationally a treaty to which the Crown is a party binds the Crown even if there has been no ratification of any kind. This is elementary and probably not denied, though sometimes concealed by loose

> formulations. Thus, when it is said of a treaty to which the United Kingdom is a party that in order to be binding it requires legislation, what is referred to is only the binding character of the treaty in municipal law.

And at p. 45:

> … *A treaty to which the legislature has failed to attribute the force of law cannot be given that very same force by the judiciary. This point is so fundamental that it necessarily imposes severe limitations upon the ambit within which treaty obligations may constitute a head of public policy. The mere fact that a particular decision would be inconsistent with the terms of a treaty concluded by the Crown and, therefore, would involve a breach of this country's treaty obligations cannot lead to a decision in the opposite sense.*

(Emphasis added - M.S.)

We see no basis for drawing the conclusion that a defined and accepted thesis has been developed which establishes the automatic adoption of law-making treaties under English common law.

The reference to the question of the application of the laws of war in the domestic English law also does not breach the existing reservations outlined above, but there are those who see the authority of the Crown to conduct war, to exercise powers to this end and to conclude treaties (for instance, armistice agreements) as part of the common law. Says Prof. Mann (*ibid.*, at p. 37):

> It would seem to follow that, if and in so far as the *prerogative rights of the Crown in war-time prevail,* the Crown can, by treaty no less than by proclamation, alter the common law, for to that extent *it is in pursuance of the existing domestic law* that the Crown alters it.

(Emphasis added - M.S.)

In discussing the above-mentioned *Porter* case [29], he seeks to discern by way of conjecture what thesis underlay the approach of the judges who weighed there the matter of the application of Regulation 23(h) of the Hague Regulations, 1907, in the English courts. He remarks at p. 38:

> The explanation can only be found in the view that, in the absence of any relevant *restriction by Parliament of the Crown's prerogative in war-time,* the Crown could by treaty alter the common law.

And in note 28 he adds:

> Lord McNair, *British Year Book of International Law* 1928, 63 sqq. and *Law of Treaties,* p. 337, seems to think that the Hague regulations constitute a treaty affecting belligerent rights and therefore bind the subject. Similarly, Wade & Phillips, *Constitutional Law* (4th ed. 1950) assert the binding character of treaties affecting belligerent rights, because waging war comes under the prerogative. There is probably not much difference between these formulations and the statement of the rule suggested in the text. However, the conception of belligerent rights originates from public international law and is not germane to English constitutional law. The latter regards treaties as binding only if and in so far *as the prerogative of the Crown prevails.* If it does not prevail even treaties affecting belligerent rights cannot bind the subject.

(Emphasis added - M. S.)

Similarly see McNair and Watts, *supra,* at 371.

I do not believe that conjecture regarding the specific English constitutional situation should serve as a basis for converting the clear and well-defined Israeli legal situation to the system suggested by the Petitioners.

(b) In England a law was passed in order to implement the provisions of the Fourth Geneva Convention (The Geneva Conventions Act, 1957). On the face of it, this would

appear to support the thesis that in England as well legislation is necessary in order to implement the Geneva Conventions in internal law. In Rubin's above-mentioned article, it was pointed out in relation thereto, that the purpose of the legislation was limited to the application of the rules of the war crimes convention and no more. Even this interpretation, according to which legislation is necessary only for creating provisions to enable legal proceedings in the national courts, does not necessarily support the thesis proposed to us. Moreover, the fact that the Act incorporated only provisions which are applicable in the kingdom does not mean that the rest of the provisions, dealing with the conduct of armed forces in an occupied territory, have instantly become rights enforceable in an English court. There is a question, for example, of the point of time when the stated system of rights and duties consolidates according to the proposed legal thesis, whether immediately upon ratification of the treaty at the international level, or perhaps at a later stage? And if the second possibility is preferred, the question remains - what is this later stage? As already hinted, a derivative question is why parliamentary legislation is necessary with regard to part of the treaty, in order to bind the courts, and whether in terms of such legally binding status, there is a a difference between the part that was legislated and the part that was not included in the legislation. These are interesting questions worthy of examination, but as far as we are aware, there is no uniform view on the subject in Britain either.

I do not see, therefore, a need to enter into a discussion of the question, although interesting *per se*, whether there is a basis for adopting the conclusion reached by Lord McNair regarding the meaning, for purposes of the issue before us, of the above-mentioned judgment of the English appeals court in the *Porter* case [29], according to which the English courts were basically prepared to apply the provisions of the Hague Regulations even without changes in internal English law (McNair, *supra,* at 89, McNair and Watts, *supra,* at 371).

In the portion of the *Porter* judgment ([29] at 878), that is in my opinion central to our issue, the argument raised before this court is presented (the question of the application of Regulation 23 (h) of the Hague Regulations as part of the common law), and the conclusion is that there is no need to resolve the question, since Regulation 23 (h) of the Hague Regulations in no way sought to change the law applying within England itself.

It remains an open question, it seems, whether the court was prepared to change the interpretation of the existing municipal law on the issue of *locus standi* before an English court, without any internal legislation and based solely on the Hague Regulations. From the following remarks in *Porter* (129] at 878), McNair, *supra,* concluded that the court was prepared to view the Hague Regulations as part of the common law:

> It is impossible to suppose that this means (as it must do if the effect of the paragraph (h) [the reference is to rule 23(h) of the Hague Regulations - M.S.] is to abrogate the law existing hitherto in England and to give an alien enemy the position of a *persona standi in judicio* in English Courts of Law) that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French, commanding our land forces in the field, forbidding him to "declare" that the rights of alien enemies - Germans, Austrians, or Turks - to institute legal proceedings in the High Court of Justice in London are suspended or inadmissible. And yet this absurdity seems necessarily to follow from the scheme of the Convention as applied to paragraph (h) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law, which hitherto has not given to an alien enemy the position of a *persona standi in judicio.*
>
> Our view is that article 23(h), read with the governing article 1 of the Convention, has a very different and very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field.

With all due respect to the learned writer, I would have refrained from expressing so certain an opinion based solely upon the remarks cited above.

(c) As already indicated, the views on interpretation are not uniform. Thus, for instance, O'Connell states *(op. cit.,* at p. 24):

> It is sometimes suggested that there is a type of treaty which is properly legislative, in the sense that it lays down the law where none existed before, *tout d'un coup* [emphasis in original - M. S.] It is important that this proposition be carefully examined. True, one may cite innumerable conventions, mostly multilateral, which are now taken as international and not contractual law. One may cite the Slave Trade Conventions, the Declaration of Paris, 1856, between the combatants in the Crimean War which put an end to privateering, and most notably, of course, the Hague Conventions of 1899 and 1907, and *the Geneva Conventions.* But the point is whether nonsignatory and non-accessionary States were automatically bound by the provisions of these conventions as soon as they became operative, or whether they became bound by the rules they contain at a subsequent date when it was accepted that these rules had become part of international custom. *The latter is the correct interpretation, and it is clear, then, that it is custom embodying the treaty, and not the treaty itself, which creates law as distinct from contractual rules.*

(Emphasis added - M.S.)

The learned writer refers in his above remarks to the extent a legal obligation is binding upon states which did *not* sign the convention; by way of contrast, countries, which are signatories to the treaty, are obligated to adhere to their said obligations in relations *inter se;* however, in the system of relations between the individual and government, one can lean in court only upon rules of customary public international law. This approach formed the basis for Witkon J.'s remarks in H.C. 390/79 [18], when he said (at p. 29):

> One must view the Geneva Convention as part of conventional international law; and therefore - according to the view accepted in common law countries and by us - an injured party cannot petition the court of a state against which he has grievances to claim his rights. This right of petition is given solely to the states that are parties to such a

> convention, and even this litigation cannot take place in a state's court, but only in an international forum.

(d) Mr. Rubin questions in his above-mentioned article, whether grounds exist to assume that the Hague Regulations were considered at the time of signing of the Convention as merely an international obligation undertaken by the signatory state to the Regulations, and that *only subsequently* did they turn into binding customary international law and as such a part of the internal law. The answer to this question emerges, in my view, from the following statement in the judgment of the International Tribunal in Nuremberg *(I. M. T. Judgment, supra,* at 65):

> The rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention (Hague convention Concerning the Laws and Customs of War on Land) expressly stated that it was an attempt "to revise the general laws and customs of war" which it thus recognised to be then existing, but *by 1939 these rules laid down in the convention were recognised by all civilised nations and were regarded as being declaratory of the laws and customs of war...*

(Emphasis added - M.S.)

In other words, there has been development as regards the status of the Hague rules as customary law in the period that has elapsed since the signing of the Convention in 1907.

(e) To sum up the discussion regarding the third question posed above - a change in the English approach - even if shown to have occurred - need not influence the adoption of an identical approach by us. For as has already been mentioned, the context and constitutional structure in Israel is different, and there is no justification in Israel's present constitutional dispensation for abandoning an approach that has crystallized in Israel since the establishment of the state. Moreover, there is no ground for concluding that the argument regarding the existence of a uniform and monolithic legal approach in England has been thoroughly substantiated.

