Israel's Expulsion of Islamic Militants to Southern Lebanon

Justus R. Weiner
ISRAEL'S EXPULSION OF ISLAMIC MILITANTS TO SOUTHERN LEBANON

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I. INTRODUCTION

Israelis across the political spectrum hardly expected their government's unprecedented decision to expel 415 Hamas and Islamic Jihad militants from the Administered Areas on December 16, 1992. Surprisingly, the Labor-led coalition of Prime Minister Yitzhak Rabin acted with the backing of the left-wing Meretz Party. For diverse reasons, virtually the entire political spectrum supported the government's dramatic edict. Moreover, immediately following the

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2. Following the withdrawal from the Sinai, the Administered Areas constituted the bulk of the territories captured by Israel during the 1967 Six Day War. Some allude to these territories as the "Occupied Territories" or the "West Bank and Gaza Strip," while others refer to them as "Judea and Samaria" and the "Gaza District." In an attempt to be neutral, the author will utilize "Administered Areas," which describes the territories without imparting a political coloration. When referring to specific parts of the Administered Areas, the author will use the terminology employed throughout recorded history up until the purported Jordanian annexation of the "West Bank" in 1961, i.e. Judea, Samaria and Gaza.

murders of seven Israeli soldiers and police officers by Hamas over twelve days, public opinion polls indicated that the government's action had the support of more than ninety percent of the population.

Hundreds of Islamic militants affiliated with the Hamas and Islamic Jihad organizations were arrested, placed on buses and were on their way to exile in Lebanon when the Association for Civil Rights in Israel secured a restraining order against the minister of defense temporarily preventing the expulsion from taking place. Consequently, the buses were halted overnight before they crossed the border. After a hearing the next morning, the Supreme Court, sitting as the High Court of Justice, rescinded the injunction and, on December 17, 1992, the expulsion was carried out. Palestinians reacted with anger and alarm. The Palestinian delegation to the peace talks then being held in Washington announced its withdrawal until Israel reversed the expulsion. Once the initial shock wore off, however, the Palestinians found that the Israeli action had a marked unifying effect on their fragmented body politic. The expulsions also dramatized Israel's acknowledgment that Hamas had become a major rival of the Palestine Liberation Organization (PLO), despite the PLO's insistence that it alone represented the interests of the Palestinians. Although unintended by the Rabin government, the expulsions enhanced the popularity of Hamas among the Palestinians.

The expulsion, which was unanimously upheld by the Israel Supreme Court, sitting as the High Court of Justice, in the landmark Hamas Decision, significantly affected the peace process. It also focused attention on the dilemma Israel faces, as a democracy plagued by endemic terrorism, in preserving human rights while simultaneously endeavoring to curb Islamic-inspired violence aimed at liquidating the state and undermining any prospects for bilateral or regional peace between and among Israel, the Palestinians and neighboring Arab states.

This Article comprehensively identifies and analyzes international and municipal legal issues arising out of Israel's expulsion of the 416 Hamas and Islamic Jihad activists. It considers and evaluates the factual circumstances and the political motivations and considerations of the major players in this drama: the government and cabinet of Prime Minister Yitzhak Rabin, the expellees themselves, the Hamas and Islamic Jihad organizations, the PLO, neighboring Arab states, other nations and the United Nations.

Part II of this Article focuses on the origins of expulsion in municipal law and its use in December 1992. Part III analyzes the relevant international law issues, examines the attitudes of the current and previous governments of Israel toward expulsion and surveys the Middle East 216 (1994).

9. Jarbawi & Hascock, supra note 3, at 27–40. Palestinian militants generally fear expulsion, for the obvious personal difficulties it creates, such as loss of livelihood, and because it distances them from the struggle with which they identify. See generally Esther R. Cohen, Human Rights in Israeli-Occupied Territories: 1997–1998, at 104 (1998). The militants prefer imprisonment in Israel or the Administered Areas, where they can receive regular visits from family members and remain immersed in their cause, to freedom in Lebanon, Jordan or elsewhere. From September 1967 until 1974, the expellees were sent to Jordan. Id. at 105–06. This attitude explains the utility of the expellees' not having returned. Telephone Interview with David Makovsky, Reporter, The Jerusalem Post (Sept. 20, 1994); Barbara Victor, A Voice of Reason: Hamas Ashrafii and Peace in the Middle East 216 (1994).


views of leading scholars and the United Nations Security Council on Israel's historic use of expulsion. The Israel Supreme Court's landmark rulings on expulsion are the topic of Part IV, while Part V juxtaposes the humanitarian issues raised by Israel's policy with global reaction to governmental deportations and expulsions elsewhere. The author's conclusions and outlook comprise Part VI.

