HCJ 253/88
HCJMiscApp 323/88

Ibrahim 'Abd al-Hamid Sajdiya

v.

Minister of Defense

At the Supreme Court Sitting as the High Court of Justice

(14 August, 1988; 8 November 1988)

Before President M. Shamgar, Vice-President M. Alon and Justice G. Bach

A. Feldman, L. Tsemel, 'A 'Assali - on behalf of the petitioners

N. Arad, HCJ Department Director, State Attorney's Office - on behalf of the respondents

Judgment

President Shamgar: The Petition

1. The cause for this petition was the administrative detention of the petitioners and it raises challenges on two issues, namely the place of detention and the conditions of detention.

   Most of the petitioners have been released from detention in the interim and only five of them, petitioners 4, 11, 12, 13 and 16 were still in custody at the time we completed the hearing of the petition in this court.

2. (a). Each of the petitioners (with the exception of petitioner 14) was detained in accordance with detention order issued pursuant to the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229) 5748-1988. Petitioner 14 is a resident of the Gaza trip who was detained pursuant to a court issued detention warrant before his trial at the military court in Gaza. In the interim, he was sentenced in Gaza and released immediately upon serving his sentence.

   Petitioners 16 and 17 were not held in Qetziot when the petition was prepared. However they were brought there prior to the hearing of the petition in this court. Petitioner 17 has already been released. Petitioner 15 was never held in Qetziot.

(b). The primary and central argument made by learned counsel for the petitioners was that since each of the petitioners is a resident of Judea and Samaria (with the exception of petitioner 14), and since these are occupied territories which come under special rules in public international law, it is impossible to hold the petitioners in the military prison in Qetziot, which is inside the State of Israel. Moreover, according to their argument, neither military administration orders nor the laws of the State of Israel provide a legal basis for transferring them from the held territories into Israel.

Learned counsel for the petitioners based this argument on the text of the Order regarding the Operation of a Prison Facility (Judea and Samaria) (No. 29) 5727-1967, which refers to prison facilities located in the "Area" as defined in Section 1 and does not, on the other hand, refer to holding detainees in facilities outside the Area.

Moreover, they allege that the military commander has no authority to designate a detention facility located outside the Area in the detention order, be it pursuant to the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229) cited above, or the Defense (Emergency) Regulations, 1945.

According to the petitioners, their transference to Qetziot contravenes the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the Fourth Geneva Convention). On this issue the court was referred in particular to Articles 49 and 80 therein. In their written submission and oral arguments, learned counsels for the petitioners also relied, by analogy as they state, on the provisions of Article 76 of the aforesaid Convention; they presented a preliminary argument whereby if the response stated that the Convention does not reflect public customary international law, indeed in their view, it is binding in the case at hand both since it forms part of the IDF's General Staff Orders and since the state declared that it would effectively implement the humanitarian portions of the Conventions.

(c). As stated, the petitioners also referred to the holding conditions in Qetziot. On this issue the petition stated as follows:

> … There is no choice but to note that the conditions under which the petitioners are held in this facility, which is no more than a detention camp or a desert paddock, housed by thousands who have been brought from afar and live in unbearable conditions, including brutal treatment of the inmates by their guards; cruel punitive measures and degradation. The inmates also suffer extremely poor hygienic conditions; they are tormented by lack of water and deficient medical treatment, despite the diseases that afflict them, mostly as a result of the conditions in the facility; the inmates are denied basic rights such as writing and reading, a proper change of clothes, and do not receive family visits, which indicates that this is a unique prison facility, to say the least. Counsels for the petitioners who visited the facility on April 6, 1988 and interviewed most of the petitioners heard from them of their unfortunate state in the above facility.

On the basis of the foregoing, this court was requested to issue an order nisi with respect to returning the petitioners to an incarceration facility located inside the held territory. An interim order with respect to the transfer of petitioners 15, 16 and 17 to Qetziot was also requested and issued. However, as mentioned above, the aforesaid interim order could not be executed at the time of issuance.

The Incarceration of the Petitioners in Israel

3. The respondent's response is that the incarceration in the Qetziot prison facility was lawful. In support of his account, he relies on the following legal reasoning:

(a). The petitioners are held pursuant to the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229).

(b). Article 2 of the aforesaid Order stipulates that the detention order shall provide a basis for the imprisonment of a detainee in a "prison facility" as defined in Article 1 of the Order regarding the Operation of a Prison Facility (Judea and Samaria) (No. 29), unless it is possible to imprison him in a different facility, provided that the location is named in the detention order itself, or in a separate order in which the commander instructs the change of detention site.

It must be noted, in the context of this argument, that Article 2 of the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229) must not be interpreted as meaning that the name of the detention site can be omitted from the detention order and included only in a separate, subsequent order. An administrative detention order must always include the detention site and a subsequent order can only instruct a transfer to a different detention site after the initial determination of the detention site had already been made in the original order (cf. HCJ 95/49[1], p. 41).

The petitioners' current detention orders do cite the Qetziot camp as the detention facility.

(c). Other security legislation provisions explicitly permit determining a detention site inside Israel. Article 5 of the Order regarding Punitive Methods (Judea and Samaria) (No. 322) 5729-1969 stipulates:

> (a)(1) The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued pursuant to security legislation, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel (emphasis added – M.S.)

In a notice dated October 16, 1967, regarding setting the place of detention and imprisonment of individuals detained pursuant to the Order regarding Security Provisions (Judea and Samaria) 5727-1967, or those sentenced to prison terms (Chief Military Police Officer (Judea and Samaria) No. 6) 238), the IDF commander in the Area at the time instructed that they be held in custody –

> In any site in Israel lawfully declared as a prison.

The Order regarding Security Provisions (Judea and Samaria) (No. 378) 5730-1970, which revoked the previous order also includes provisions regarding administrative detention (Chapter E-1, including Sections 87 and 87(a) therein). However, the validity of these was suspended under the provisions of the above noted Order regarding Administrative Detention (Temporary Order) (Judea and Samaria) (No. 1229), so long as the detention is carried out pursuant thereto. The citation of an administrative detention order under the Order regarding Security Provisions (Judea and Samaria) (No. 378) must be replaced by a citation of a detention under the Order regarding Administrative Detention (Temporary Order) (Judea and Samaria) (No. 1229) in every legislative act, including the abovementioned notice of October 16, 1967; see Section 13(a) of the Order regarding Interpretation (Judea and Samaria Area) (No. 130) 5727-1967. I.e., the abovementioned notice applies also to a detention ordered pursuant to the Order regarding

Administrative Detention (Temporary Order) (Judea and Samaria) (No. 1229), according to which the detainee may be held in Israel in a place declared as a prison.

The aforementioned notice of October 16, 1967 referred, as quoted above, to any place lawfully declared as a prison. It did not refer only to prisons established pursuant to the Prisons Ordinance [new version] 5732-1971. It follows, that this also includes the military prisons Qetziot A and B which were lawfully declared as such by the Minister of Defense in the Military Adjudication Order (Establishing Sites as Military Prisons) 5748-1988, and by the Chief of the General Staff under his powers pursuant to Regulation 14 of the Military Adjudication Regulations (Military Prisons) 5747-1987.