8. Often raised, peripherally to the discussion of the legal problems regarding the applicability of conventions, is the matter of the status of a *customary rule* of public international law in our internal law. The question of the nature and identification of a customary rule was discussed in detail in H.C. 69,493/81 [16] at pp. 238-242, and I therefore will not reiterate it here. However, it is worth taking note and repeating certain words of caution, which were included in the above-mentioned judgment:

> 15. In his above cited work, the *The Law of Armed Conflict* (vol. 2, at 3) Prof. G. Schwarzenberger gives two necessary warning signs that must be taken into account by anyone inquiring into the existence of a binding rule under the Laws of War: One points to the tendency of creating the impression of greater certainty of the existence of binding legal rules that can be attained in the area of the Laws of War in which belligerents seek to retain for themselves, as is natural - although it may not seem so to others - the maximum freedom of action. The second warning concerns the obstacle set up by the unwarranted praise heaped on a given usage with which it is sought to dress up a particular interest with a universal rule that is inappropriate. The viewpoints of parties or sectors of states, parties interested in the upholding of a rule, do not reflect the existing law, but rather only to a description of the legal situation they desire.
>
> The practical conclusion that is to be reached at this stage, is that a careful, detailed and *all-inclusive* examination is required, giving proper weight to various opinions on a specific subject, to determine whether we are referring to a view acceptable to the overwhelming majority, or to only one of various possible viewpoints.

9. In H.C. 27/88 the Petitioner again raised the argument that Regulation 112 of the Defence (Emergency) Regulations is not in force in Judea and Samaria.

This legal argument too has already been discussed and rejected in H. C. 513, 514/85 and M.A. 256/85 [5] and earlier in the above-mentioned H.C. 97/79 [2]. As stated, I see no reason to add to what has already been said in the matter.

10. Learned counsel for the Petitioner in H.C. 845/87 raised, toward the close of the hearing, a new contention, which was not mentioned in the petition and in the arguments voiced before us in the course of the hearing. In his opinion, the Military Commander no longer has any authority to direct the deportation of the Petitioner under Regulation 112 of the above-mentioned Regulations, since with the signing of the Peace Treaty with Egypt, the Military Government terminated and the Respondent no longer possesses the legal authority to issue such an order. Petitioner's counsel did not take the trouble, I regret, to base his contention on a reasoned legal argument. Thus, he did not explain which provisions of the Peace Treaty would lead us to the above conclusion, or what rules of law sustain them.

I find the above-mentioned contention unacceptable and the reason is both short and simple. *The Treaty of Peace between Israel and the Arab Republic of Egypt* was accompanied by an additional agreement between the states that concluded it namely *A Framework for Peace in the Middle East Agreed at Camp David.* According to this agreement, it was determined, *inter alia,* that further developments would ensue in the deployment of the Military Government at a certain stage, which need not be spelled out here, in the implementation of the said agreement. What emerges from this agreement is that as long as the said stage has not arrived, the Military Government continues to function. There is no indication that the powers which signed the Peace Treaty had decided upon the abolition of the Military Government either at that time or at a subsequent stage prior to this time.

This court has already ruled that as long as the military force exercises control over the territory, the laws of war will apply to it (H.C. 102,150,593,690/82; 271/83, *Tzemel and Others v. Minister of Defence,* [22] at 373):

> The application of the provisions of the laws of war regarding the powers and obligations of a military force that has taken effective

> control of an area lying beyond the jurisdiction of its country's applicable law, can also be the result of belligerent action which provides the military force with control over a state against which *it is not* waging a war.

The court further stated at p. 374:

> ...even where the territory is seized from a country with whom a state of belligerency exists (an armistice agreement does not terminate a state of belligerency) at the time the military forces enter and seize effective control. If an agreement was subsequently signed, such as an agreement terminating the state of belligerency, the transfer of the territory, the powers, or both, to the previous authority is disposed of in accordance with the terms of the said agreement. However, as long as the military force exercises control in the territory, the powers granted it and the limitations imposed upon it by virtue of the laws of war, remain in effect. This, of course, is entirely subject to the arrangement agreed upon by the duly authorized political bodies.

See also H.C. 574/82 [23].

For our purposes it similarly emerges that, irrespective of the fact that a peace treaty has been signed, so long as the Military Government has not left the Gaza Strip and the relevant parties have not agreed otherwise, the Respondent continues to hold the territory by force of belligerent occupation and is subject to the laws of customary international law that apply in war-time.

11. Let us now turn to the specific submissions of each of the Petitioners:

12. **H.C. 785/87:** (a) The Petitioner *Abd al Nasser Abd al Aziz Abd al Affo,* born in 1956, is a resident of the town of Jenin.

The deportation order was issued by Maj.-Gen. A. Mitzna, Commander of I.D.F. Forces in Judea and Samaria on 3 September 1987, while the Petitioner was serving a prison sentence that was to terminate on 20 September 1987. The full text of the order reads as follows:

> By virtue of my authority under Regulation 112 (1) of the Defence (Emergency) Regulations, 1945, and my authority under any law or security legislation, and whereas I believe the matter is necessary to ensure the security of the Region, public welfare and public order, I hereby order that:
>
> *Abd al Nasser Abd al Affo Muhamad Abd al Aziz* , I. D. no. 94808545, born in 1956, from the town of Jenin, be deported from the Region.
>
> *Abd al Nasser Abd al Afro Muhamad Abd al Aziz* is a senior operative in the "National Front" organization, who has been sentenced three times in the past to prison terms for his terrorist activity. He is about to finish a third prison term of five years and three months. During his stay in prison, he assiduously continues his hostile activity in order to further the purposes of the organization.

(b) After the deportation order was served, the Petitioner applied to the Advisory Committee which operates under Regulation 112 (8) of the above-mentioned Regulations (in a number of documents and previous petitions, this body is called an "Advisory Board"). The Committee was composed of the President of the Military Courts in Judea and Samaria, as chairman, and two additional officers holding the rank of Lieutenant-Colonel. The Committee heard the Petitioner and his learned counsel and also the Respondent's counsel in the course of four sessions, during which it was also furnished with the information on which Maj.-Gen. Mitzna relied in reaching his decision. Part of this information was unclassified, and part was classified for security reasons and therefore not brought to the attention of the Petitioner. The Respondent was also presented with a long list of written questions by learned counsel for the Petitioner, which the Respondent

answered, as the Committee noted in its decision, subject to the security limitations. These questions and answers were also brought before the Committee. The detailed and reasoned decision of the Committee given on 28 October 1987, stated, *inter alia:*

> According to the statement of the Respondent's counsel, the activity of the Applicant began in 1972 when he was studying in high school. He was involved in the theft of a mimeograph machine which was used for duplicating posters. In the years 1975-76, he took part in inciting students to demonstrate in Jenin. In December 1976 he was detained for questioning and in the course of it he admitted to organizing demonstrations and incitements. He was sentenced to three years in prison, of which seven months were actual confinement. In February 1979 he was again arrested and he admitted recruiting people for the Popular Front organization. He was tried in Case Sh. 7033/79 and was sentenced to three years in prison, of which nine months were actual confinement. In April 1980 he took part in elections at Najah University as a representative of the Popular Front. In June 1980 he incited youths to engage in a demonstration, in the course of which stones and bottles were thrown at I.D.F. soldiers and a Palestinian flag was flown. In November 1980 he took part in a student strike against the activities of the Military Government in Ramallah. In November 1980 he participated actively in disturbances, in the course of which road blocks were erected and stones were hurled at I.D.F. soldiers. He acted similarly a month later. Since then and on various additional occasions up until July 1982, as detailed in the unclassified material, the Applicant was reported to have been active in recruiting students for Najah University from among the supporters of the National Front organization (1980). He incited a strike to halt studies and delivered speeches on behalf of the Popular Front. He was an organizer of demonstrations and strikes. At a number of these disturbances, road blocks were erected and rocks were hurled at I.D.F. forces and once at an Israeli bus. In one of the gatherings held in honour of Fatah Day

(January 1982), the applicant spoke of revolution and of the unification of all the organizations.

In July 1982 the Applicant was arrested and in the course of his interrogation admitted that he was recruited to the Popular Front. In the charge sheet against the Applicant in August 1982, it was stated that beginning in February or March 1981, the Applicant renewed his active membership in the terrorist organization called the "National Front". It was also stated that the Applicant was appointed to head the political wing of that organization at Najah University in Nablus. Further, it was stated in that same indictment that at the end of 1981, the Applicant recruited two additional members to the organization. The Applicant admitted what was attributed to him in the indictment. He was convicted and sentenced to three years of actual confinement. Additionally, his suspended sentence of two years and three months was activated to be served consecutively. Thus, the Applicant was to serve a sentence of five years and three months actual imprisonment. This is the penalty which the Applicant is about to complete serving in the coming days.

In its sentence, which was submitted to the Advisory Board and marked Exhibit 1, the court noted as follows:

> Barely a year and a half has elapsed since the accused was released from prison, and the accused has again engaged in crime and committed the violations which are the subject of this case. This court has decided on more than one occasion to exercise severity in the cases of recidivist offenders who did not learn the proper lessons from the sentences imposed on them in the past, did not fulfil the conditions of the suspended sentences and returned to their errant ways. More rare is the case of an accused who has already been sentenced twice in the past for security offences, yet

> is ready to carry on and to continue his association with a hostile organization, compounding his transgression by recruiting others.

> As may be recalled, it has been contended by counsel for the Respondent that even in prison he continued his activities to further the goals of the organization. Because the classified material is highly sensitive, it cannot be made public, save for the fact that in February 1985 - from deciphering a note which a prisoner attempted to smuggle out during a family visit - a report concerning the activity of the security prisoners in the prison was uncovered. The Applicant apparently signed the report ... The Applicant began serving as a leader of the Popular Front in Jenin. He attained this status when he arrived in prison and retains it to this day. Furthermore, since the 80's, the Applicant has been among of the leaders of the Popular Front organization in the Judea and Samaria Region.

(c) The Petitioner contended that although he did participate in demonstrations, he never took part in violent activities or instigated others to carry them out. He also denied any illicit activity while in prison.