II. EXPULSION'S ORIGIN AND USE

A. Expulsion Under Local Law

Expulsion was originally authorized in local law by the British Mandatory government when it enacted Regulations 108 and 112 of the Defence (Emergency) Regulations of 1945 (DER). Used extensively to obstruct both the Jewish and Arab rebellions against the British administration, Jews were exiled to Eritrea, Kenya and other British colonies in Africa, while Arabs were expelled to Lebanon, Syria and the Seychelles. The regulations continued in force during

17. On May 24, 1948, the military commander of Jordan's Arab Legion issued Proclamation No. 2, stating that all laws and regulations that had been in effect on the termination of the British Mandate would continue to apply, as long as they were not inconsistent with Jordanian legislation. See Nazal v. Israel Defense Forces (IDF) Commander of Judea and Samaria (HCJ 619/86, 514/85), 39(3) Pizel Din (P.D.) 646 (1985). When Judea and Samaria were purportedly annexed by Jordan, it was declared that all existing enactments would remain in force. Annunciation of the West Bank Law, No. 1098, 1 Jordanian Official Gazette §128, translated in David Yahav, Legal Aspects of the Deportation of Members of the Hamas, 8 Newsletter of the Int'l Ass'n of Jewish Lawyers and Jurists, at 6 (1993). Some critics of Israel's expulsion practice have argued that article 9(a) of the Jordanian Constitution of 1952, which forbids the deportation of residents, invalidated DER Regulation 112. See Allison M. Fahrenkopf, A Legal Analysis of Israel's Deportation of Palestinians from the Occupied Territories, 8 Boston U. Int'l L.J. 125, 141–45 (1990) (discussion of Jordanian constitutional provision and whether DER was revoked by Great Britain despite lack of publication of the revocation in Palestine, and of the view that it was implicitly repealed by later Jordanian legislation). The IDF effectively removed any doubt concerning this issue when it issued an order stating that the DER were in force in the Administered Area. Interpretation (Additional Provisions) (No. 5) Order (Judea-Samaria) No. 224 (1968). See also Abu Awad v. Regional Commander of Judea and Samaria (HCJ 9779, 33(3) P.D. 309, 315 (1979), excerpted in Judicial Decisions Supreme Court of Israel, 9 Isr. Y.B. on Hum. Rts. 309, 315–17 (1979); Kwaawase v. Minister of Defence (HCJ 685/80), 35(1) P.D. 617 (1981), excerpted in Judicial Decisions Supreme Court of Israel, 11 Isr. Y.B. on Hum. Rts. 340 (1981) (Kwaawase II).

18. In the Gaza Strip, Egyptian authorities made no changes in the legal status of the areas between 1948 and 1967, and therefore there can be no question that the DER continued to apply. Yahav, supra note 17, at 8. See also Cohen, supra note 6, at 96.


21. See Cohen, supra note 8, at 94.
the DER in the Administered Areas has continued pursuant to article 43 of the Hague Regulations of 1907. 22

The administrative legal measure of expulsion is not intended to punish individuals for offenses they have committed but rather primarily to prevent the perpetration of illegal acts. 23 Israel regards expulsion as an exceptional security measure and issues expulsion orders only against individuals in the Administered Areas who pose grave threats to the lives of Israelis or Palestinians. 24 The Israel Supreme Court has held that individuals may not be expelled in order to deter others from violating the law and that expulsion orders may only be issued in cases where the potential expellee poses a danger to the security of the population, and the use of expulsion is vital to neutralizing that danger. 25 The government claims that expulsion orders are issued only under extreme circumstances, when lesser administrative measures, such as travel limitation orders 26 and administrative detention orders, 27 have proven ineffective in deterring individuals from sustained involvement in terrorist activities. 28 Moreover, expulsion and the lesser administrative measures are only employed in cases where regular criminal judicial procedures cannot be used because of danger to the lives of witnesses 29 or because secret sources of information cannot be revealed in open court. 30 Typically, individuals issued expulsion orders have had long histories as leaders or officers of terrorist organizations. Consequently, no other

1995] ISRAEL’S EXPULSION OF ISLAMIC MILITANTS 363

27. Israel issues administrative detention orders in the Administered Areas in circumstances in which there is corroborating evidence from two or more reliable sources that an individual is engaged in illegal acts which involve a direct danger to state security or to the lives of members of the public. According to the Ministry of Justice, such orders are issued against individuals whose activities have been consistently hostile and who have posed an ongoing threat to security and public safety. Letter from Tamar Gaulan, Director, Hum. Rts. & Intl Relations Dep’t, Isr. Ministry of Justice, to members of Amnesty Int’l, at 1 (1989) (file no. 164.1339 to 649, on file with Hum. Rts. & Intl Relations Dep’t, Isr. Ministry of Justice, Jerusalem). Mere membership in a terrorist organization or advocacy of its goals is never sufficient grounds for detention. Id.

The use of administrative detention and travel restriction orders is in full compliance with article 78 of the Fourth Geneva Convention of 1949. Article 78 states: “If the Occupying Power considers it necessary for imperative reasons of security to take security measures, it may, in the most, subject them to assigned residence or to internment.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 78, 6 U.S.T. 5156, 3566-68, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

Israel’s detention procedure in the Administered Areas adheres to, and, in several respects, surpasses the protections for the rights of detainees delineated in the Fourth Geneva Convention. In addition to the right of a first appeal to a military appeals judge, which fully satisfies the requirements of article 78, a detainee may thereafter appeal to Israel’s Supreme Court. Israel is the only nation to open its highest court to non-citizens seeking redress against administrative legal measures. Cheryl V. Reitz, Preventive Detention, Curfew, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories, 8 Cardozo L. Rev. 515, 532 (1987); Hum. Rts. & Intl Relations Dep’t, Isr. Ministry of Justice, Israel’s Use of Administrative Detention, at 3 (Aug. 31, 1993) (file no. 164.1-649/2), on file with Hum. Rts. & Intl Relations Dep’t, Isr. Ministry of Justice, Jerusalem.