(d). According to the respondent's argument, the conclusion to be drawn from the foregoing is that imprisonment in Israel is consistent with the security legislation in effect in Judea and Samaria.

(e). Additionally, and here is the crux of the matter, imprisonment such as the aforesaid, is also consistent with the laws of the State of Israel wherein the detainees were held, as Regulation 6(b) of the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offenses and Legal Aid) 5727-1967, as extended in the Law Amending and Extending the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offenses and Legal Aid) 5748-1987:

> The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority granted pursuant to a commander's proclamation or order, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel.

Namely, the law in effect in Israel pursuant to Knesset legislation explicitly permits an arrest warrant issued in the Area to be carried out inside Israel; the term "Area" as defined in the aforementioned Regulations refers to Judea and Samaria or the Gaza Strip.

(f). With respect to petitioners' arguments which are based on the language of the military administration orders referring to the definition of "prison facility" and restricting it to a facility inside the Area only, the respondent claims that the petitioners are confusing the issue. The aforesaid orders concerning prison facilities (Order regarding the Operation of a Prison Facility (Judea and Samaria) (No. 29) and Order regarding Prison Services (Judea and Samaria) (No. 254) 5728-1968) do refer to facilities in the Area in their provisions setting out the rules for the management of the facilities and the operation of the prison services of the Area. However, this has no bearing on our issue as these orders concern only the establishment of rules and procedures within the Area and nothing more. The commander of the Area does not purport to have powers to set down rules for the management of prison facilities outside the Area. In prison facilities inside Israel, administrative detainees come under the Regulations regarding Emergency Powers (Detentions) (Administrative Detention Holding Conditions) 5741-1981. This in view of Regulation 6(b) of the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offenses and Legal Aid) which addresses, inter alia, the manner in which a detention order is carried out in Israel.

Establishing rules for facilities in the Area and establishing the detention site of a specific individual are two separate issues. The lack of authority to regulate procedures in facilities outside the Area does not mean there is no authority to order detention inside Israel, when lawful incarceration in Israel is regulated both by the Prison Site Law and the law in effect in the area where the [detention] order was issued.

(g). The petitioners cited the Defense (Emergency) Regulations. Yet, these did not serve as the legal basis for the arrest in this case and therefore need not be addressed at this hearing.

(h). With respect to the limitations that apply, according to the petitioners', to the transfer of detainees under the Fourth Geneva Convention. Hereinafter follows a summary of the position of Adv. Nili Arad, learned counsel for the respondent:

1. The detention of the petitioners in Israel is regulated by Israeli municipal legislation, and therefore, there is no need for the rules of international law;

2. The Fourth Geneva Convention, which is a treaty convention, is not enforceable in court as it does not constitute domestic law;

3. The provisions of the Convention must be interpreted subject to the military commander's duty to maintain public order and the right of the occupying country to portect its security, as indicated, inter alia, by Article 43 of the Annex to the Hague Convention respecting the Laws and Customs of War on Land of 1907 (hereinafter: the Hague Regulations);

4. The provisions of the Fourth Geneva Convention do not explicitly prohibit the transfer of administrative detainees to a prison facility inside the State of Israel;

5. The humanitarian provisions of the Convention do not become binding legal norms simply because there is a political decision to respect them in practice.

4. As detailed above, the respondent claims that there is a legal basis in the laws of the State of Israel and in the security legislation of Judea and Samaria which allows for the petitioners to be held in the Qetziot camp inside Israel.

We have examined the relevant statutory provisions of the State of Israel and the military administration orders and have found no reason to reject the respondent's aforesaid legal thesis.

Learned counsel for the petitioners, Adv. Avigdor Feldman, argued in this context that it would be wrong to examine the statutory provisions and orders alone but that they must be examined from the perspective of public international law in general and the Fourth Geneva Convention in particular. The argument is that municipal law must be interpreted, to the extent possible, in a manner reconciling its provisions with those of public international law.

In view of these arguments, it would be appropriate to consider the question of what the relevant provisions of public international law are and thereafter, at the second stage, the separate question concerning the legal connection between the rules of international law and Regulation 6(b) of the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offenses and Legal Aid), quoted above.

5.(a). The petitioners base their argument, as mentioned, on the provisions of Article 49 of the Fourth Geneva Convention. They further refer to Article 80 of the Convention and even seek to deduce, by analogy, from the content of Article 76 therein.

(b). The question of the interpretation of Article 49 has recently been reviewed in HCJ 785/87 845, 27/88 [2].

(c). Article 8, to which the petitioners refer, addresses prisoners' legal status and rights, stating:

> Internees shall retain their full civil capacity and shall exercise such attendant right as may be compatible with their status.

As indicated by the wording of the above quoted Article, Article 80 neither adds nor subtracts with respect to the issue of setting the detention site in Israel.

(d). The first clause of Article 76 concerns residents of the territory who were tried for offenses and establishes as follows:

> Protected persons accused of offences shall be detained in the occupied country and if convicted they shall serve their sentences therein. (emphases added, M.S.)

The petitioners' argue that the aforesaid provision in Article 76 with respect to offenders' place of incarceration should also be read into Article 78 of the Convention which concerns administrative detention, although Article 78 does not contain an express provision as aforesaid.

With respect to this argument, one must recall that Article 79 of the Convention, which prescribes the general guidelines for holding conditions in administrative detention and lists each of the other main Convention provisions that are to apply to administrative detention, including Articles 41, 42, 43, 68 and 78, does not list the aforesaid Article 76. It is thus possible to claim that according to Article 79, the Convention does not view what is stated in the first clause of Article 76 as part of the principles that apply to administrative detainees, i.e. the absence of any mention of Article 76 in the list of Articles detailed in Article 79 points to where it does not apply.

I have not, of course, ignored the interpretation of Article 78 in The Geneva Conventions of 12 August 1949, Commentary (Geneva, Ed.by J.S. Pictet, Vol. 4, 1958), 368, according to which the provisions of Article 78 (administrative detention) should be read subject to the restriction that follows from Article 49 (deportation). However, Pictet's conclusion is not anchored in the language of Article 78 but rather in an interpretive construction which he formulated and which, with all due respect, I do not accept.

The crux of the matter, as noted, is that for the purpose of the case at bar, there is no need to address the issue of the interpretation of Article 49. What does this mean? The petitioners' argument does indeed focus on what is stated in Article 49; however, in view of the existence of an explicit statutory provision in the law of the State of Israel as expressed in Regulation 6(b) of the aforesaid Regulations, the legal problem before us takes on an entirely different character: the issue which must be examined in this case is not what the interpretation of Articles 49 and 78 is, but what the relationship between the two legal systems cited herein is: in other words, even if we theoretically presume that the interpretation of Articles 49 and 78 is as the petitioners claim, indeed, one must examine the status of these Articles with respect to its applicability in Israel, given that there is a different and contradictory provision in the country's internal law. This question must be reviewed, in my view, in accordance to the accepted dichotomy between customary international law and international treaty law. We shall discuss the latter first.