(d) The classified material that was presented to the Committee attested, in its opinion, to the senior status of the Petitioner in the above-mentioned organization and to his modes of operation both inside prison and those conducted from prison and directed outside. Counsel for the Respondent noted before the Committee that before the issue of the order, a less severe measure, such as administrative detention, was considered. However, this alternative was rejected. For in view of the intensive activity of the Petitioner while in prison, this alternative was shown to be totally ineffective in his case.

Regarding the nature and quality of the evidence presented, the Committee noted the following:

> The reliability of the material was examined by us, as was the method of gathering the material and the weight assigned it. Similarly, we

> examined the work methods of the Intelligence Service until the information was consolidated. On the basis of our examination and on the basis of clarifications which we received from representatives of the General Security Service, we have no hesitation in determining that this information is reliable, substantiated and well-supported by evidence that conforms to the requirements for the production of evidence in administrative proceedings such as these, as it is clear, unequivocal and convincing.

After the Committee addressed itself in detail to the contentions of counsel for the Petitioner regarding the exercise of authority under Regulations 108 and 112 of the Regulations and the way in which the Committee operated, the Committee summed up its opinion in these terms:

> We have before us an Applicant [i.e. the Petitioner - M.S.] whose is involved in activity of such nature that, along with his role, seniority and status in the Popular Front organization, transform him into a person whose presence and continued activity pose a tangible danger to the security of the Region. The Applicant has not learned any lessons from the past. Placing him on trial three times has been to no avail. For even while in prison he continued his work to further the purposes of the organization. The material presented to us indicates the Applicant's intention to continue his activities in order to secure his standing and advancement in terms of his level of seniority.
>
> We have been persuaded that the Applicant is intimately involved in Popular Front circles. He is a part of the organization and has influence within it. Similarly, we are convinced that we are not dealing with a onetime activity that was perpetrated by the Applicant, but with protracted activity that has taken place over a number of years. As mentioned, the Applicant was termed a leader of the Popular Front in the prison, and, since the beginning of 1980, he is a member of the leadership of the Popular Front in the Judea and Samaria Region.

> After seriously considering the arguments of the parties, we have been persuaded that the considerations of the Regional Commander and the grounds for the issuance of the order were pertinent and within the purview of his authority as defined in Regulation 108 of the Defence (Emergency) Regulations, 1945 and were intended to ensure public welfare, the security of the Region and the maintenance of public order within it.
>
> Therefore, we have reached the conclusion that a material security justification exists for adopting this measure of deportation against the Applicant.

The Committee also recommended that the Regional Commander again review the statements of the Petitioner and his counsel before the Committee. In those statements the Petitioner consented to submit to a protracted sentence or to forced transfer to another place of residence and promised not engage in any illicit activity, provided the deportation would not be carried out.

(e) When the Respondent decided on 1 November 1987, in consultation with advisers on legal and security matters, to continue the deportation procedures, the Petitioner, on 6 November 1987, turned to this court.

(f) The Petitioner raised in his petition a number of general legal points, which I have addressed above. He additionally contested the weight of the evidence produced against him and especially its true significance. In his opinion, he had engaged purely in legitimate and open activity, and one should not ascribe to him actions whose seriousness would justify so grave a measure as was decided upon on this occasion.

(g) The State's response, as presented to us and as put forward in a statement by the State Attorney's Office, can essentially be summed up by the following arguments:

The terrorist organizations, including the Popular Front of which the Applicant is a member, are striving to build up an infrastructure in the Judea and Samaria Region that is intended to undermine security and the control that I.D.F. forces exercise in the Region, and their ultimate goal is to take control of the entire Region and even beyond.

The Respondent, as Commander of I.D.F. Forces in the Region, is dutybound to act to the best of his ability to frustrate this process and ensure security and public order, and this indeed is one of the central purposes of Regulations 108 and 112(1).

The Commander of I.D.F. Forces in the Judea and Samaria Region is convinced that the deportation of the Petitioner from the Region will enable the Commander of I.D.F. Forces in the Region to fulfil the obligation upon him by virtue of his position and will result in the cessation of the Petitioner's hostile activity in the Region.

The opinion of the Respondent is that less severe measures, such as issuing an administrative detention order or placing the Petitioner on trial, are not appropriate for the Petitioner under the circumstances.

For even during the course of his last prison sentence that extended, as stated, for over five years, the Petitioner transformed his very stay in the prison into a broad vista for hostile activity.

Administrative detention, by its very nature, is intended either to frustrate a concrete evil that could be created by a certain person's activity or to prevent a relatively short term phenomenon. By contrast, the harm in which the Petitioner is involved is continuous, since he occupies a senior position in the terrorist organization.

> In view of his continuous hostile activity, the Petitioner constitutes a protracted danger, which can be feasibly frustrated solely by means of deportation.

(h) With the consent of learned counsel for the Petitioner, this court was apprised in the absence of the Petitioner and his counsel, of those items of evidence that were classified, pursuant to a certificate issued by the Minister of Defence, in accordance with Section 44 of the Evidence Law (New Version), 5731-1971. As mandated under section 44 and on the basis of the above-mentioned consent of the Petitioner, we heard explanations from learned counsel for the State and from representatives of the Security Service. We examined the possibility of disclosing additional elements of the classified material to the Petitioner and we announced our negative conclusion in our decision of 15 February 1988.

(i) As a direct outcome of studying both the unclassified and the classified material, the Court has formulated its opinion that it cannot find any justification for intervening in the factual and pertinent conclusions that the Respondent drew and that the Advisory Committee drew subsequently with regard to the character, scope and purposes of the activities of the Petitioner and the degree of danger that they posed for security. We were persuaded that the Respondent had clear, unequivocal and persuasive evidence, and even the classified evidence, as stated, was brought to our attention. The consistent activity of the Petitioner for and on behalf of the terrorist organization emerges from this evidence.

The court's clear conclusion is that the Respondent could have arrived at the conclusion which he reached.

13. **H.C. 845/87:**

(a) *Abd al Aziz Abd Alrachman Ude Rafia,* born in 1950, is a resident of Gaza.

On 15 November 1987 a deportation order was issued against him, reasoned as follows:

> This order is issued since the above serves as a spiritual leader of the Islamic Jihad movement in the Gaza Strip, which supports a violent

> Islamic revolution on the Iranian model, armed struggle and the liberation of Palestine through *Jihad.* In the framework of his sermons in the mosques, he calls for action against the Israeli rule by military struggle.

Immediately upon the issue of this order, the Petitioner was arrested and jailed in Gaza. The Petitioner applied to the Advisory Committee, which functions under Regulation 112(8) of the above-mentioned Regulations, and the hearing before the Committee took place on 19 November 1987.

(b) The Petitioner was represented before the Advisory Committee by five attorneys.

Counsel for the Respondent described the hostile activity of the Petitioner in the past, including his conviction for membership in an illegal organization and incitement, and regarding his activity following his release from prison, counsel stated, *inter alia,* as follows:

> The Appellant was released from prison on 30 July 1985. Despite the sentence that he had served and the suspended sentence pending against him, he persisted in similar activity; that is, since June 1985, numerous complaints have been filed against him, which are detailed in the order. The unclassified facts are as follows: In May 1986, at the Friday prayer marking the opening of *Ramadan* in al Kasam Mosque, the Appellant delivered a sermon of a nationalist character, in the course of which he accused the authorities of fanning local disputes, of stirring up emotions and of planting spies whom one had to identify and act against. Moreover, he warned that the authorities intended to perpetrate in the Region what they had done in Lebanon. The Appellant delivered his statement in his capacity as *Immam* of the mosque. In June 1986 the Appellant actively participated, together with other religious people from the Region, in the disturbances that took place on the Temple Mount in Jerusalem. The disturbances occurred on 3 June 1986, during a Moslem religious festival, and this was a real incident in the course of

which a number of investigation files were opened. The Appellant was not investigated at this stage. Information received in July 1986 revealed that the Appellant was found consorting with those responsible for the Islamic *Jihad* in Gaza. An additional item of information in this vein is from October 1986, according to which three people were appointed to direct the activity of the Islamic *Jihad* in Judea and Samaria. They were in turn subordinate to the Appellant and his brother Salman. As this is related to the Islamic *Jihad* organization, I will present material further on.

There are three items of information from November 1986 dealing with the investigation of three members of the Islamic *Jihad,* who were accused of the sabotage incident against the Givati soldiers in Jerusalem. The three gave evidence separately. One of them visited the Appellant in Gaza before the incident, without indicating a connection between the Appellant and the incident. The other two said the same. An item from February 1987 reports that in a religious instruction that the Appellant transmitted over the mosque loudspeaker, he noted, among other things, that there are parents who view their children who throw stones as hooligans, but in the Appellant's opinion, a stone is like a bullet and the children are not hooligans.

An item from March 1987 deals with a sermon delivered by the Appellant in a mosque on 6 February 1987 in which he spoke of the Jordanian five-year plan. He rejected the plan with the comment that the Palestinians had no need for financing, nor for strengthening the Israeli conquest and rule; rather they had a need for liberty and for expelling the occupation.

In a religious instruction given on 10 February 1987, he expressed support for Iran and came out strongly against Iraq and Israel.

In a sermon on 27 February 1987, the Appellant called upon the believers to continue the struggle, because this was an opportunity to arouse believing residents to struggle.

The Appellant spurned the requests that were directed to him to cease these disturbances. In the investigation of a suspect from Rafiah in January 1987, the person interrogated divulged that he was recruited for the Islamic Revolutionary Movement by Fathi Brij Jacki, who was a prisoner sentenced for membership in the Islamic *Jihad.* That same suspect divulged that Fathi stipulated to him that should

he be arrested, the Appellant would replace him, and the suspect would have to coordinate with the Appellant the attendance of youths at the Friday sermons.