29. Palestinians who assist Israeli security forces in identifying terrorist cells and weapons are considered “collaborators” and have been tortured and murdered by PLO and Hamas activists. See B’Tselem, Collaborators in the Occupied Territories: Human Rights Abuses and Violations 59-61 (1994).

30. Successive Israeli governments have maintained that when an individual can be brought to trial, the government does not resort to administrative legal measures. See, e.g., Gaulan, supra note 27, at 4.
the regional commander. The Israel Supreme Court is known for its political independence and commitment to civil rights.43

B. The December 1992 Expulsions of Islamic Radicals

Prior to the December 1992 expulsions of Hamas and Islamic Jihad militants, Israel used expulsion sparingly. From 1967 until 1975, only a few dozen of such orders were usually issued each year.44 During the period from 1976 to 1984, only eight individuals were issued expulsion orders.45

In the first nine months of the intifada, or uprising, which began in December 1987, eighty-eight Palestinians from the Administered Areas were expelled.46 After September 1988, no new expulsion orders were issued.47 Although Defence Minister Rabin considered expulsion effective in deterring terrorism,48 its utility diminished during recent years due to the lengthy appeals process.49 Indeed, in August 1992, as a gesture to the Palestinians, the newly elected government of Prime Minister Rabin canceled eleven expulsion orders that were then pending review before the Supreme Court.50

Following the string of terrorist murders committed by Hamas activists51 and in response to the danger posed by Islamic-inspired terrorism, the government’s Ministerial Committee for National Security adopted decision no. 456 on December 16, 1992. The decision authorized the IDF regional commanders of Judea and Samaria and Gaza to promulgate emergency orders to expel immediately those inciting terrorism. It specified that the expulsions would be limited in duration, not to exceed two years.52 This committee, which was acting for the government, further determined that expellees would have the right to appeal only after their expulsion.53 They would not themselves be able to appear before the appeals board but could be represented by a family member or a lawyer.54 The decision of the appeals board would be final.55 In the attorney general’s response to the petitions before the Supreme Court in the Hamas expulsions case, it was argued that the emergency orders were necessary because of the “unique and severe security situation.”56 The attorney general stated that, in balancing between security needs and legal procedures such as prior hearings, the need for immediate implementation of the expulsion orders took precedence.57 The security officials’ assessment was that any delay in the process “might have provoked an even more severe wave of unrest and violence aimed at creating pressure . . . upon the State of Israel to cancel the intended deportation” and that some of those chosen to be expelled would go underground and would be difficult or impossible to locate.58

On the basis of the government’s decision, the regional commanders promulgated emergency orders59 under which 415 separate expulsion orders were issued — some for eighteen months and 52. Yahav, supra note 17, at 7.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id. at 98–99.
59. Parallel orders were issued in Judea and Samaria and in Gaza by the respective military commanders. Maj. Gen. Dani Yatomin, Commander of IDF Forces, Judea and Samaria, IDF Order No. 1381, Order Concerning Temporary Deportation (Emergency Provision), 1992; Maj. Gen. Matan Vilnai, Commander of IDF Forces in Gaza Strip, IDF Order No. 1086, Order Concerning Temporary Deportation (Emergency Provision), 1992. Nearly one month later, two additional orders were issued (No. 1384 in Judea and Samaria and No. 1089 in the Gaza Strip), which modified the appeals committees’ discretion to determine if their proceedings would be held in camera and cancelled the 60-day statute of limitations for filing appeals.

43. Reicin, supra note 27, at 534.
44. B’Tselem, supra note 4, at 17.
47. Amik-Kohn et al., supra note 23, at 131.
48. Dan Margalit, Rabin: Gerushim — Medinut Yehalim LeShmirat Seder BaShikhim (Rabin: Deportation — An Efficient Policy for Maintaining Order in the Territories), Ha’aretz, Dec. 30, 1987, at 3 (statement of Defence Minister Yitzhak Rabin before Knesset Foreign Affairs and Sec. Committee). Interestingly, there appears to be no way empirically to prove or disprove the utility of expulsion as a deterrent. Since it is used by few states, comparative analysis is unavailing.
49. See Yossi Werter, Rabin: Taintamutam Bit Onesh Ha’irush, Sofeq Im Hu Yu’ili (Rabin: We’re Reduced Use of the Punishment of Deportation, Doubts Whether it’s Efficient), Hadashot, Jan. 25, 1988, at 3.
50. Struck, supra note 5, at 1; see Letter from Tamar Gilead, Director, Human Rts. and Int’l Relations Dep’t, Ministry of Justice, to Madam/Sir 3 (May 27, 1993).
51. Seven murders had been committed by Hamas terrorists in the previous twelve days. B’Tselem, supra note 4, at 41. See also Amik-Kohn et al., supra note 23, at 194–95.
the others for two years. Some eighty percent of the expellees had previously been arrested for security offenses.60

Nineteen expellees were returned almost immediately, most for reasons of ill health or because an error had been acknowledged in selecting them for expulsion.61 Pursuant to an understanding with the United States reached in early February 1993, Israel offered to return immediately a further 101 expellees, whose cases had been favorably reviewed by the appeals committees, and to halve the exile period of the remaining expellees.62 Those served with eighteen-month expulsion orders were thus allowed to return on September 9, 1993, some nine months of their orders having run.63 They numbered 189, although eight of them chose not to return at that time.64 However, of these 189, Israel had announced its willingness to permit 123 to return in February, 101 of them pursuant to decisions of the appeals committees.65 For their own reasons, the expellees initially refused to do so, insisting that all would return or none.66 Nearly all of the remaining 215 temporary expellees, those initially served with two-year expulsion orders, returned on December 17, 1993, exactly one year after their expulsion.67 Eighteen chose to remain in Lebanon.68