6. (a). When it comes to a principle which is anchored in international treaty law, the principles explained in the judgment of this court in CivA 25/55, 145, 148 [3] (the remarks of Justice Berinson) apply: such a public international law treaty principle does not become part of our law, unless it is adopted and incorporated into our law through legislation.

This rule was reviewed with respect to the Fourth Geneva Convention in HCJ 785/87, 845, 27/88 [2], and reaffirmed by the entire bench.

(b). The question of the status of the Fourth Geneva Convention, with respect to its relationship with domestic law and its applicability therein was raised in the USA as well: The federal courts have examined whether the Fourth Geneva Convention is indeed part of the law in effect in the USA several times, namely, whether the Convention is self-executing, and became part of the law of the USA upon ratification even in the absence of incorporating legislation, and whether it confers upon an individual who believes he has been wronged a right of action in American courts. The federal courts have unequivocally responded negatively. In *Tel Oren v. Libyan Arab Republic*, Court of Appeals District of Columbia (1984)[10] at 809, the Court of Appeals ruled as follows:

> Of the five treaties in force, none provides a private right of action. Three of them — the Geneva Convention for the Protection of Civilian Persons in Time of War, the Geneva Convention Relative to the Treatment of Prisoners of War, and the OAS Convention to Prevent and Punish Acts of Terrorism — expressly call for implementing legislation. A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing. *See Foster v. Neilson*, 27 U.S. (2 Pet.) at 311-14; *United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). These three treaties are therefore not self-executing. Indeed, with respect to the first Geneva Convention, one court has already so held. *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978)
> (emphases added, M.S.)

The US Federal Court of Appeals has thus held, following a previous judgment in 1978, that the Fourth Geneva Convention which includes a provision whereby state parties should initiate implementing legislation for the purpose of applying what is stated therein, did not become part of American municipal law upon joining and ratification. In view of the above, it would not be superfluous to add that there is still no implementing legislation in the USA.

Following this, the California District Court ruled, in the same vein, in *Handel v. Artukovic* (1985) [11], at 1425, stating:

> The Court must look to the treaty as a whole to determine whether it is self-executing. *Diggs v. Richardson*, 555 F. 2d 848, 851 (D.C. Cir. 1976). Four factors are relevant to such a determination:
>
> > The extent which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: (1) the purpose of the treaty and the objectives of its creators, (2) the existence of domestic procedures and institutions

> appropriate for direct implementation, (3) the availability and feasibility of alternative enforcement methods, and (4) the immediate and long-range social consequences of self- or non-self-execution.
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> *People of Saipan v. United States Dep't of Interior*, 502 F. 2D 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S. Ct. 1445, 43 L.Ed.2d 761 (1975).
>
> Applying these factors to the two treaties before the Court, it is clear that neither the 1929 Geneva Convention nor the Hague Convention was intended to establish judicially enforceable obligations. In Article 129 of the 1949 Geneva Convention that adopted and revised the 1929 agreement, the signatory countries specifically provided for implementation through municipal law. A treaty which provides that signatory states will take measures through their own laws to enforce its provisions evinces an intent that the treaty not be self-executing. *See, e.g., Foster v. Neilson* 27 U.S. (2 Pet.) 253, 311-14 L.Ed. 415 (1829), *overruled on other grounds, United States v. Perchman*, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833). As a result, the Geneva Conventions does not offer plaintiffs a private right of action. *See, Tel Oren*, 726 F. 2D. at 809 (Bork, J., concurring). (emphasis added, M.S.)

Two comments must be made here. First, the reference to Article 129 in the *Handel* [11] Judgment concerns the Geneva Convention Relative to the Treatment of Prisoners of War (the Third Geneva Convention). In the matter of the Fourth Geneva Convention, which is our subject matter, the relevant Article is Article 146. The aforesaid *Tel Oren* [10] judgment, however, discusses the Fourth Geneva Convention directly. Second, unlike what is stated in the aforesaid American judgment, this court considers the Hague Regulations customary international law.

> The position, expressed in the aforesaid rulings, was adopted as the official position of the USA (see US State Department memorandum submitted to the New York (South) *District Court in United States v. Shakur*, SSS 82 Cr. 312 (CSH); 84 Cr. 220) in the *United States v. Buck* case, *ibid.*, at p. 18 of the memorandum).

b. The outcome of the foregoing is that what is stated in the aforesaid CivA 25/55, 145, 148 [3], is all the more applicable when it becomes clear that not only has the treaty principle not been incorporated into our legislation, but it is rather further clarified that Israeli law contains a provision which contradicts it in that it stipulates an express arrangement which is clearly different from the treaty principle set in the Convention. So far with respect to a principle of international treaty law.

c. When it comes to a principle of customary international law, the principle reiterated in CrimA 336/61 [4] at 2040-1041, according to which where Israeli legislation and the principles of public international law clash, the statutory provision of our laws is preferred applies. As stated therein:

According to the law in effect in Israel, which is identical to English law on this issue, the relationship between domestic law and international law is determined according to the following principles:

1. The same rule is received in the domestic legislative system and becomes part of it only after it is generally accepted internationally … (i.e. when it is a customary principle, M.S.)

2. What does this mean? When there is no conflict between the provisions of the local statute law and the rules of international law. However, where such conflict exists, the court is obligated to prefer the provision of the local legislature and validate it… (emphasis added, M.S.). True, the presumption should be that the legislature sought to have its law correspond to the principles of international law (which have received general acceptance). However, when the law the latter enacted indicates a clear counter tendency, this presumption loses its value and the court must not consider it.

3. However, with the aforesaid presumption in mind, when the statue law implies different meanings and its content does not expressly oblige a different interpretation, one must interpret it in concert with the provisions of international law (HCJ 279/51; 280/51 etc. **Amsterdam v. Minister of Finance**, IsrSC Vol. 6, p. 945, 966; Lauterpacht-Oppenheim, 8th Edition, Vol. 1, p. 41, Sec. A 21). It should be noted that this interpretative rule has no bearing on our case as the nature of the law under discussion as a law which creates "external offenses" with retroactive validity is not brought into question.

   According to the second principle, even if counsel for the appellant was correct in saying that the severe nature of the law breaches international law, indeed, this argument is of no avail to him.

Lord Atkin made similar remarks in *Chung Chi Cheun v. The King* (1939) [14], at 168:

> The Court acknowledges the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having, found it they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by the statutes or finally declared by their tribunals. (emphasis added, M.S.)

d. Thus, with respect to a customary rule of public international law, indeed this is all the more valid, as mentioned, with respect to Article 49, which constitutes a customary rule.

The conclusion of this point is that an express Israeli statutory provision is the deciding factor in such matters.

e. The general legal issue before us was also clearly presented in Prof. Y. Dinstein, **International Law and the State** (Shocken and Tel Aviv University, 1971) 128 and thereafter. The foregoing corresponds to the approach of the learned author.