On 5 June 1987 in the Bet Lahiya mosque, the Appellant delivered an address to mark 20 years since the Six Day War. He incited to *Jihad,* called for the liberation of Jerusalem and urged his followers to continue the struggle and not surrender even if they be injured.

On 9 October 1987, in the course of the Friday afternoon prayer in his Gaza mosque, he devoted the sermon to the four terrorists who were killed in clashes with the security forces and, *inter alia,* stated the following:

> The worshippers should take the four slain terrorists as an example and engage in struggle as they did. The individual must overcome his private interests and act against the authorities for the sake of the general Islamic interests. The worshippers ought to adopt the path of armed struggle even if it might cost them their lives.

In the course of the sermon, proclamations were disseminated among the worshippers that included the portraits of the slain terrorists and a message similar to the one just mentioned. I would like to present two proclamations that were disseminated on that occasion, together with a translation. There is a problem at this stage in presenting the translation. I wish to waive the presentation of the translation at this stage.

The proclamations will be designated as Exhibit 2 and Exhibit 3. The investigation report of October 1987 states that on 1 October 1987 in the afternoon sermon in his Gaza mosque, the Appellant remarked that Islam is the religion that calls for *Jihad.* Those present must go forth and struggle as God wills. Those present must unite in order to expel the foreign conqueror. At the end of October 1987, the Appellant took part in a memorial ceremony for two attorneys who were murdered in Gaza a few months ago. The two were identified as supporters of the Islamic *Jihad.* In the ceremony the Appellant delivered a speech, in which he stated, *inter alia,* that blood must be requited by blood. The report of November 1987 on the interrogation of M.F. of Jelazun, in the

Ramallah area reveals that he indicated that he and the members of his cell were members of the Islamic *Jihad* and that they had visited the Appellant in Gaza, who knew of his activities in the Islamic *Jihad.*

In a sermon at his mosque on 6 November 1987, the Appellant called upon God to pour down fire on the enemies, for He always sides against the tyrants.

From some of the items of information that I have detailed and will detail later, it cannot be said that the preachings of the Appellant were addressed solely to the Israeli authorities. But preachings which call for violent activity and civil disorder in the context of religious extremism, including actions against persons suspected of heresy to Islam, as well as against stores which carry abominable movies or against weddings where western music is played - these activities also severely harm the security of the Region, because there was resort to fire arms and casualties were caused .

At this stage I would like to present two documents. The first is the expert opinion of a General Security Service officer regarding the Islamic *Jihad.* It is identical to what has been presented in the past in the trials of members of the Islamic *Jihad* and is in the possession of the defence attorneys - marked as Exhibit 4.

In addition, I would like to present a personal profile and impression of the Appellant that was prepared by the Advisor on Arab Affairs of the Region's civil administration, on the basis of the material in his possession, as well as a meeting he held with the Appellant. As stated, this document is a precis of the Appellant's personality and activities.

In addition, counsel for the Respondent also brought before the Committee classified material containing detailed information on the Petitioner's activity that endangered security. This information was presented subsequently to this court, with the consent of counsel for the Petitioner (in the absence of the Petitioner or his counsel), and with respect to which we rendered our decision of 15 February 1988.

The Committee noted in its reasoned and detailed decision, *inter alia,* as follows:

The Applicant is mentioned as responsible for the Islamic *Jihad* in the Gaza Strip and perhaps beyond that area. He is depicted as a guide of that organization and as an influential figure among the residents of the area in general, and among those who belong to that organization in particular. They look to him constantly and often wait by his doorway to hear his word. He acquired this status through his activities as a lecturer at the university and as a preacher in the mosque, where he delivered extremist religious and nationalist addresses laden with incitement and hatred against Israeli rule. These more than once called for violent struggle, including encouragement of civil disorder and even extreme acts of violence, such as murder. There is no doubt, therefore, that the Applicant constitutes an actual danger to the security of the Region and its inhabitants and to the maintenance of public order; further, that the deportation order was given, within the framework of considerations enumerated in Regulation 108 of the Regulations... The question remains whether in the Applicant's case, the most severe measure, namely deportation, is called for.

In view of the Applicant's "history" and personality, we are convinced that the answer to this question is affirmative. The Applicant was subject in the past to various restrictions because of his activity, was even tried and has served a prison sentence. However, despite all this, he did not mend his ways and continued precisely along the path upon which he had embarked previously. In the course of time, he even extended his influence and acquired a greater following of believers.

The Applicant has impressed us as a man of strong character, who totally believes in the righteousness of his ways and, therefore, there is no chance that in the foreseeable future he will desist from his dangerous activity. We do not believe that any restrictions imposed upon him will suffice to prevent the continuation of his negative influence on the residents of the Region.

> Even his incarceration (e.g. by way of administrative detention), will not counter his influence. There is ground to fear that precisely in such a place will he be even more accessible to the extremists among his followers, and that his stay in prison will have a most dangerous and negative influence on what takes place both within the prison and outside it.
>
> The most efficient and suitable measure in this case is, therefore, to deport the Applicant outside the Region and the country.
>
> Even if he be free to go about in a foreign land, with no one to constrain him, his harmful influence on the Region would be immeasurably smaller and less perceptible and immediate than would be the case, were he to walk about in our midst.

(c) When the Committee rejected the application of the Petitioner and recommended on 25 November 1987 that the deportation order be upheld, the Petitioner turned to this court.

His biography was described in his petition in these terms:

> 3.a. The Petitioner bears I.D. card no. 92118635, was born in 1950, and is a permanent resident of Gaza. He is married and the father of 5 minor children.
>
> b. In 1970 the Petitioner traveled to Cairo with the consent of the Israeli military authorities to pursue academic studies. In 1975 he completed his studies for a master's degree on the subject of the Islamic *Sharia*.
>
> c. Between the years 1976-1981, the Petitioner served as a teacher in the Emirate of Shajah in the Persian Gulf.

d. During the course of his study and work outside the Region, the Petitioner would intermittently visit his family in the Gaza Strip.

e. In 1981 the Petitioner returned permanently to Gaza, his place of domicile. He was hired as a lecturer on Islamic *Sharia* at the Islamic University of Gaza and served in the post of *Immam* at one of the mosques of Gaza. In the framework of this position, he delivered sermons during the Friday prayers at the mosque.

f. In September 1983, a six month supervision order was issued against the Petitioner. It was extended for another six months (up to September 1984). Under these orders the Petitioner was prohibited. *inter alia*, from entering the Islamic University where he worked.

g. The Petitioner appealed against the orders. His first appeal, however, was struck out due to his non-appearance. The second appeal was heard in June 1984 and dismissed.

h. In October 1984 the Petitioner was put on trial before the Military Court in Gaza, on charges of membership in an illegal organization (Regulation 85 (1) (a) of the Defence (Emergency) Regulations) and of incitement (Section 7 of the Order Prohibiting Acts of Incitement and Hostile Propaganda).

i. The Petitioner was convicted on the second offence - incitement and membership activity, and was sentenced to 11 months of actual imprisonment, from the date of arrest, and to an additional suspended sentence. He was released from prison in July 1985.

j. Following his release he returned to work at the Islamic University and to his post as *Immam.*

(d) As stated, all the evidentiary material, including the classified material, was presented to us.

Respondent no. 1, O/C Southern Command, noted in the affidavit that he submitted to us:

> The decision to deport the Petitioner from the Region was taken after all parties responsible for the security of the Region, its welfare and proper administration, including military and security personnel at the highest military, security and political echelons, consulted and seriously examined the need for deportation. All were convinced that the status, position and activity of the Petitioner in the Islamic *Jihad* movement dictate today the adoption of this grave and extreme measure of deportation.
>
> The copious evidentiary material accumulated by the security authorities was presented to the above-named parties and to me, and it sufficed to persuade me unequivocally that the Petitioner serves as the spiritual leader of the Islamic *Jihad* movement in the Gaza Strip, a movement which supports a violent revolution on the Iranian model and an armed struggle and the liberation of Palestine through *Jihad*. In the framework of his sermons in the mosques, the Petitioner calls for action against the Israeli rule by means of military struggle.

The facts as presented to us clearly and persuasively attest to the consistent and hostile activity of the Petitioner, and they directly refute the contentions and denials of the Petitioner. The sole possible conclusion is that this material was, as the court requires, clear, unambiguous and convincing.

We find no basis for the contentions as to lack of good faith or arbitrariness, and can discern from the proceedings up to now that, with respect to the question here deliberated, the authorities acted cautiously, upon thorough examination and with discretion.

I therefore see no grounds for intervention by this court in the decision of Respondent no. 1.

14. (a) **H.C. 27/88:**

(a) The Petitioner, *J'mal Shaati Hindi* , is a resident of Jenin and is studying at Al Najah University. On 1 December 87 a deportation order was issued against him reasoned as follows:

> J'mal Shaati Yunis Hindi is a senior operative in the *Al Fatah* organization and the focus of his hostile activity is in the city of Nablus in general and at Al Najah University in particular. He was sentenced to four years of actual imprisonment for his terrorist activity and was subject to a restriction order for a year and a half and to a nine month period of administrative detention. During that entire time he continued intensively to act in furtherance of the organization, both inside and outside prison.

He applied to the Advisory Committee and this body heard the submissions of counsel for the Petitioner and of course for the Respondent, who produced the evidence that assisted the Regional Commander in making his decision. A portion of the evidence was submitted by the security authorities in the absence of the Petitioner or his counsel.

The disclosed facts against the Petitioner, as subsequently summarized in the decision of the Advisory Committee, were as follows:

> The hostile activities of the applicant began in 1976. In that year, the applicant was among a group of youths who incited students in Jenin to demonstrate, and the windows of the school were shattered. The applicant was among those who organized demonstrations in the Jenin refugee camp.