Upon returning, the expellees underwent identification and medical checks. Certain cases were reassessed, as the security forces had sufficient evidence that they had participated in terrorist activity, either before or during their expulsion.69 The majority of the expellees, however, were returned to their homes upon the completion of the identification and registration process.70

III. THE USE OF EXPULSIONS AND INTERNATIONAL LAW

A. Introduction

International law can be divided into two categories: customary and conventional. In general, customary international law binds all nations. Conventional law has more limited applicability in that it binds only those states that have ratified and, if required by the local legal system, transformed the treaty into municipal law.71

Under customary international law, there can be little question that expulsion from occupied territories is permitted. The Hague Regulations, the primary source of customary international law concerning belligerent occupation of territory,72 make no reference to deportations.73 Thus, for example, between 1920 and 1925, the forces occupying the Rhineland (United States, Great Britain, Belgium and France) deported 41,608 local residents. The deportees were not afforded any right to appeal, despite the fact that the deportations took place in a time of peace.74

B. The Fourth Geneva Convention of 1949

The Fourth Geneva Convention of 1949 is the leading source of conventional international law concerning relations between the residents of an occupied territory and the occupying government.75 Drafted in the aftermath of World War II, article 49 of the Fourth Geneva Convention provides, in relevant part: "Individual or mass

60. B’Tselem, supra note 4, at 150. This figure would be reduced to 74 percent if one excludes individuals held in detention (including administrative detention) but never convicted of a security offense. Id.
61. B’Tselem, supra note 4, at 148.
64. Id.
65. Id.
68. Id.
69. IDF Spokesman’s Office, supra note 63, at 4.
70. About two-thirds of those returned in December 1993 were released after a few days. Majority of Returned Deportees Released, Jerusalem Post, Dec. 20, 1993, at 1. According to one source, 65 of the 86 Gazans who were readmitted on September 9, 1993, were released to go home after three days of interrogation. Gaza Center For Rights and Law, IDF Use Massive Firepower in Six Military Attacks in Gaza Strip 2 (unpublished press release, Oct. 3, 1993).
72. Id. at 692. See also Judgment of the International Tribunal for the Trial of Major War Criminals (London 1946) Cmd 6964, at 64; Judgment of the International Military Tribunal for the Far East, 15 LITWC 13 (1949).
73. See, e.g., B’Tselem, supra note 4, at 14.
75. See, e.g., B’Tselem, supra note 4, at 14.
legal measure can effectively assure security. Critics, however, claim that expulsion has been used either to deflect the public's anger at the government for its failure to prevent terrorist killings or to punish political activity.

Although it was canceled in Israel proper, Regulation 112 of the DER was kept in force by successive governments ruling the Administered Areas. It authorizes the Israel Defense Forces (IDF) regional commander to expel persons for reasons of security. This provision states, inter alia:

The High Commissioner (whose successor is the IDF Regional Commander) shall have the power to make an order, under his hand . . . for the deportation of any person from Palestine [the Administered Areas]. A person in respect of whom a Deportation Order has been made shall remain out of Palestine [the Administered Areas] so long as the Order remains in force.

DER Regulation 112 is subject to the provisions of DER Regulation 108, which provides that no deportation order may be issued unless the "Military Commander . . . is of the opinion that it is necessary or expedient to make the order for securing of public safety, the defence of Palestine [currently applying to the Administered Areas], the maintenance of public order or the suppression of mutiny, rebellion or riot."

Under Israeli practice, before any expulsion order is issued, all the classified and unclassified material relevant to the case are submitted for review by senior lawyers at the Ministry of Justice. Each expulsion order is issued only upon the approval of the attorney general. According to Regulation 112 of the DER, a person against whom an expulsion order has been issued is required to remain outside the Administered Areas for the duration of the order. That person may, according to the DER, petition an advisory committee, which can recommend that the order be set aside. Under Israeli practice in effect since the first Kawasme decision in 1980, as a matter of administrative law the hearing must, in most instances, be held prior to the expulsion. In that case, the Court agreed with the petitioner's argument that implementation of an expulsion order prior to a hearing impairs the ability of the petitioner to challenge the order.

At the hearing, the petitioner, represented by counsel, may present witnesses as well as documentary evidence. The committee examines all the evidence, typically including classified material, before making its recommendations to the IDF regional commander to either implement the order or set it aside. In practice, the recommendations of the advisory committee are followed by the military. Furthermore, the appellant may petition the Supreme Court, sitting as the High Court of Justice to override the decision of

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31. Id.
34. DER, supra note 14, as amended by Palestine Gazette No. 1470, at 163 (Supp. No. 2, 1946).
35. DER Regulation 108, supra note 14.
36. Israel considers classified any material which could lead to the exposure of sources of information, thus endangering the lives of the sources. See Israel Nat'l Section of the Int'l Commission of Jurists, The Rule of Law in the Areas Administered By Israel 73 (1981).
38. Orders are generally of indefinite duration. In individual instances expelled persons have petitioned for readmission and their request has been granted. See Jon Immmanuel, Fifteen Exiled Palestinians Return To Territories Today, Jerusalem Post, Apr. 30, 1993, at 1.
39. DER Regulation 112(8) states:

Any advisory committee appointed under the provisions of subregulation (4) of regulation 111 of the principal Regulations may, if so requested to do [sic] by any person in respect of whom a deportation order has been made under this regulation, consider and make recommendations to the government in respect of any such deportation order.