7. Adv. Feldman further argued that even allowing the principle of the supremacy of internal Israeli legislation, there still is the attendant rule, cited in the aforesaid CrimA 336/61 [4] whereby when Israeli statute law implies different meanings and its content does not expressly oblige a different interpretation, it must be interpreted in a manner consistent with international law. From the general to the specific: according to his argument, Regulation 6(b) and the prohibition inferred from Article 49 according to this thesis can be reconciled; Regulation 6(b) should be interpreted narrowly such that it is said to refer to the execution of a detention order in Israel only when the detainee is apprehended in Israel and the detention is sought to be executed there. According to his position, Regulation 6(b) is inapplicable to the execution of the entire imprisonment in Israel. In other words, the aforesaid provision allows, according to his argument, detention in the transition phase, until a person caught in Israel is returned to the Area, but not beyond, namely, it does not mean the execution of the arrest order until the end of the period cited therein.

I do not accept this argument. First, Regulation 6(b) does not include, even by implication, a provision which limits it to the preliminary phase of the detention, or to transitional detention or temporary, time-limited detention. Namely, we are not confronted with a text that lends itself to different interpretations, since its meaning is clear and unequivocal, as according thereto:

> The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority granted pursuant to a commander's proclamation or order, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel (emphasis added – M.S.)

The provision in Regulation 6(b) applies, according to its language, to anyone who is arrested, whether he is arrested in the Area or in Israel. Its application to persons arrested in the Area provides a legal basis for the execution of the detention, including bringing the detainee from the Area to the detention site in Israel.

First, the phrase "a person against whom… was issued" literally means anyone against whom an arrest warrant was issued.

Second, the legislature did not stop at citing the act of the arrest but saw fit to add and include a separate reference, "detention", alongside the term "arrest". This textual duplication clearly indicates that the legislature intended to remove any doubt with respect to the scope of application.

Third, the provision of Regulation 6(b) has to be read in context, as accepted. On this issue, Regulation 6(a), which addresses the serving of a prison sentence, is instructive. This Regulation is, to a large extent, parallel to or the "twin" of the aforesaid provision in Regulation 6(b). Regulation 6(a) states as follows:

> The penalty imposed on a person convicted and sentenced by a military court may be served in Israel in the manner in which a penalty imposed by the court is served in Israel, provided the penalty was not served in the Area. (emphasis added, M.S.)

It is plain that Regulation 6(a) does not speak of preliminary imprisonment but of the entire prison term, the duration of which is restricted only by what is stated in the

sentence. The subheading of Regulation 6 implicitly stresses the parallels between the two provisions in its sub-regulations.

In our context, it is also interesting to address the purposes that guided the drafters of the Fourth Geneva Convention, who sought to benefit administrative detainees (internees) by comparing their status to that of prisoners of war. Thus Pictet, in the aforementioned Commentary on page 372 (interpretation of Article 79):

> The new Geneva Convention represents a great advance in that these civilians will in future enjoy a status similar to that of prisoners of war and regulated by a Convention. It may seem paradoxical to consider that placing civilians on the same footing as members of the forces in time of war represents progress. The truth of the matter is that modern war makes demands on the whole nation. The whole economic system of a State is placed at the service of national defence. The engineer or workman is as necessary as the officer or soldier, and every individual may have his part to play in the war; that fact justifies the security measures which each of the Parties to the conflict may take in regard to individuals of enemy nationality in their territory, or which the Occupying Power may take in regard to the inhabitants of occupied territory. Such measures should at least conform to the laws of humanity, and that is the assurance given to protected persons by Article 79. Their internment both in the territory of the Parties to the conflict and in occupied territory is subject to rules which would have provided millions of human beings with protection if they could have been applied during the Second World War.

This commentary puts the emphasis on meeting the conditions stipulated in Article 79. There was no dispute between the parties before us on this issue.

8. In light of the foregoing, I found no basis for the argument that the very detention of the petitioners in Qetziot is unlawful. We now turn to the grievances regarding the manner in which arrest appeals are held and holding conditions. First, appeals.

Arrest Appeals

9. a. The petitioners are held in administrative detention pursuant to the aforesaid Order regarding Administrative Detentions (Amendment) (Judea and Samaria) (No. 1229). According to the Order, every detainee has the right of appeal. According to the Order regarding Administrative Detentions (Temporary Order) (Amendment) (Judea and Samaria) (No. 1236) 5748-1988, the appeal is brought before a jurist judge, in the meaning of the term under the Order regarding Security Provisions (Judea and Samaria) (No 378). As stated in Section 5 of the Order regarding
Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229), as amended by the Order regarding Administrative Detentions (Temporary Order) (Amendment) (Judea and Samaria) (No. 1236):

   (a) The role of the jurist judge is to review every appeal of a detention order to which the provisions of this Order apply.

   (b) The jurist judge may uphold or revoke the detention order or shorten the duration cited therein.

The right to appeal before a jurist judge under the amending order replaces the right to appeal to an appeals committee which was reestablished by the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229), which had advisory powers only (cf. Regulation 111(4) of the Defense (Emergency) Regulations, Section 67 of the Order regarding Security Provisions, 5727-1967 and Section 87 of the Order regarding Security Provisions (Judea and Samaria) (No. 378), in their original form).

In Israel, the Emergency Powers Law (Detention) 5730-1979, introduced immediate judicial review of every administrative detention order which may be issued in a state of emergency. In so doing, the Law established arrangements which are more efficient and fairer in terms of individual rights, than those which were in effect and still are in effect in a state of emergency in other countries in the free world. As articulated in Section 4 of the aforementioned Law, if a person is detained pursuant to a Minister of Defense issued order (pursuant to Section 2 of the aforesaid Law), he shall be brought before the President of the District Court in the jurisdiction where he was arrested within 48 hours. The President may uphold or revoke the detention order or shorten the duration cited therein. If a detainee is not brought before the President and a hearing before him does not occur within 48 hours as stated, the detainee shall be released, unless there is a different cause for his detention under any law. The aforesaid Law thus ensures judicial review within 48 hours. There is a right of appeal to the Supreme Court against the ruling of the President of the District Court, where the matter is heard before a single judge.

b. Following the enactment of the Law by the Knesset, the rules governing administrative detention in the held territories, which were very similar to those stipulated in Regulation 111(4) of the Defense (Emergency) Regulations, were amended. The new Chapter E-1 which was added to the Order regarding Security Provisions (Judea and Samaria) (No. 378) instituted arrangements very similar to those of the Israeli law of 1979 with minor changes stemming from the circumstances: for instance, instead of the provision requiring a detainee to be brought before the President of the District Court, a provision requiring him to be brought before a military jurist judge within 96 hours was enacted. An appeal against the decision of the jurist judge is brought before the President of the Military Court.

c. The main grievance raised by the petitioners in the context of arrest appeals concerned the long period of time between submission of an appeal and the time it is heard. It was also argued that the appeals are heard quickly and superficially. There were no specific and concrete grievances by the five petitioners.

We have received written notices from the respondent which included details of the measures taken in order to have appeals that have been delayed heard and of completed appeal hearings. As indicated by the information, processing of all appeals has been rushed and we have found no basis for the grievances against existing administrative arrangements.