In July 1976 doctrinal material regarding the *Al Fatah* organization was found in the applicant's home.

In August 1976 the applicant was arrested and interrogated. He admitted that about a year earlier he had been recruited to the *Al Fatah* organization. He received a code name and recruited additional activists. Together with members ... (not clear) he trained in laying sabotage charges and even prepared an explosive charge himself. The applicant also knew of the location of a box of bullets, kept by one of his companions. During that same period he participated actively in organizing demonstrations, erecting road blocks, throwing rocks and setting fire to tires.

On the basis of the investigation material and the admission of the accused, he was tried, convicted and sentenced to four years of actual imprisonment.

In July 1980 the applicant completed his sentence and was released from prison. A few of months after his release, in April 1981, the applicant took an active part in organizing "Palestine Week" at Najah University, sponsored by *Al Fatah.*

In a demonstration that took place in November 1981, at Najah University, the applicant was one of the leading activists. In the course of the demonstration, stone road blocks were erected and rocks were hurled at a military force that arrived on the scene. A similar demonstration in which the applicant was active took place that same month.

During the months of March and June 1982, the applicant was again involved in disturbances in which he played an active role. In this period the applicant was arrested twice. From the interrogation of an *Al Fatah* activist in October 1982, it emerged that the applicant headed the

volunteer youth committee of the *Fatah* in the Jenin refugee camp. In January 1983 a celebration marking the anniversary of the establishment of the *Fatah* was held at Najah University. Four thousand people participated in that celebration. The applicant was among those active in organizing the celebration. In January 1983 the applicant again took part in throwing stones at I.D.F. forces.

On 19 April 1983 a special supervision order was issued against the applicant for a period of six months. In May 1983 he was again involved in disturbances. The original supervision order was extended for another six months, commencing 19 October 1983; and on 19 April 1984 it was extended for yet another six months.

In August 1984 the applicant was a member of *Lijnat A'Shabiba* in the Jenin refugee camp. In August 1985 an administrative detention order was issued against the applicant for six months, but following his appeal, the period of administrative detention was shortened to three months. With his release from administrative detention, a celebration was held in his honour in May 1986, in the course of which songs were sung in support of *Al Fatah.* In July 1986 the applicant was among the senior operatives of the *A'Shabiba* movement at Najah University.

On 8 January 1987, the applicant spoke to an *Al Fatah Day* event at Bir Zeit University, and extended greetings to mark the day. On 12 June 1987 the applicant was placed under administrative detention for a period of six months.

In July 1987, a day before the student council elections, the applicant presented the *Shabiba* candidates to the students of Najah University and called for continued nationalism and struggle, including armed struggle. Toward the end of November 1987, the applicant was again arrested for his involvement in disturbances at the Jenin refugee camp.

> According to the material, the applicant's name came up in the interrogation of a member of a youth committee in Jenin, as one of those responsible for *Shabiba* activities in the Jenin refugee camp.

The above was a precis of the unclassified material presented by counsel for the Respondent. In addition to this material, a large collection of classified material was brought before the Advisory Committee.

The Petitioner denied all involvement in a terrorist organization and attributed the issueance of the order to a desire to hamper him in expressing his political views. The Advisory Committee had this to say in its decision of 27 December 1987:

> The statement of the applicant is totally belied by what we have found in the copious material, both classified and unclassified, that was presented to us. As opposed to the sweeping and blanket denial of the applicant, we found in the body of the material details concerning his activity and standing in the *AI Fatah* organization. In closed hearings, clarifications were received regarding the method in which the material was gathered and the reliability of the sources. We were persuaded that the sources of the information are numerous and that most of the the important items of information were received from diverse sources and corroborated. We were persuaded that the evidence presented to us meets the requirements set in the case law, being clear, unequivocal and persuasive (H.C. 513,514/85, *Nazzal and Others v. Commander of I.D.F. Forces in the Judea and Samaria Region,* 39 (3) P.D. 645). In examining the material, we took into consideration the fact that it is difficult for the applicant to defend himself against material that is not brought to his attention and, therefore, we exercised special caution.
>
> The import of our above determination is that the applicant's course of conduct is totally at odds with the description he presented to us and upon which his counsel relied. We are dealing with a person holding a senior position in the *AI Fatah* organization and with connections in the

organization. His m*odus operandi* is sophisticated. He refrains from appointments to official positions to avoid exposure, but is fully involved in what is going on. His main activity is to take an active part in organizing demonstrations and violent disturbances, in some of which rocks were thrown at military forces and road blocks were set up. The applicant is a person of standing, power, influence and ability to instigate and bring about relatively large scale disturbances in those centres where he is active and known.

As emerges from the material, the applicant's activity continued over a period of years. He was imprisoned for four years for terrorist activity; he was subject to special supervision orders and was placed under administrative detention, but he did not cease his hostile activities. He continued them intensively and on one occasion when he participated in a disturbance he suffered injury from a bullet fired at his leg.

The applicant's activity has continued up until recently and from a perusal of the material one can gauge not only his sense of determination to act and to engage others in violent ways in order to further the goals of the organization in whose framework he functions, but one can also discern in him a person who has decided to make such activity his life's goal. We have been persuaded that he is likely to pose a tangible and lasting danger, due not solely to his growing stature, but also to the range and type of his activity, which reflects a method for realizing the armed struggle that the applicant propounds.

In light of the aforesaid, there is no basis for the contentions of the applicant and his counsel that the order was issued purely for a political view expressed. The applicant's activity and its inherent danger to the security of the Region, was the basis for the issue of this order. There is no need to dwell on the danger that could result from this type of activity in which the applicant is engaged. Violent demonstrations and

> disturbances gravely effect the Region's security and the maintenance of public order. and prevent securement of the public welfare.
>
> We have no doubt that material and decisive security considerations prompted the issuance of the order against the applicant.

After the Committee recommended upholding the deportation order, the Petitioner turned, on 12 January 1988, to this court.

(b) The material upon which we must base our decision is that which was presented openly before the Petitioner and the Advisory Committee, because in this case we were not requested to examine the evidence for which a certificate of privilege was issued in accordance with Section 44 of the Evidence Ordinance (New Version), 5731-1971.

The Petitioner did not submit an appeal in the regular manner prescribed in the latter part of Section 44 of the above-mentioned Ordinance, as distinguished from the method of review by the bench that is hearing the matter, a method that depends upon the agreement of the parties. The legal significance of the matter is that the Petitioner cannot today contest the justification for classifying the evidence (as opposed to challenging the justification for the deportation order). What implication does this have? The legislature authorized the Minister of Defence to attest by a signed certificate that the presentation of certain evidence could harm state security. The legislature also left the affected party an opening to try and persuade a judicial authority that the need for disclosing the evidence in order to do justice takes precedence over the need for withholding it, i.e. that the classification of the evidence is unjustified. Once a party has refrained from requesting disclosure of the evidence in the prescribed manner so that it could be decided statutorily by the competent judicial authority - that is, having abandoned the avenue of appeal established in the Evidence Ordinance (New Version) - his claim, that preference be given to considerations supporting disclosure of the evidence over considerations supporting the maintenance of secrecy, cannot in any case be argued before us.

(c) In his petition, the Petitioner repeatedly claims that there is nothing in the arguments or the evidence to justify the adoption of such a severe and far reaching measure as deportation.

He has contested the legality of issuing a deportation order, a matter that we have discussed above, and has disputed the existence of a justification for issuing it in his specific case. The Respondent's reply submitted to us quotes the above-mentioned statement of the Committee, namely:

> The applicant's course of conduct is totally at odds with the description he presented to us and upon which his counsel relied. We are dealing with a person occupying a senior position in the *Al Fetch* organization and with connections in the organization. His *modus operandi* is sophisticated. He refrains from appointments to official positions to avoid exposure, but is fully involved in what is going on. His main activity is to take an active part in organizing demonstrations and violent disturbances, in some of which rocks were thrown at military forces and road blocks were set up. The applicant is a person of standing, power, influence and ability to instigate and bring about relatively large scale disturbances in those centres where he is active and known.

(d) The Petitioner complained about the legal procedure, in the framework of which classified evidence was presented to the Advisory Committee in his absence and in the absence of his counsel. On this issue the court has stated in the above-mentioned H.C. 513,514/85 and M.A. 256/85 [5] at p. 658:

> The Petitioners complained that they were not privy to the secret material that was presented to the Advisory Board, but as this court has already explained in a similar case in A.D.A. 1/80, this is the sole reasonable arrangement that strikes a balance between the two interests, which are: on the one hand maintaining review of the considerations and decisions of the Military Commander; and on the other hand

> preventing damage to state security through disclosure of secret sources of information. It indeed does not provide an opportunity to respond to every factual contention and the Advisory Board (or a court under given circumstances) must take this fact into consideration when it examines the weight or the measure of additional corroboration of the information. However, the legislature found no more reasonable and efficient way to guard against the disclosure of secret information in circumstances where this is vital in order to prevent grave damage to security; and it may be said in passing that this method is mentioned not only in Section 44 of the Evidence Ordinance (New Version), 5731-1971, but also in the less known provision in section 128 of the Penal Law, 5737-1977, by which one can similarly limit the full disclosure of information.

This time too the Committee examined, what the maximal information was that it could place at the disposal of the Petitioner without damaging vital security interests, and one has no cause for complaint against the Committee. We have nothing to add in the matter, because we have not examined the secret material and do not know its details.