DER, supra note 14.
40. Kawasme v. Minister of Defence (HCJ 320/80), 36(3) P.D. 113 (1981) (Kawasme 1). The High Court created the right to a prior hearing. This was not because of any requirement that appears in DER Regulation 111 or 112. Rather the Court saw it as necessitated by natural justice. See, e.g., Geingold v. National Labor Court (HCJ 654/78), 35(2) P.D. 649, 655–57 (1979).
41. Kawasme 1, 36(3) P.D. at 118.
42. Cohen, supra note 8, at 107.
the others for two years. Some eighty percent of the expellees had previously been arrested for security offenses.

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B. The Fourth Geneva Convention of 1949

The Fourth Geneva Convention of 1949 is the leading source of conventional international law concerning relations between the residents of an occupied territory and the occupying government. Drafted in the aftermath of World War II, article 49 of the Fourth Geneva Convention provides, in relevant part: "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.\textsuperscript{76}

Some authorities, including Yoram Dinsein\textsuperscript{77} and Chaim Cohen,\textsuperscript{78} claim that article 49 is both applicable and unconditional in its prohibition of deportations from occupied territory. Indeed, if one disregards the threshold issue of applicability and focuses instead on the literal language of article 49, in the author's opinion, a plausible argument can be made that even Israel's relatively infrequent (pre-1992) expulsion of terrorists posing serious security threats was contrary to international law.

However, other international law experts such as Julius Stone,\textsuperscript{79} William O'Brien,\textsuperscript{80} Irwin Cotler\textsuperscript{81} and Thomas S. Kuttner\textsuperscript{82} have concluded that Israel's actions have nothing in common with deportation prohibited by the Fourth Geneva Convention. Their opinions are supported by the authoritative commentary on the interpretation of article 49 issued by the International Committee of the Red Cross:

> There is doubtless no need to give an account here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of forced labour service. The thought of the physical and mental suffering endured by these "displaced persons," among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.\textsuperscript{83}

Thus, Professor Stone wrote that a reasonable reading of article 49 would limit that provision to practices "at least remotely similar" to those perpetrated by the Nazis in World War II, i.e., the mass transfer of persons "for torture, extermination, or slave labor."\textsuperscript{84} Professor O'Brien notes that since the historical context of the drafting of article 49 implies a concern for practices similar to those employed by the Nazis, "Israel's textual interpretation of article 49 is more plausible than that literal, textual interpretation of the United States and the other nations."\textsuperscript{85}

As a threshold issue, the Israel Supreme Court has held that the Geneva Conventions of 1949, which constitute conventional international law, do not automatically become part of the binding municipal law of Israel in the absence of a process of legal adoption (enactment) by the Knesset (parliament).\textsuperscript{86}

Nevertheless, on several occasions since 1967, Israeli governments have voluntarily undertaken to comply with the humanitarian provisions\textsuperscript{87} of the Geneva Conventions. The legal

\begin{footnotes}
\footnotetext{76}{Fourth Geneva Convention, supra note 27, art. 49, 6 U.S.T. at 3548.}
\footnotetext{77}{Yoram Dinsein, Girush Roshay Ha'aron MaYahuda [Deportation of the Mayors from Judea], 8 Tel Aviv U. L. Rev. 158, 169 (1981).}
\footnotetext{78}{Chaim Cohen, Girush KaHalaha [Proper Deportation], 2 Mishpat U' Mimshal 471 (1993).}
\footnotetext{79}{Julius Stone, Behind the Cease-Fire Lines: Israel's Administration in Gaza and the West Bank, in 2 The Arab-Israeli Conflict 410 (John N. Moore ed., 1974).}
\footnotetext{80}{William V. O'Brien, Law and Morality in Israel's War with the PLO 256 (1991).}
\footnotetext{81}{Irwin Cotler, Deportations and the Law, Jerusalem Post, Jan. 17, 1988, at 8.}
\footnotetext{82}{Thomas S. Kuttner, Israel and the West Bank: Aspects of the Law of Dilettant Occupation, 7 Isr. Y.B. on Hum. Rts. 196, 213-17 (1977).}
\footnotetext{83}{Oscar M. Uhler et al., Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 275-79 (Jean S. Picuet ed., 1958).}
\footnotetext{84}{Id., supra note 79. According to article 6 of the Charter of the International Military Tribunal of Nuremberg of 1945, deportation was considered a grave war crime since it was used during World War II for physical annihilation or forced labor. Charter of the International Military Tribunal of Nuremberg annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis in L. Friedman, 1 The Laws of War — A Documentary History 883, 887 (1972).}
\footnotetext{85}{O'Brien, supra note 80. A number of commentators have pointed out that article 49 was drafted in the aftermath of World War II, when the horrific deed of the Nazis, including the deportation of millions of innocent civilians to extermination and slave labor camps, was fresh in the minds of the drafters. See, e.g., Schwarzenberger, supra note 75.}
\footnotetext{87}{Amid-Kohn et al., supra note 25, at 21–22. There is some uncertainty regarding the limits of the humanitarian provisions, as distinct from the technical provisions, of the Fourth Geneva Convention. Clearly, however, any reasonable assessment would place expulsion within the former rather than the latter category.}
\end{footnotes}
significance of these declarations is unclear. In his decision in Kawasme II, President of the Supreme Court Landau stated that since the decision to comply with the humanitarian provisions of the Geneva Conventions was a political decision, it had no legal significance. However, in the subsequent Affo case, Justice Bach viewed the declaration as constituting an administrative guarantee that can be relied upon in court to compel the state to comply with the humanitarian provisions of the Convention. The majority opinion in Affo, however, holds that while it is possible to classify article 49’s prohibition of deportation as humanitarian in character, the article does not forbid selective deportations where required by real security reasons.