However, in order to prevent errors, establish guidelines for the future and clarify the main points that should be followed, I have found it necessary to address the issue of arrests and appeals generally.

d. As stated, the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229), suspended the application of the aforesaid Chapter E-1 which is similar in content to the Emergency Powers Law (Detention). The outcome is that anyone detained under a military commander order undergoes judicial review only after he files an appeal and when his appeal is heard before a judge, as stated in the Order regarding Administrative Detentions Temporary Order) (Amendment) (Judea and Samaria) (No. 1236). Clearly, if a long time elapses between the arrest and the time the appeal is brought before a military jurist judge, the military

commander's initial decision on the administrative detention remains in force without the detainee or his counsel having an adequate opportunity to stake their claims before an impartial judicial official and without it having undergone judicial review. It is superfluous to add that if an appeal is not submitted, there is no judicial review of the arrest order.

The duration of time until the hearing of the appeal is, therefore, a most important and substantive issue, as, as stated, only then can the detainee present grievances regarding his arrest and arguments in support of his release. The fact that, according to the state's claims before us, 28 percent of the appeals heard were fully accepted either by releasing the detainee or shortening the period cited in the original order, reinforces the conclusion that administrative detention without effective judicial review can lead to factual or discretionary errors which mean the denial of an individual's liberty without relevant cause. One must therefore do everything possible to prevent such phenomena. The main avenue for effective review is, in the existing legal situation (wherein the detainee is brought before a jurist judge within 96 hours), for the appeals to be heard as soon as possible. In more detail: the authorities would do well to take effective action toward reducing the time between the detention and the submission of an appeal and judicial review. If there is still no possibility to return to judicial review immediately upon issuance of the order, as done under Chapter E-1 before the application of the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229), one must ensure that the appeal is heard within two to three weeks from the time the first appeal of the detention or of the decision regarding the extension of the detention, as relevant, at most. This must be done in order to bring the current arrangements as close to those the Knesset found to be fair and appropriate in 1979 and mostly in order to reduce, as much as possible, the time between the administrative decision on detention and effective judicial review.

What is the significance of the above? If there is a great number of detainees, it is necessary to add more jurist judges for the purpose of hearing the appeals. Logistical difficulties in increasing the number of jurist judges who are called to service in order to allow a prompt and efficient hearing of detainees' appeals, cannot serve as a justification throughout the period in which a detainee is held without his case having been judicially reviewed. Current emergency conditions have undoubtedly necessitated massive deployment in order to handle the riots in Judea, Samaria and the Gaza Strip and the matter before us, i.e. the erection of a special camp in Qetziot is an example thereof. However, by the same token, efforts must be made and resources must be allocated for ensuring detainee rights and increasing the scope of judicial review. If the great number of appeals so requires, they may be simultaneously heard by ten or more jurist judges who would be called to service for this purpose, and not just by the smaller number seeing to the matter currently. The same holds true, *mutatis mutandis*, for prosecutors whose numbers too could be increased due to the need to speed appeal proceedings and the preparations involved.

10. The grounds for detention are detailed in the detention order in a general manner only. The portion of the evidence on the basis of which the decision on the arrest of the detainee was made which is not confidential is presented in the open hearing. The statements of the detainee and his counsel in response to these factual allegations are also heard.

Seeing as in most cases, if not all, confidential evidence is presented and is reviewed by the jurist judge alone, it is crucial that the judge examine the material thoroughly and ensure that he is indeed presented with every piece of evidence related to the matter before him. In this context, it is not superfluous to note that the judges will undoubtedly never let the quantity affect the quality and depth of the judicial review.

Whilst receiving the confidential evidence, the judge may examine whether there is further factual information which has not been presented to the detainee which may be revealed to him with the

state's consent without compromising security. Since at this point there is no possibility of an active cross-examination by the detainee or his counsel, the onus to initiate a thorough examination of the material and the military's arguments is on the judge.

The judge makes his decision after the conclusion of his review of the evidence. It is beneficial, even for the appearance of justice, to hear every appeal submitted by a detainee in a single continuum, namely, according to the following order of proceedings: presentation of the military's unclassified grounds, response by counsel for the detainee (and the detainee himself if he so wishes), review of the confidential material in the absence of the detainee and his counsel, a second appearance by the detainee and his counsel before the judge in order to hear further comments by the detainee or his counsel, where the judge sees fit to raise questions on his own part or comments as mentioned above following review of the evidence and the judge's decision or notice regarding the date on which the decision would be rendered.

11. (b) Denying liberty on the basis of decisions which were not issued by a judicial authority is an inherently far reaching and severe measure, permissible by law only when necessary for imperative security grounds. The correct discretion which must be exercised prior to issuing the order also relates to the question of whether the decision on the detention reflects, in every specific case, the proper balance between a security necessity, which has no other reasonable solution, and the fundamental goal to respect a person's liberty. These considerations are also the ones reviewed by the judge at the appeal stage, in view of parties' arguments, which normally revolve around the facts, information about the detainee and its significance and the weight of the security risks at issue in the specific case.

12. Patience, tolerance, fairness and openness are among the qualities with which a jurist judge must be equipped in such appeals as in any other judicial or quasi-judicial proceeding. This is clear, well known and accepted by the military jurist judges and by all, and the above remarks serve only to stress and reiterate it.

Holding Conditions

13. In the petition, and mainly in its supplements, many arguments were raised with respect to holding conditions. These were reviewed in a general manner, with parties' consent and without reference to the particular petitioners. We were presented with much written material, but have decided that it would be appropriate for the court to gain a direct impression of the prison facility and the conditions prevailing therein and so we have done.

14. The statements regarding holding conditions require a preliminary clarification, which constitutes a premise: an administrative detainee has not been convicted of an offense and, by inference, is not serving a sentence. He is imprisoned pursuant to the decision of a military-administrative authority as an exceptional security measure, for imperative security reasons (Article 78 of the Fourth Geneva Convention, Section 87 of the Order regarding Security Provisions (Judea and Samaria) (No. 378), Section 3 of the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229). The detention is meant to prevent and pre-empt a security threat which stems from actions the detainee may take and which cannot be reasonably prevented by other legal means (criminal proceedings) or by administrative detention with less severe results (on the issue of deducing future risks from past acts see HCJ 95/49 [1] above; HCJ 554/81 [5], AdminDetA 1/82 [6]; AdminDetA 2/82 [7]).

The difference between a prisoner who is serving a prison sentence and a person who has been detained as aforesaid to prevent security risks is expressed in the status of the administrative detainee and the holding conditions that ensue. Specific provisions on this issue have been put in place in our internal legislation, in Israel and in the Area (for the State of Israel see Emergency

Powers Regulations (Detention) (Administrative Detention Holding Conditions). With respect to Judea and Samaria and the Gaza Strip see Regulations regarding Administrative Detention (Administrative Detention Holding Conditions) (Judea and Samaria) 5742-1981; Regulations regarding Administrative Detention (Administrative Detention Holding Conditions) (Gaza Strip) 5742-1982, as relevant. Incidentally, in view of Section 8(b) of the Order regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1229) which concerns the inapplicability of any regulation enacted pursuant to the above Chapter E-1 of the Order regarding Security Provisions (Judea and Samaria) (No. 378), it appears prima facie that any enactment of regulations regarding administrative detention holding conditions in Judea and Samaria and the Gaza Strip is not currently valid and this requires review and constitutional clarification.