As regards the examination of the material, I am aware that in the absence of a request to this effect by the Petitioner, we have not had an opportunity to peruse the classified material. From the standpoint of the Petitioner, this cannot avail him in the case at hand. The unclassified material attests to consistent and prolonged hostile activity on the part of the Petitioner. In the absence of any supporting data, we can find no basis for the Petitioner's contention that the Respondent's action is based on arbitrariness or lack of good faith, or that the classified material does not support the Respondent's approach. No reason or grounds exist to preclude our concluding from the known constellation of circumstances that the Respondent found in the classified evidence substantial support for the approach he adopted, a view also held by the Committee which did examine the material. The absence of an initiative on the part of the Petitioner to submit the secret information for review in the manner established by the legislature for this purpose, or to request that the court do so, can only lend support to the thesis presented by the Respondent.

(e) Having studied the material in the Respondent's reply and in his arguments before us, and having considered the submissions of the parties, we have concluded that there are no grounds for the intervention of this court in the discretion of the Respondent. The manner in which the Respondent acted for the purposes of exercising his authority under Regulation 112 in the specific case before us was proper, and the matter was examined in a thorough and exhaustive manner by the Advisory Committee.

The considerations of the Advisory Committee, whose reasoned decision was before us, and the considerations of the Respondent as they emerge from the reply submitted to us, and as buttressed by and consistent with the unclassified material presented to us, do not point to the existence of any grounds upon which this Court could exercise its authority under section 15(d)(1) and (2) of Basic Law: The Judicature.

Finally, a general comment. Having regard to the substance and scope of the material which substantiated the Respondents' decisions regarding each of the Petitioners, we see no reason to deal with the Petitioners' theoretical argument as to what likelihood of danger is generally required in order to found a decision under the above-mentioned Regulation 112.

15. During the hearing before the Advisory Committee in the case of the Petitioner in H.C. 785/87, as well as before us, the question arose as to whether a person against whom a deportation order is issued and who appeals to the Advisory Committee is allowed to call witnesses to testify on his behalf before the Committee.

In one of the sittings of the Advisory Committee, a categorical view was expressed that no such right exists. I find this opinion unacceptable.

In its functioning, the Advisory Committee hears arguments just like any advisory committee that examines a question within the purview of its authority, and upon which it must express an opinion and provide its recommendation. Customarily, the Committee also hears the prospective deportee, if he so desires. The hearing before the Advisory Committee is not in the nature of a judicial proceeding in which evidence is presented in

the manner acceptable in a court of law; and whoever represents the statutory authority, to which the Committee presents its recommendations, does not have to prove his contentions in the same manner that evidence is adduced before a judicial body. However, in a case where the Petitioner raises a detailed and reasoned argument in apparent good faith, contending that a particular witness can provide the Committee with relevant information that has a direct bearing on the case and which can shed light on the question posed before the Committee, it would be proper for the Committee to decide to hear the witness.

In retrospect, it does not appear that the witness, whom it was sought to summon in this case could have refuted the evidentiary material, whose substance and quality were described above, and therefore no miscarriage of justice requiring remedy was caused at that point.

16. The Petitioners raised the argument that a deportation order must specify the duration of the stay outside the Region imposed by the order.

There is nothing in the text of Regulation 112 to support the above argument. The Regulation authorizes the Military Commander to direct, by way of a signed order, the deportation of person. Incidentally, the text of Regulation 122 (7), as promulgated during the period of the Mandate, even relieved the person issuing the order from the obligation of noting the name of the deportee. Obviously, today the authority is not exercised in such fashion.

There is no provision in the Regulation as to the period of time for which the order is in effect. All that is stated in the original version is:

> 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.

This signifies that the prohibition on return to the Region remains in force so long as the deportation order has not been rescinded by whoever issued it. It is my opinion that the Regulation would admit the possibility of raising anew the question of the duration of the order, either by applying to the person who issued the order or by a renewed application to

the Advisory Committee. Regulation 112(8) empowers the Advisory Committee appointed for the purposes of Regulation 111(4), to consider the applications of a person against whom a deportation order was issued.

The task of the Advisory Committee was defined in Regulation 111(4) as follows:

> The functions of any such committee shall be to consider, and make recommendations to the Military Commander with respect to, any objections against any order under this regulation which are duly made to the committee by the person to whom the order relates.

Regulation 112(8) provides that the Committee shall consider the application of a person against whom a deportation order was issued, and make its recommendation in this regard. There is nothing in the aforesaid text to indicate a onetime examination. One should interpret this Regulation in accordance with the language used, in a manner that will permit a person against whom a deportation order was issued, and which is still in force, to renew an application for reconsideration of his case.

This approach finds support in the tendency reflected in the second paragraph of Article 78 of the Fourth Geneva Convention, which deals with a different though essentially related subject to that before us. It also coincides with the directive in section 16 of the Interpretation Order (Judea and Samaria Region) (No. 130), 57271967, which states:

> *Exercise of Power or Fulfilment of obligations.*
> 16. Where a power is vested in or by virtue of a security enactment, or a duty imposed therein or thereunder, the power may be exercised and the duty shall be fulfilled, repeatedly, from time to time as the circumstance may require, provided no other intention is implied.

Therefore, repeated applications may be made to the Advisory Committee, even after the implementation of a deportation order and so long as the order is in force.

17. In summary, we have not found any abuse of authority, deviation from authority, lack of good faith, arbitrariness, unlawful discrimination or similar shortcomings or irregularities that would invalidate the Respondent's acts. In light of all of the facts presented to us, there is no room to doubt the veracity of the Respondents' submissions and their reliability, and one cannot negate the legal and substantive basis for their decisions.

Accordingly, I would dismiss the petitions and set aside the orders issued pursuant to them.

LEVIN J.: I concur.

GOLDBERG J.: I concur.

BEN-PORAT D.P.: I concur in the instructive opinion of my esteemed colleague, Shamgar P. I would only add that in his judgment he mentioned and reviewed that interpretive approach which holds that one should interpret a treaty in a liberal and broad fashion, paying due attention to the intention of the treaty's draftsmen and to the purpose underlying its conclusion. For this purpose, a passage was quoted from Starke, *op cit. at* p. 511:

> ...Treaties should be interpreted *in the light of existing international law*.

(Emphasis added - M.B.P.).

A similar rule of interpretation is accepted by us in relation to legislative enactments, namely: two laws that deal "in pari materia" with the same subject and have the same purpose should be interpreted in a uniform manner, so as to create a suitable interpretive harmony between their provisions. See: C.A. 303/ 75 [24] at 605; H.C. 609/82 [25] at 766. I believe that one can apply this also to the present issue: Regulation 43 of the Hague Regulations, which is found in the section on "Military Authority Over the Territory of a Hostile State", reads as follows:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The provisions of Article 49 of the Fourth Geneva Convention should be read (*inter alia*) in the light of the directive in Regulation 43 of the above-mentioned Hague Regulations, so that the strict prohibition against the deportation of civilians, according to a simple reading of the text, should be qualified by the duty imposed under Regulation 43.

Let me clarify my position. One can deport individual residents of those territories to locations outside them, so long as their continued residence may harm public security and order in the occupied territories, and on condition that in the given circumstances no other option than deportation exists in order to protect the population of the territories. I would further add that one should read Article 49 of the Fourth Geneva Convention in the light of what is stated in Regulation 43 of the Hague Regulations, since the Hague Regulations bind Israel as part of *customary* international law, whereas the Geneva Convention has only *conventional* force. It is, therefore, understandable that greater weight should be accorded to the duty of ensuring security and public order in the occupied territories as set forth in Regulation 43.

In the petitions before us an affidavit was submitted by the Respondents, explaining that all other remedies including administrative detention had been exhausted, that it had become evident that none of these could respond to the security problem relating to the Petitioners, and that the sole solution was to deport them outside the occupied territories.

As stated, this is but an addendum to the exhaustive and persuasive considerations advanced by my esteemed colleague, Shamgar P.

BACH J.: 1. I concur in the final conclusion reached by my esteemed colleague, the President, in these petitions; however, on one point of principle I must dissent from his opinion.

This point is the proper interpretation of Article 49 of the Fourth Geneva Convention (hereinafter "The Convention"). Counsel for the Petitioners requested that we re-examine this question and consider again an argument advanced on a number of occasions in the past - that the deportation of persons permanently residing in the territories occupied by the I.D.F., outside the boundaries of those territories and into the territory of another state, is indeed in contravention of the provisions of Article 49 of the Convention.

2. In a reasoned decision given by Sussman P. in H.C. 97/79[2], it was established, explicitly, that the deportation of a person from the territories of Judea, Samaria and the Gaza Strip to one of the neighboring Arab states out of concern for state security, is within the purview of the Military Commander's authority under Regulation 112 of the Defence (Emergency) Regulations and outside the framework of actions to which Article 49 of the Convention applies.

In subsequent petitions, when this point was again raised on behalf of the Petitioners, the court was content to refer to the judgment in the above-mentioned H.C. 97/79[2], expressing its concurrence in the ruling given in that case (e.g. see the judgment in H.C. 513,514/85 and M.A. 256/85 [5], at 650-659) which is extensively quoted in the opinion of my esteemed colleague, the President. However, there have been instances when the court decided to reserve judgment on this point. Thus in H.C. 698/80 [3], Landau P. reviewed the various arguments on this question and decided not to adopt a position regarding them when he stated (at p. 627):

> ...and I will refrain from deciding upon the legality of the deportation orders under Article 49(1) of the Geneva Convention, which for the time being must be regarded as a provision of conventional international law alone, upon which an individual cannot found his petition in a court adjudicating according to the positive law of the forum country.

(I will return to this last argument below.) My opinion, therefore, does not contradict the conclusions of Landau P. in H.C. 698/80 [3] and I am constrained to dissent only from the opinion expressed on this point in H.C. 97/79 [2]. It should be recalled that in

that same judgment in H.C. 698/80 [3], a minority opinion was delivered by Cohn J. who held that it was proper to make the order *nisi* absolute, and regard the deportation order as void.