The Israeli Supreme Court, in the cases of Abu Awad, Kawasme I and Kawasme II, upheld Israel’s expulsion practices, holding that such practices do not violate article 49 of the Fourth Geneva Convention. In the Abu Awad case the Court noted that [Israel’s use of expulsion] has nothing to do with the expulsions for forced labor, torture, or extermination that occurred in the Second World War. Furthermore, the objective of the Respondent was to remove the applicant from the country and not to bring him to Israel; to prevent: the danger he constitutes to the safety of the public, and not to make use of his manpower by exploiting him for the benefit of Israel.

Hence, although a literal understanding of article 49 would absolutely prohibit all forms of expulsion, to do so would mean that infiltrators, persons whose visas have expired, those who are the subject of an extradition request and even smugglers could claim immunity from expulsion. The Supreme Court has recognized the senselessness of this approach to article 49 in Affo. The Court in Affo noted that interpreting article 49 as a categorical prohibition of any expulsion would lead to absurd and unreasonable results. This would be contrary to article 32(b) of the Vienna Convention on the Law of Treaties of 1969, which seeks, by proper interpretation, to avoid “a result which is manifestly absurd or unreasonable.” The Affo decision stated:

The acceptance of the argument that Article 49 applies, whatever the motive for its personal operation, means that if someone arrived in the territories for a visit for 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 . . . it is prohibited to deport him as long as the territory is under military rule.

Moreover, the Court adopted the view that different parts of a treaty shall be given a consistent interpretation in light of existing international law and that ambiguous provisions should be given a meaning which is the least restrictive of a party’s sovereignty. This teleological method of interpretation has led the Court to conclude that article 49 should be interpreted as forbidding only forcible mass deportations like those imposed by the Nazis during World War II.

The United Nations Security Council holds the view that the Fourth Geneva Convention applies on a de jure basis to the Administered Areas. The United Nations Security Council and the General Assembly have, on a number of occasions, urged Israel

95. Affo translation, supra note 86, at 26 (emphasis in original).
100. On November 16, 1979, the U.N. General Assembly approved a resolution urging Israel to cancel an expulsion order against the Palestinian mayor of Nablus for allegedly condoning a terrorist attack. G.A. Res. 34/29, U.N. GAOR, 34th Sess., Supp. No. 46, at 73, U.N. Doc. A/34/29 (1979). See von Glahn, supra note 71, at 697–98. The order was cancelled shortly thereafter and the mayor was returned to office on the
to cease the expulsion of Palestinian activists and condemned its failure to do so. This longstanding position found its most recent expression in Resolution 799, adopted on December 15, 1992, which condemned the Hamas and Islamic Jihad expulsions, required Israel to return the Islamic militants forthwith pursuant to article 49 and threatened international sanctions should Israel not comply. Two days later, Israel rejected the Resolution as “one-sided” and charged that it ignored Israel’s security concerns. Most Israelis and many other observers discount assessments of the United Nations in matters involving Israel. The Security Council, the General Assembly and many United Nations agencies have maintained a blatantly hostile attitude toward Israel for some two decades. Even with the repeal of the resolution equating Zionism with racism in 1991, the U.N. still has evidenced a less than objective attitude towards Israel. In late January 1993, the PLO circulated a draft resolution in the Security Council which sought to impose broad sanctions against Israel. On February 1, 1993, with international pressure on Israel intensifying, the U.S. and Israel announced an agreement whereby 101 expellees were to be immediately returned and the remainder to have the duration of their exile halved. Pursuant to this understanding, all the expellees would be permitted to return by December 15, 1993.

In reviewing cases challenging the Israeli practice of expulsion from the Administered Areas, the Israel Supreme Court could have sidestepped the entire controversy concerning article 49. From a positive law standpoint, there was never any need to delve into the meaning of this provision, as the Supreme Court had repeatedly determined that its provisions are conventional international law and not declaratory of any rules of customary international law. Moreover, although Israel has signed and ratified the Fourth Geneva Convention, it has not been enacted by the Knesset into municipal legislation or included in the legal system of the Administered Areas by means of orders issued by the IDF commanders of the regions. For this reason, expellees, as private individuals, would not have been

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110. Rudge & Kotzer, supra note 67.

111. *Klausen 2*, supra note 17 (opinion of President of the Supreme Court Landau) id. at 647–48 (Kahan, J., concurring). But see id. at 638–46 (Chin, J., dissenting).

112. See 30(1) Kifel Amen at 559 (ratification by Knesset).

standing to rely on article 49 in the domestic courts of Israel, since Israel, like Britain, follows the rule that constitutive treaties are not automatically incorporated into municipal law even though they bind the state in the international arena.