The provision in Section 48 of the Penal Code 5737-1977, according to which an inmate in Israel must work under the Prisons Ordinance [New Version] and its regulations does not apply to administrative detainees due to their different status. According to the relevant Regulations, an administrative detainee must only carry out work related to the cleanliness and order of the cell in which he is held. However, it has always been the norm in Israel and abroad for detainees who are held in large groups to prepare, cook and serve their own food.

The Fourth Geneva Convention saw fit to greatly elaborate on the conditions that should be applied to administrative detainees. As we have seen, the aforesaid Commentary by Pictet indicates that the drafters of the Fourth Geneva Convention intended that administrative detainees under Article 78 would be comparable, in terms of holding conditions, to prisoners of war, as much as possible. This thesis also indicates that the frame of reference must differ from that employed for individuals who have been convicted and are serving their sentence. Therefore, there is also a duty to separate between convicts and administrative detainees in any prison facility. The provisions of Article 84 of the Fourth Geneva Convention were formulated in the same spirit.

In our law, the issue of holding conditions comes under explicit statutory provisions which express the aforesaid purpose. Regulation 6(b) of the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offenses and Legal Aid) stipulates that the detention of individuals against whom arrest warrants were issued in the held territories will be carried out in the manner in which an arrest warrant is carried out in Israel. Namely, the Emergency Powers (Detention) (Administrative Detention Holding Conditions) Regulations are to be upheld in Qetziot as well.

15. The main and obvious problem with respect to holding conditions in Qetziot is overcrowding.

We are under the clear impression that the problem of severe overcrowding in the Qetziot camp must be resolved. The practical outcome of housing 28 individuals in a connected tent (two Indian tents) is that inmates lie next to each other with no gap between one mattress and the next, from one end of the tent to the other. In the circumstances of the place, such overcrowding has a worse impact than overcrowding in a tent in which occupants only sleep or rest: the climate in Qetziot, particularly in the summer, the structure of the enclosure where the tents are located and the prohibition on detainees' gathering outside the tents in large numbers result in the detainees' remaining inside the tent during most hours of the day. This is also where they receive their meals and hold their prayers. Due to all these, overcrowding is significantly burdensome.

Overcrowding is an unwanted phenomenon per se, yet it also has incidental results which reduce the possibility of reasonable holding conditions. Thus, for example, due to the lack of space, detainees cannot have their personal effects next to them despite the fact that it is their right to do so (provided that any such object is not a security or safety threat).

The conditions of overcrowding are not transient and temporary, as this is not transitive imprisonment but imprisonment for many months.

The security necessity of holding many individuals at the same time can explain extreme overcrowding in the beginning of a wave of detentions. However, once it has become clear in the months since that there are many detainees, a duty to implement conditions which do not include such overcrowding and to reduce the number occupants in each tent arises. We understand that this requires preparation and resources, yet the very building of the camp proves that this is feasible within a reasonable time.

16. We have been presented with allegations of violent and degrading treatment during the transportation of detainees to the prison facility. The allegations were of a general nature, with the exception of the case of one detainee whom we met at the camp and who spoke of being degraded during the drive to the camp. No concrete and detailed complaint has yet been filed even with respect to the above case. Moreover, we have no information on the frequency of such cases.

In any event, if an unacceptable and prohibited phenomenon occurred, as alleged, indeed it harms and degrades not only the detainee but also the person treating him violently or authoritatively: harming a person who is chained and helpless is a disgraceful and cruel act which requires a response commensurate with its severity.

In the absence of concrete facts, it is impossible to point to specific conclusions. We understand, from the state's notice, that instructions prohibiting any use of such violence are in place and that every complaint is investigated. Explicit instructions and the establishmentof transfer protocols which include adequate supervision by a senior ranking official are some of the measures which can reduce the risk that an act such as the aforesaid occurs. Moreover, frequent repetition of these instructions could contribute to their effective adaptation.

As for the general grievances of improper treatment of detainees by military personnel in the facility itself: we have not been persuaded that there is substance in this allegation. A number of complaints demonstrating that disciplinary action had been taken against military personnel who have exceeded the bounds of permissibility in speech or action have been brought to our attention. The nature of the punitive response in these few cases attests to the fact that the necessary action is taken in order to prevent and uproot unacceptable phenomena, which according to all indicators, are very few.

17. In a notice by the State Attorney's Office, submitted to us following our visit to Qetziot, the punitive measures that may be employed against [inmates who] disobey discipline rule have been brought to our attention. As detailed in the aforesaid notice, these include:

    1. Forcing a detainee to stand in the corner of the enclosure for a maximum period of 30 minutes – on authority of the responsible military police officer on the scene.

    2. Forcing a detainee to stand as detailed for two hours – on authority of a shift commander who is an officer holding the rank of lieutenant.

    3. Holding in an isolation room up to three days – block commander or his deputy.

    4. Holding in an isolation room up to 14 days – prison commander personally.

Measures 1 and 2 above are not among the measures listed in the Emergency Powers (Detentions) (Administrative Detention) regarding holding conditions (See Regulation 16). They are also unacceptable to me as a disciplinary response which can be practiced against an administrative

detainee. The above described punitive measures do not correspond, by nature, to the guidelines detailed above. Their unwanted character is clearer in view of the location's conditions. I also do not believe that every military police officer should be granted punitive powers.

We have learned from the State Attorney's Office's notice that with respect to punitive protocols, there is a registry as is the norm in prisons in the country and we accept this as appropriate and necessary.

18. We are under the impression that medical care is appropriate and up to standard and we have not found substance in the allegations made in connection thereto. Clearly, the protocols whereby every detainee is examined upon admission to the prison facility and every detainee has a right to seek medical assistance must continue to be followed.

19. With respect to religious worship, namely, with respect to the grievance regarding gatherings for prayer, any decision should be duly preceded by requesting the opinion of an official Muslim religious authority in Israel in order to examine the substance of the detainees' allegations vis-à-vis the solutions offered by the military authorities. Such opinion would be used by security officials in establishing the possible arrangements in the context of security considerations.

20. (a). We have heard many allegations regarding the frequency of newspaper deliveries. In this context, the fact that these are individuals who are cut off from their natural environment and who have nothing to do during most of the day must be taken into account. There is no reasonable cause not to respond to the allegations with respect to the frequency of newspaper deliveries and the freshness of the newspapers when they are delivered. Obviously, the authorities may take security precautions, yet one must make sure that these precautions do not result in the papers delivered to the inmates becoming obsolete.

(b). With respect to book deliveries: there is room for a great increase and the initiative must come from the authorities.

21. The issue of correspondence by the detainees has also been raised. According to regulations, the authorities may restrict the quantity to no more than four letters of a prescribed size and four postcards per month. There was no dispute that these must be sent and that letters addressed to the detainees must be given to them within a reasonable time frame.

22. Various allegations were made with respect to food and water. There was a dispute on the facts with respect to these issues. The inmates alleged that food is in short supply and does not suite their taste and that expired canned foods (meat) had been distributed.

As we have come to know, the appropriate military food tables are implemented and the detainees cook their own food.