3. Before I clarify my stand on this matter, and in order to make it easier to follow my arguments later, it would be useful to cite now the text of the relevant part of the aforesaid Article 49 as well as the reasoning of Sussman P. in H.C. 97/ 79 [2], which the Petitioners requested us to reject.

The first two passages of Article 49 provide:

> 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.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given territory if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

"Protected persons", in the sense of the Convention (according to the definition in Article 4 of 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 a Party to the conflict or an Occupying Power of which they are not nationals.

The following reasoning underlies the view of Sussman P., in H.C. 97/79 [2] at pp. 316-317, that the deportation of people who endanger the security of the Region, under Regulation 112 of the Defence (Emergency) Regulations, lies beyond the scope of the above-mentioned Article 49:

> Neither have I found any substance in the argument that the exercise of the above-mentioned Regulation 112 contradicts Article 49 of the Fourth Geneva Convention of August 1949 Relative to the Protection of Civilian Persons in Time of War. It is intended, as Dr. Pictet in his commentary on the Convention (p.10) writes, to protect civilians from arbitrary action by the occupying army, and its purpose is to prevent acts such as the atrocities perpetrated by the Germans in World War II, during which millions of civilians were deported from their homes for various reasons, generally to Germany to serve the enemy in forced labour, along with Jews and others who were deported to concentration camps for torture and extermination.
>
> It is clear that the above-mentioned Convention does not detract from the obligation of the Occupying Power to preserve public order in the occupied territory, an obligation imposed by Article 43 of the 1907 Hague Convention, nor does it detract from its right to employ the necessary means to ensure its own security; see Pictet, *Humanitarian Law and the Protection of War Victims,* at p. 115.
> The High Commissioner, or whoever succeeded him, was not empowered to use the above-mentioned Regulation 112 as he saw fit, since Regulation 108 directs 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

(Land of Israel), the maintenance of public order or the suppression of mutiny, rebellion or riot.

This direction tells us that the powers entrusted to the authorities by virtue of the state of emergency, were granted for one sole purpose, the maintenance of public order and security. Even according to Dr. Pictet, *ibid*, at p. 159, this is a legitimate goal. It has nothing whatsoever in common with the deportations for forced labour, torture and extermination carried out in World War II. Moreover, the intention of the Respondent is to expel the Petitioner from the country and not to transfer him here, to remove him because of the danger he poses to the public welfare and not to draw him near so as to exploit his labour and derive benefit from him for the State of Israel.

4. Professor Kretzmer, representing the Association for Civil Rights in Israel, submitted a comprehensive and exhaustive argument on this point on behalf of the Petitioners, without ignoring the inherent difficulty of moving the court to deviate from precedents established by it in the past and affirmed in subsequent hearings. He stresses, however, that we are dealing with a conspicuous error in interpretation which is incumbent upon us to correct, and that in contradistinction to previous compositions of the court, when dealing with this matter in the past, we are sitting now in an enlarged bench of five judges, and this fact as well can facilitate our adopting a decision to deviate from the aforesaid rule.

5. After examining the question in all its aspects, I am inclined to accept the position of the Petitioners on this matter, and my reasons are these:

a) The language of Article 49 is unequivocal and clear. The juxtaposition of the words *individual or mass forcible transfers as well as deportations* with the phrase *regardless of their motive,* [emphasis added - G.B.] admits, in my opinion, no room to doubt that the Article applies not only to mass deportations but to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional - "regardless of their motive".

b) I accept the approach which also found expression in the judgment of Sussman P. in H.C. 97/79 [2], namely that the Convention was framed in the wake of the Hitler rule in Germany, and in face of the crimes perpetrated against the civilian population by the Nazis during World War II. Likewise, I would subscribe to the opinion that one may consider the historical facts accompanying the making of a convention and its purpose, in seeking the proper interpretation of its provisions. Also the Vienna Convention, upon which Professor Kretzmer relied in this context, is compatible with this possibility, since it provides in Article 31:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

On this issue I do not dissent at all from the opinion of the esteemed President and most of the authorities cited by him are acceptable to me as well. However, I find no contradiction between this "historical approach" and a broad interpretation of the Article in question.

The crimes committed by the German army in occupied territories emphasized the need for a convention that would protect the civilian population and served as "trigger" for its framing. But this fact does not in any way refute the thesis that when framing that convention, the draftsmen decided to formulate it in broad forms, in a manner that would, *inter alia,* totally prevent the deportation of residents from those territories either to the occupying state or to another country.

The language of the Article, seen in its own context and in light of the treaty in its entirety, does not admit, in my opinion, the construction that it is intended to prevent only acts such as those committed by the Nazis for racial, ethnic or nationalistic reasons.

We must not deviate, by way of interpretation, from the clear and simple meaning of the words of an enactment when the language of the provision is unequivocal and when the

literal meaning does not contradict the legislative purpose or lead to an illogical and absurd result.

(c) The second portion of Article 49 supports the above interpretation. Here the Convention allows the evacuation of a population *within the territory,* i.e. from one place to another in the occupied area, if necessary for the security of the population or imperative for military purposes. It teaches us that the draftsmen of the Convention were aware of the need to safeguard security interests, and for this purpose even allowed the evacuation of populations within the occupied territories. The fact that this qualification was not included in the first portion, i.e. the deportation of residents beyond the borders for security reasons was not permitted, is significant.

(d) Other provisions of the Convention also illustrate an awareness by the draftsmen of the security needs of the occupying state, and indirectly support the stated broad interpretation of Article 49.

Thus Article 78 opens:

> 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.

I accept Professor Kretzmer's contention that Articles 78 and 49 should be read together, to infer from them as follows: where a person poses a security risk, one may at most restrict his freedom of movement within the territory and detain him, but one cannot deport him to another country. This idea is also expressed by Pictet in Commentary, *supra,* at p. 368. In discussing Article 78 of the Convention, he states:

> 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.

A similar conclusion emerges from an examination of Articles 35 and 48 of the Convention. The first part of Article 35, which deals with the fate of aliens in the territory of a party to the conflict, reads:

> All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State.

Article 48 of the Convention has a like provision concerning protected persons in the occupied territory, as follows:

> Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35...

Again one sees an alertness to the need for permitting measures to protect the interests of the occupying state. To further such an interest, one can prevent the departure of persons from the occupied territories. The absence of a similar provision permitting deportation of a person from the territory, for similar purposes, is conspicuous, especially considering that Articles 48 and 49 are contiguous to each other.

Article 5 of the Convention, which deals specifically with spies and saboteurs, leads to the same conclusion. Its second paragraph reads:

> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

The rights of communication accorded to protected persons under the Convention include the right to communicate with their families (see Article 25 of the Convention), the

right to communicate with the Red Cross and other organizations (see Article 30 of the Convention), and the right to maintain free contact with an attorney (Article 72 of the Convention).

We see that under the Convention, the rights of spies and saboteurs can be denied in various ways, if the matter is deemed necessary for security reasons. Yet despite the alertness of the Convention's draftsmen to the security needs of the occupying power, there is no provision qualifying the sweeping prohibition in Article 49, and there is no allusion to the right to deport such persons to another state .

The above-mentioned Articles of the Geneva Convention supplement the provisions of Regulation 43 of the Hague Regulations, which obligates the occupying power to ensure public order and public welfare in the occupied territories, in the sense that they indicate the measures which may be adopted in order to fulfil this obligation. In any event, nothing in Regulation 43 of the Hague Regulations is incompatible with the simple and broad interpretation suggested for Article 49.

(e) A clear direction is discernible in the Convention. The freedom of movement of a "protected person" can be limited, and he can even be arrested without trial, if it is necessary in order to protect public security or another vital interest of the occupying state; this is in addition to the possibility of placing him on trial, punishing him and even condemning him to death. But the "protected person" cannot be deported; for the moment deportation to another country is carried out, the occupying state has no further control over him, and he therefore ceases to be a "protected person".

(f) Most scholars subscribe to the opinion that the above broad interpretation of Article 49 of the Convention is indeed the required interpretation. Thus at p. 279 of the above-mentioned *Commentary* on the Convention, Pictet says the following regarding the first part of Article 49:

> The prohibition is absolute and allows of no exceptions, apart from these stipulated in paragraph 2.

This opinion has been expressed in Israel on a number of occasions and in a consistent fashion by the learned scholar, Professor Dinstein. In his article, "Settlements and Deportations in the Occupied Territories" (*Iyunei Mishpat , 7* (1979-1980), 188), Professor Dinstein levels piercing criticism at the judgment in the above cited H.C. 97/79 [2], and relying on the text of Article 49 of the Convention, he writes, *inter alia*, as follows (at p. 193):

> No one would dispute that this paragraph was formulated on the basis of the bitter experiences of World War II. However, it is equally quite clear that the text of the paragraph is formulated as a total prohibition that admits no exception. A qualification that is based on military order and the security of the civilian population does appear in Article 49. However, these matters are not included in the first paragraph (which deals with deportation and exile outside the occupied territory), but rather in the second paragraph (which deals with a temporary evacuation that can and even must be performed within the occupied territory).

Likewise, the question of the authority to deport and evacuate in occupied territories is discussed in Professor Dinstein's book "The Laws of War" (Schocken and Tel-Aviv University, 1983). At p. 225 of the book, Professor Dinstein mentions the Articles of the Convention (such as Article 35), which permit restricting the freedom of movement of residents of the occupied territories for the purposes of protecting certain interests of the occupying power, and he adds:

> The position is different when the departure - or more precisely, the removal - from the occupied territory is done by force. Article 49 of the Convention distinguishes between deportation and evacuation. Deportation is the forcible transfer of civilians - on an individual or collective basis - from the occupied territory to the territory of the occupying state or to another state (whether it is occupied or not). Deportation is prohibited unconditionally and without consideration of motives.