Additionally, three other articles of the Fourth Geneva Convention can be used to justify the Israeli government's use of expulsion. One alternative is that article 5 of the Fourth Geneva Convention can be argued as negating article 49's prohibition of expulsion of individuals suspected of involvement in terrorism, assuming the presence of such individuals would be prejudicial to the security of the state. Article 5 states: "An individual . . . suspected of or engaged in activities hostile to the security of the State . . . shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State." Although no government of Israel has ever relied on article 5, it would arguably apply to individuals like those expelled to southern Lebanon.

114. The concurring opinion of Justice Bach in the Affo case, which disagreed with the opinion of the Court that article 49 of the Fourth Geneva Convention did not apply to the deportation of individuals, spoke to this point. Despite his interpretation of article 49, Justice Bach agreed with the president and other justices that the petitions against expulsion must be rejected, explaining that he had no reason to deviate from the rule laid down and confirmed in a considerable number of judgments, according to which the provision in article 49 of the Convention is a provision only of international treaty law, as opposed to a provision of international customary law, and such a provision does not represent a binding law and cannot serve as the basis of a petition brought by a private citizen before the courts.


116. N. Feinberg, Amanot Deklaratuyot vaAmanot Ronstituyot BeMishpat haBayyenuyi (Declaratory and Constitutive Treaties in International Law), 24 HaFraktis 433, 443 (1967-1968). This rule prevents the executive from overriding the legislature's prerogatives by ratifying treaties which cannot achieve enactment. The United States rule, by contrast, automatically makes a validly concluded international treaty part of municipal law. John S. Gibson, International Organizations, Constitutional Law, and Human Rights 113 (1991).


1995] ISRAEL'S EXPULSION OF ISLAMIC MILITANTS 377

Were Israel to recognize the full applicability of the Fourth Geneva Convention, it would also be in a position to make arguments based on articles 64 and 147. Article 64 entitles Israel to subject the population of the occupied territory to provisions to ensure its security and that of its forces and installations. Article 64 states, in pertinent part:

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Additionally, article 147 declares that the "unlawful deportation or transfer . . . of a protected person" is a "grave breach" of the Convention. The use of the word "unlawful" implies that some expulsions are permitted under the Fourth Geneva Convention, despite the apparently categorical text of article 49.

C. Positions on Expulsion of Current and Previous Israeli Governments

Successive Israeli governments since 1967 — Labor, Likud and National Unity — have taken the position that the Geneva Conventions of 1949, which Israel ratified in 1951, are not de jure applicable to its administration of the Administered Areas. While serving as the attorney general of the state of Israel, the current Supreme Court President Meir Shamgar announced in 1971 that the

118. Id. at 64, 6 U.S.T. at 3558.

119. Id. at 147, 6 U.S.T. at 3618.

120. Although its application to occupied territory is doubtful, it is nonetheless interesting to note similarly that article 9 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, art. 5, 3d Session at 73, U.N. Doc. A/810 (1948) (emphasis added).

121. The rejection of the de jure applicability of the Fourth Geneva Convention to the Administered Areas has been clearly enunciated by various senior Israeli government officials over the years. They have included then-Foreign Minister Moshe Dayan and then-Nation's ambassador Chaim Herzog. Bar-Yaakov, supra note 113, at 496–97.
government’s administration of the territories would be in accordance with the humanitarian provisions of the convention on a de facto basis.

In light of the ongoing peace process, the application of the Fourth Geneva Convention to the Administered Areas may depend more on political factors than on legal arguments. It is worth noting, however, that among the many states that have captured territory in recent decades, only Israel has applied the Fourth Geneva Convention’s humanitarian terms, even on a de facto basis.

Israel has also advanced the argument before the U.N. Security Council that even if the Fourth Geneva Convention were de jure applicable, Israel as a belligerent occupant would nevertheless be permitted to expel individuals who threaten the security of the Administered Areas. This argument is based primarily on article 43 of the Hague Regulations of 1907. The Hague Regulations embody the following basic principle in article 43:

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.

Many security experts believe that expulsion serves to preserve public order and safety. Therefore, article 43 would appear to justify Israel’s use of expulsion, at least in grave circumstances.

Israel has also argued that its use of expulsion respects the laws in force, as required by article 43. Indeed, Israel endeavors to preserve the amalgam of laws it found in place in 1967. As both customary international law (the Hague Regulations) and the relevant local law (the DER) permit the selective use of expulsion in order to deter threats to Israel’s public order and safety, article 49 should not be interpreted as forbidding these expulsions.

Thus, Israeli governments, past and present, have regarded the use of expulsion orders against individuals who pose a grave and immediate threat to security and public order as reasonable by


123. Blum, supra note 122, at 203-04. Blum and others argue that since article 2(2) requires that the occupation be of the territory of another contracting party, Israel’s application of the Fourth Geneva Convention would concede recognition of Jordan’s and Egypt’s claims to sovereign rights over the Administered Areas. See also Allen Gerson, Trustee Occupant: The Legal Status of Israel’s Presence in the West Bank, 14 Harv. Int’l L.J. 1 (1979).

objective standards, and in full conformity with local and international law.