With respect to water, the officers in charge of the facility were adamant that allegations regarding shortages are misplaced and that the supplied quantities are large and sufficient to meet drinking, washing and laundering needs (75 liters per day per person). It is also agreed that it is essential to ensure and see to the adequate routine supply of soap and extra clothes.

We have no reason to question the arrangements pertaining to food and water: however, constant monitoring and supervision by the camp headquarters that the arrangements are implemented in practice is required in order to prevent the occurrence of any errors in the supply of food and water.

23. In our above remarks we have addressed two main issues which have been presented to us in detail. Needless to say, in this framework the court is unable to take a position about each of the

many other factors which together make up the holding conditions. Moreover, the court has referred to the prison facility as it is according to the allegations and according to what we saw at a specific point in time.

Our presumption is that our general comments regarding service conditions require action and preparation in accordance to our remarks above.

The court, with its structure and scope of operation, cannot routinely monitor and supervise. However, constant monitoring and proper supervision enable reference to and examination of the various new questions which may arise in a facility housing such a large number of detainees. Establishing supervision methods can also facilitate the creation of a correct balance between fair and humane conditions and the need for order and internal discipline as well as safety and security (cf. on this issue the federal judgment of the US Supreme Court *Bell v. Wolfish* (1979) [12] at 547 and *Rhodes v. Chapman* (1981) [13] at 361).

We therefore see fit to turn the respondent's attention to the need to establish effective monitoring and supervision protocols. This issue did not arise in the petition or in the arguments before us and the suggestion presented below is made as a conclusion from the hearing before us: our suggestion is that the respondent consider appointing a permanent advisory committee that would conduct ongoing monitoring and report and advise the respondent on the holding conditions in the Qetziot prison facility. The committee may be headed by a senior military jurist judge from the military courts unit and could include experts in the fields of medicine, psychology, prison administration etc.

24. In view of our conclusions, as presented above, we have seen no place for rendering the order absolute and have decided to revoke the *order nisi* issued by us.

Vice President M. Alon: I concur

Justice G. Bach

1. I accept the conclusions of my esteemed colleague the president, but I must make some reservations with respect to some of the opinions expressed by him on the issue of international law with respect to the interpretation of the Articles of the Fourth Geneva Convention (hereinafter: the Convention).

As noted by the honorable president, the petitioners in this petition also rely on the provisions of Article 49 of the Convention. The difference between the petition at bar and the case reviewed by us in HCJ 785/87 845, 88/27 [2] is that HCJ 785/87, 88/27 [2] concerned the lawfulness of deporting residents of the Judea and Samaria and Gaza Strip Areas to neighboring Arab countries, whereas here, the petitioners are arguing against the powers of Israeli administrative authorities to transfer residents from the aforesaid held territories, against their will, to the territory of the State of Israel in order to be held here in a detention camp under administrative detention orders.

Both these situations are covered by Article 49 of the Convention to the same extent, as it stipulates (in the portion relevant to our matter):

> 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.

We can clearly see that the Article makes no distinction between the deportation of protected persons into the territory of the occupying power and their deportation to any other country.

Contrary to the opinion of my colleagues who presided with me over HCJ 785/87, 88/27 [2] and who ruled that the aforesaid Article 49 applies only to mass deportations of the population of an occupied territory; I expressed my opinion that the explicit mentioning of "individual or mass" along with the phrase "regardless of their motive" at the closing of the Article does not allow such a restrictive interpretation. I provided the grounds for my position in detail there and I see no need to repeat it again. Suffice it to recall the comment that appears in the Commentary on Article 49 in the abovementioned book by Pictet, at 279: "The prohibition is absolute and allows of no exceptions…" This comment seems correct to me (see in this vein also Prof. Y. Dinstein, *Settlements and Deportation in the Held Territories*, 7 **Tel Aviv Univ. L. Rev.** 188 (Hebrew, 1979).

If I believed so with respect to HCJ 785/87, 88/27 [2], which concerned the deportation of only three petitioners, indeed I hold fast to it all the more with respect to the transfer of thousands of people.

2. In my dissenting opinion in HCJ 785/87, 88/27 [2], I relied, inter alia, on Article 78 which concerns administrative detentions,the subject matter before us in the current petition, in order to emphasize that the drafters of the Convention did not ignore the fact that elements that pose a threat to public safety or to the safety of the occupying power may be found in the occupied territory and that special measures may be used against such individuals.

For the sake of clarity, we recall the language of the aforesaid Article 78:

> 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.

In his aforesaid commentary on the Convention, Dr. Pictet expresses the opinion that Articles 49 and 78 of the Convention are to be read together and the conclusion to be drawn is that there is also a prohibition on the deportation of administrative detainees. Thus in p. 368 of Dr. Pictet's aforesaid book:

> It will suffice to mention here that as we are dealing with occupied territory, the protected persons concerned will benefit by the provisions of Article 49 and cannot be deported; they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself.

In his opinion, my esteemed colleague, the president, explicitly disagrees with Dr. Pictet's above opinion. I, on the other hand, see no choice but to accept it. The determination made in the above Article 78 that such persons, namely, those posing a security threat, can "at the most" be detained reinforces this view, particularly when considered along with the sweeping and unequivocal language of Article 49.

3. In his opinion, my esteemed colleague relies on another reason to support his position that the Convention poses no impediment to transferring an administrative detainee to the territory of the occupying power for the purpose of his imprisonment therein for the duration of his detention. This reason is based on Articles 76 and 79 of the Convention.

The honorable president recalls the arguments made by the petitioners, who wish to rely on Article 76 of the Convention which reads as follows:

> Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.

On this issue, my colleague, the president, expresses his opinion that:

> With respect to this argument, one must recall that Article 79 of the Convention, which prescribes the general guidelines for holding conditions in administrative detention and lists each of the other main Convention provisions that are to apply to administrative detention, including Articles 41, 42, 43, 68 and 78, does not list the aforesaid Article 76. It is thus possible to claim that according to Article 79, the Convention does not view what is stated in the first clause of Article 76 as part of the principles that apply to administrative detainees, i.e. the absence of any mention of Article 76 in the list of Articles detailed in Article 79 points to where it does not apply.

If this implies that the fact that Article 79 of the Convention does not mention Article 76 indicates that the Convention imposes no impediment to moving an administrative detainee outside the borders of the occupied territory, I cannot accept the opinion of my esteemed colleague.

It is true that Article 76 does not specifically refer to administrative detainees. On the basis of the above, as expressed *inter alia* in Dr. Pictet's commentary, there was no need to specify that the deportation of an administrative detainee is prohibited. Articles 49 and 78 make this sufficiently clear.

However, if, to remove doubt, the Convention stipulates that one must not deport outside the occupied territory even a person who is accused of a criminal offense and even if he was sentenced to a prison term due to this offense, indeed, logic dictates that the same must apply, all the more so, to a person who is held in detention despite not being accused of any specific offense before a competent court.

In my view no conclusion can be drawn for our matter from the fact that Article 79, which lists specific rights granted to administrative detainees, does not include a prohibition on transferring such persons outside the occupied territory against their will. In any event, Articles 76 and 79 read together certainly do not lead to the conclusion that such deportation is permitted under the Convention.