See also Professor Dinstein's "The International Law of Belligerent Occupation and Human Rights", 8 *Israel Yearbook on Human Rights* (1978), 104, 123.

This interpretation of Article 49 of the Convention has won nearly universal acceptance and I accept it as well.

6. My esteemed colleague, the President, attempts to demonstrate through a number of examples, that the simple, literal interpretation of Article 49 will lead to intolerable results. With all due respect, I do not believe that any of these aforesaid examples can lead to such a conclusion.

The learned President mentions the judgment of the U.S. Supreme Court in *Ex parte Quirin* [27], which deals with German agents who infiltrated into the United States on an espionage mission, for which they were sentenced to death. It is clear that the case as such is not in point here, because it did not involve an occupied territory, only the territory of the United States itself, and the question of deportation did not arise there. The President is aware of this, nevertheless he expresses the following thought:

> The event took place inside the territory of the United States; but had a similar incident occurred in an occupied territory after 1949, and it was decided not to execute the terrorists but to deport them back, whether in the framework of an exchange or in some other way, this would constitute, as it were, a serious violation of the Fourth Convention.

It is difficult to see how such a hypothetical possibility can avail the arguments of my esteemed colleague. Let us in fact assume that those people spying against the United States were apprehended after 1949 in territory occupied by Americans. If we further assume that these people could expect a death sentence, then we may suppose that they would have willingly consented to be transferred to another country in order to save their lives. Nothing in the Convention prevents the willing transfer of protected persons to another country. Only forcible deportations are prohibited. But if we were to imagine that for one reason or another, these German residents would not have agreed to leave the

territory, then in truth the authorities of the United States could not deport them against their will to another country (if it were determined that they were "protected persons"), without violating the Convention. If for example, a spy with communist ideological sympathies were caught in the American occupation zone in Germany, it would be permissible to arrest and punish him in every possible legal manner, but it would not be possible, according to the Geneva Convention, to deport him forcibly, not even to East Germany, the Soviet Union, or some other communist country. To the best of my knowledge, no such attempt was ever made. In any case, I do not find anything unreasonable or absurd in such an outcome.

My esteemed colleague, the President, also relies on the argument that, in light of the sweeping formulation of Article 4 of the Convention which includes a definition of the term "protected persons" under the Convention, a literal interpretation of Article 49 would lead to the conclusion that one could not even deport terrorists who illegally infiltrate into the territory during the occupation; similarly that it would not be possible to extradite criminals from the territories to other states in accordance with extradition treaties.

The question regarding infiltrators could arise because of a certain difficulty in the interpretation of Article 4 of the Convention, which is not free of ambiguity. Thus when that same Article 4 states that "Persons protected by the Convention are those who *find themselves* in case of a conflict or occupation in the hands of a Party to the conflict or an Occupying Power..." (emphasis added - G.B.) then there is perhaps room to argue that the reference is to people who due to an armed conflict or belligerence between states, have fallen into a situation where against their will they *find themselves* in the hands of one of the parties to the conflict or in the hands of the occupying power; whereas people who subsequently penetrate into that territory with malicious intent are not included in that definition. If and when this problem arises in an actual case, there will be a need to resolve it through an appropriate interpretation of Article 4 of the Convention, but this does not suffice, in my opinion, to raise doubts concerning the interpretation of Article 49. In the matter before us, the aforesaid difficulty is in any case nonexistent, since the Petitioners are, by all opinions, permanent residents of the territories controlled by the I.D.F.; and if the Convention under discussion applies to those territories, then the Petitioners are undoubtedly included in the definition of "protected persons".

The same applies to the problem of extraditing criminals. The question as to the feasibility of an extradition treaty between states, when it concerns people who are located in territories occupied by countries which are parties to the treaty, is thorny and complicated in itself; and whatever may be the answer to this question, one can not draw inferences from this regarding the interpretation of Article 49. In any case, should it be established that it is indeed possible to extradite persons who are residents of occupied territories on the basis of the Extradition Law, 5714-1954 and the treaties that were signed in accordance with it, then regarding the possibility of actually extraditing the persons concerned, I would arrive at the same ultimate conclusion as I do regarding the Petitioners against whom the deportation orders were issued under Regulation 112 of the Defence (Emergency) Regulations, as will be detailed below.

7. Despite everything I have said above, I concur in the opinion of my esteemed colleague, the President, that these petitions should be dismissed. I do indeed see a need to dissent from the rule established in H.C. 97/79 [2] regarding the interpretation of Article 49 of the Convention. On the other hand, I do not see any ground for deviating from the rule established and upheld in an appreciable number of judgments, that Article 49 of the Convention is solely a provision of conventional international law as distinguished from a provision of customary international law. Such a provision does not constitute binding law and cannot serve as a basis for petitions to the courts by individuals.

This opinion, which was clarified in H.C. 606,610/78 [1] (at pp. 120 and 127) by Witkon J. and by Landau D.P. (his title then) and upheld as we have seen above by, among others, Landau P. in H.C. 698/80 [3], is deeply rooted in the judgments of this court.

I would also mention the judgment of Barak J. in H.C. 393/82 [17], in which (at p. 793) the declarative and hence binding nature of the Hague Regulations is explained. The judgment goes on to state:

> The same is not true of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, which even if applied to Israel's belligerent occupation in Judea and Samaria - this

> question is subject to bitter controversy and we will not express any position on it... - is essentially a constitutive convention which does not adopt existing international customs but creates new norms, whose application in Israel requires a legislative act...

Only recently we re-examined the rule that a conventional international agreement has no binding force on the national level so long as it has not been adopted by the local legislator, and we upheld the existing rule on the subject [see C.A. 580,626/82 [26] at 314.

I would agree in this regard with the judgment of Landau P. in H.C. 698/80 [3], in which he expresses the opinion (at p. 646) that if the Convention is to be interpreted in such a manner as to prohibit the deportation of individuals in order to preserve security in occupied territory, then this provision does not constitute a part of customary international law but at most an addition to conventional international rules.

Landau P. made reference in this context to the work of G. Von Glahn, The *Occupation of Enemy Territory* (Minneapolis, 1957), which states, at p. 20:

> The 1949 Convention has resulted in most valuable additions to the *conventional* law of military occupation, such as treatment of civilians, *deportation*...

(Emphasis added - G.B.)

On this point I agree with the reasoning of my esteemed colleague, the President, in his judgment on the present petitions.

8. I would further add that I see no grounds for our intervention in the decisions of the Respondents in this matter for the sake of justice. Indeed my opinion is, as stated, that formally the deportation of the Petitioners is included within the framework of acts to which Article 49 of the Convention applies. However, I also believe that the prevention of such acts of deportation was not the primary and dominant purpose of those who drafted the Convention.

I have not ignored the fact that representatives of the state have declared on a number of occasions before this court, that it is the intention of the Government to honour as policy the humanitarian provisions of the Convention.

Landau P. expressed the opinion in H.C. 698/80 [3] (at p. 627-8), that

> the decision of the State of Israel to honour in practice the humanitarian provisions of the Fourth Geneva Convention (see the article of M. Shamgar, "The Observance of International Law in the Administered Territories", 1 *Israel Yearbook On Human Rights* (1971) 262) is a political decision which does not pertain to the legal sphere with which this court is concerned.

I believe however, with all due respect, that this determination is too sweeping. We have here a policy declaration that as a general rule obligates the Government, and cases may arise where in the framework of rules of administrative law we will instruct the Government to honour its obligation.

However, each case will be examined here in accordance with its circumstances, and in contrast with the interpretation of laws and conventions which at times require strict adherence to the meaning of words and terms, the court enjoys a flexible and broad discretion when it examines a Government policy declaration in terms of its content and spirit.

It should not be overlooked that the Fourth Geneva Convention, with which we are dealing, includes a variety of provisions, the major portion of which are surely humanitarian in substance. But some are of public and administrative content and the Convention also contains provisions which can only partially be considered of a humanitarian nature. Article 49 of the Convention is indeed primarily of a humanitarian nature, but it seems that this aspect cannot predominate when it seeks, by virtue of its sweeping formulation, to prevent the deportation of individuals whose removal was decided upon because of their systematic incitement of other residents to acts of violence and because they constitute a grave danger to public welfare.

In Shamgar's article - "The Observance of International Law in the Administered Territories", 1 *lsrael Yearbook On Human Rights* (1971), it is stated (at 262-3):

> Humanitarian law concerns itself essentially with human beings in distress and victims of war...

This definition does not fit the deportation of members of terrorist organizations to one of the neighboring countries.

In any case, when we are dealing with people in respect of whom the elements of Regulations 108 and 112 in the Defence (Emergency) Regulations are satisfied, that is to say, where it has been demonstrated that their deportation is necessary for protecting public welfare and security in the Region, I would not suggest that we exercise our authority in the sphere of administrative law to order the Respondents to refrain from carrying out the deportation of the Petitioners, solely because the state has declared that in general it intends to honour the humanitarian provisions of the Convention.

It should be noted and further emphasized in this context, that even counsel for the Petitioners have not argued before us that the orders *nisi* should be made absolute because of the aforesaid declaration by the state, should their submission, that the content of Article 49 of the Geneva Convention expresses customary international law, be rejected.

There is, therefore, no room for our intervention, not even from the standpoint of the general considerations outlined above.

9. In light of what I have said, and as I also agree with those portions of the President's opinion which deal with the factual aspects of the petitions, I concur in the conclusion reached by my esteemed colleague in his judgment on the fate of these petitions.

Judgment given on April 10, 1988.