4. The foregoing indicates that I would tend to accept the arguments made by counsels to the petitioners that the Convention does not permit the transfer of administrative detainees to the territory of the occupying power for the purpose of serving their detention.

5. However, I do concur with the opinion of my esteemed colleague, the president, that the Convention forms, at least at the present stage, a part of treaty international law and is not part of the rules of customary international law. I have made my position on this matter clear in HCJ 785/87, 88/27 [2] and I see no reason to alter it. This opinion is particularly acceptable to me in view of the broad interpretation that must be given, in my view, to Articles 49 and 78 of the Convention, with which we are concerned. There is no room to hold that a complete ban on deporting residents from an occupied territory is one of the accepted and well rooted international norms such that it can be said that it is a part of customary international law. This, as opposed to the Hague Regulations of 1907, which have been recognized in our rulings as part of customary international law.

This rule has been held and upheld in a number of judgments handed down by this court and as stated, I see no reason to depart from it.

6. It is also my view that the provisions of the Convention cannot trump specific domestic statutes when such contradicts them on a certain point.

I share the opinion of my colleague the president that with respect to the issue which is the subject matter of this petition, Israeli legislation leaves no room for doubt – as Regulation 6(b) of the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offenses and Legal Aid) stipulates that:

> The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority granted pursuant to a commander's proclamation or order, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel.

In view of this clear language, it also seems to me that one cannot accept the argument made by learned counsel for the petitioners that the application of this section should be restricted to individuals who were detained inside the country.

7. With respect to the Government of Israel's declaration that it would voluntarily respect the humanitarian provisions of the conventions applicable to occupied territories, including the Convention herein, with respect to the held territories: indeed, I have elaborated on this issue in my opinion in HCJ 785/87, 88/27 [2].

I expressed my opinion, which I still hold true today, that this declaration by the state should be regarded as significant and if it is indeed its policy, we can, in appropriate cases, force it to uphold this policy.

I did however; add in this context, at 78:

> However, every case will be examined here according to its circumstances, and unlike the interpretation of laws and conventions which sometimes require strict adherence to the meaning of words and expressions, indeed, the court has broad and flexible discretion when it examines a declaration regarding government policy by its content and spirit.

Seeing as I did not see the humanitarian element as the dominant aspect of the provision preventing the deportation of individuals who systematically incite violence and pose a dangerous threat to public safety, indeed, I was of the view that there is no room for us to exercise the powers we possess with respect to administrative law to order the respondents (there) to refrain from deporting such individuals only due to that declared policy.

The same holds true for holding administrative detainees inside Israel when security and logistics necessitate such and when this arrangement was set forth in express Knesset legislation.

All this is not to be confused with the provisions regarding humane and proper treatment of detainees inside the camps, more on which will follow.

8. Based on the foregoing, my opinion, as the opinion of my esteemed colleague, the President, is that the petition must be rejected with respect to the holding of the petitioners in a detention camp inside Israel per se.

9. As for the second part of the petition, which focuses on the conditions in the Qetziot detention camp, I can only express my agreement with the exhaustive factual review of my colleague the

President and confirm that the impression I have drawn from the visit to the facility was similar to his.

I too have not found much factual foundation for the detainees' allegations relating to matters such as the quality and quantity of the food, the quantity of water supplied to the detainees and the medical treatment given to them. It seems that all these do not fall short of normal and reasonable standards. It also seemed that the detention facility's authorities do the best they can to allow the detainees to perform their religious prayers and ceremonies.

I was more concerned by the descriptions we heard from the occupants of the various tents, without communicating among themselves, of verbal abuse and injuries to their bodies and dignity on the part of some of the prison guards and army personnel who escorted them to the detention camp. We have, however, been reassured that any complaint on this subject is thoroughly investigated as we have been provided with details regarding disciplinary hearings taken against officers and soldiers against whom there was prima facie evidence with respect to such complaints. We have also been told, and the detainees in fact confirmed this to us, that each detainee is given frequent and convenient access to meetings with representatives of the Red Cross and an opportunity to present to them complaints on any subject bothering them. Army authorities in general and the commanders of the detention facility in particular maintain constant communications with the Red Cross and any complaint or suggestion is examined favorably. I shall only comment in this context that I was surprised to hear that objects which may assist the detainees to overcome the boredom attendant to the conditions of life in the camp, such as chess and backgammon sets are supplied to the detainees by the Red Cross. I would have thought that supplying the detainees with means of this sort with which they may be able to spend their time more pleasantly and which may diffuse the tension that inherently exists in a camp such as this would be not only in the detainees' interest but also in the prison authorities'.

I share the president's opinion that we are not technically or practically able to supervise substantive measures such as these; hence our suggestion to appoint an advisory committee for constant supervision and monitoring of all the above issues.

10. Yet, on one issue there is room for a clear and decisive position, namely, the unbearable overcrowding, as described in the judgment of my esteemed colleague, the president. Not only does it burden the detainees who must spend almost all hours of the day and night inside the tent, but it also causes additional negative effects which my colleague the president addressed.

With all our understanding for the security needs because of which such detentions are carried out, we must not forget that these are detainees whose liberty has been denied without having been convicted of any criminal offenses in a proper judicial proceeding. Therefore, one cannot tolerate a situation whereby such detainees' holding conditions are far inferior to those of prisoners who had been sentenced to prison terms following a conviction.

"In Israel, a person who was sentenced to a prison term (or lawfully arrested) has a right to be held in conditions allowing a civilized human life" ruled Vice President H. Cohen in HCJ 221/80 [8], at 538 and Justice Barak wrote in his judgment in HCJ 540/84-546 at 573 that "the prison must not be turned into a paddock and a prisoner's room must not be turned into a cage".

I accept these remarks and if this is the situation with respect to prisoners inside prisons, indeed these rules must also apply to administrative detainees.

It is appropriate to note in this context the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Section 10 of these rules states, *inter alia*:

> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space…

Moreover, the Convention contains specific provisions on this matter. Article 85 of the Convention addresses detainees' holding conditions and stipulates, *inter alia*:

> The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate…
> (emphases added, G.B.)

This is no doubt a provision of a clear humanitarian nature and it is my view that with respect thereto, the government must be compelled to implement its official policy whereby it intends to uphold the humanitarian provisions of international conventions.

One is not to deduce from the foregoing that all the provisions contained in the Convention regarding administrative detainees' holding conditions should be followed blindly. Each provision must be examined according to its importance, essentialness, and its correspondence to the particular circumstances of the detention camp which is the subject matter of our hearing. However, ensuring minimal living quarters and space for movement without unreasonable crowding, considering the special living conditions of detainees in the Qetziot camp, is a cardinal requirement which must be met.

My esteemed colleague the president rules in his judgment:

INSERT QOUTE AFTER FINAL EDITING (end of section 15)

I presume that the recommendation included in the honorable president's above remarks will indeed by upheld and realized by the authorities empowered by the respondent within a reasonable timeframe.

Therefore, I concur with the suggestion that the order nisi be revoked. I also join the recommendations and suggestions of my esteemed colleague the president on the various issues which he addressed.

Ruled unanimously as per the judgment of President Shamgar.

Given today, 28 Cheshvan 5749 (November 8, 1988).