IV. THE HAMAS DECISION

On January 28, 1993, the Israel Supreme Court, sitting as the High Court of Justice, ruled on the petitions challenging various procedural and substantive aspects of the temporary expulsion of the Hamas and Islamic Jihad militants. The Court unanimously rejected claims that the expulsions were contrary to international law on the grounds that the orders were based on detailed information pertaining to each individual case. It did not consider the international law arguments regarding article 49, which were addressed in several earlier decisions that rejected various arguments that article 49 bars expulsion of residents from the Administered Areas.

A. Background

The beginning of the opinion of the Court is largely devoted to an examination of the practices and objectives of Hamas and Islamic Jihad. Hamas, the Court explained, "combines the most extreme Islamic fundamentalism with absolute opposition to any arrangement with Israel or recognition of it and preaches the destruction of the State of Israel." Hamas formed as an offshoot of the Muslim Brotherhood. The Hamas Covenant, published in August 1988, calls for the liberation of Palestine in its entirety, "from the sea [Mediterranean] to the river [Jordan]." Its ultimate goal is a great Islamic state throughout the Middle East, without any national boundaries. In pursuit of this goal, Hamas rejects the Israel-PLO agreement for autonomy for the Palestinian residents of the Administered Areas, as well as the entire peace process. Article 13

129. Hamas Decision, supra note 6, at 5.

130. The Muslim Brotherhood is a large, international Islamic movement that is committed to Islamic piety and has frequently been involved in political subversion in various Arab states. Founded in Egypt in the 1920s, it strengthened its roots in the Administered Areas during the years 1967–1977, when the previously fragmented Islamic religious forces in the territories joined ranks under the aegis of similar groups in the Arab countries. Prior to the intifada, the Muslim Brotherhood's activities in the Areas focused on recruitment and gaining control of centers of influence, such as the mosques, universities and schools. During this period, the Brotherhood did not participate in anti-Israel activities, apparently out of fear of the Israeli security forces. See Gazor, supra note 1; Raphael Israeli, Fundamentalist Islam and Israel 123–28 (1993).

131. Hamas Decision, supra note 6, at 5. This formulation includes all of Israel, not just the areas captured by Israel in the 1967 Six-Day War.

132. Bruce W. Nolan, The Dark Side of Islam, Time, Oct. 4, 1993, at 62. Islamic extremists are not merely a threat to the innocent living in Israel and the Administered Areas. Their ruthless attacks have led Arab governments to respond far more strongly than Israel. Egypt has outlawed Islamic fundamentalism, and those found guilty of terrorism have been hanged. Clarence H. Wagner, Jr., Commentary: The Nature of the Beast, 18 Dispatch From Jerusalem 1, 13 (1983). The press spokesman for Egyptian President Hosni Mubarak commented following the December 1992 roundup of fundamentalists: "We are uprooting them. Egypt is unlike other countries in the region. It will not tolerate extremism and terrorism. It will crush them. We have to put an end to terrorism." Id. From January to the beginning of November 1993, Egypt executed 15 Islamic militants and eight others were on death row. Christopher Dickey, Terror at the Brasserie, Newsweek, Nov. 8, 1993, at 29. From October 1995 to April 1996, 50 militants were sentenced to death by Egypt. Cairo, Better and Worse, Economist, Apr. 9, 1994, at 45.

133. In 1979, when fundamentalist revolutionaries took over the main mosque in Mecca, the Saudi government recaptured the mosque, killing hundreds and later beheading 68 surviving rebels. John K. Cooney, Payback: America's Long War in the Middle East 59–69 (1991). In 1987, the Saudi government ordered troops to open fire on Iranian pilgrims in Mecca, killing about 402 people, according to Saudi figures. Id. at 146. Algeria has experienced almost daily shoot-outs between the Army and Islamic fundamentalists. Some 4000 persons have been killed in the conflict. Yousef M. Ibrahim, Algeria is Seen Edging Toward Brokup, N.Y. Times, Apr. 4, 1994, at A7. About 10,000 Islamic prisoners were reported to be detained by Algeria in desert camps. David Pryce-Jones, Blood Brotherhood, Jewish Chronicle, Dec. 24, 1992. In 1995, following a fundamentalist uprising in the city of Hama, Syrian President Hafez al-Assad ordered a military assault on the city. Some 10,000 to 30,000 Syrians were killed, many in cold blood, by their own army. Barry Rubin, Coulond of Turkmeni: America in the Middle East 127–28 (1992). Moreover, bombings by Islamic-inspired terrorists have reached as far as the Middle East as New York, Bombay, London, Panama and Buenos Aires. The Return of Terror, Newsweek, Aug. 8, 1994, at 24.

134. Jon Immanuel, Reorganizing the Islamic Map in the Territories, Jerusalem Post, Dec. 24, 1993, at B2. Hamas was responsible for a series of deadly terrorist attacks following the Israeli-Jordanian peace agreement, including a shooting spree in a Jerusalem restaurant district and a suicide bomber who blew up a passenger bus in Tel Aviv, killing 22 persons. Bill Hutman & David Makovsky, Search for Accomplices in Capital Terror Attack, Jerusalem Post, Oct. 11, 1994, at 1; Jon Immanuel et al., Robin: 3 held in connection with Tel Aviv bus bombing, Jerusalem Post, October 25, 1994, at 1. Indeed, Hamas members claimed that they learned terrorist techniques such as suicide bombings from Hezbollah, the Lebanese Islamic fundamentalists, while they were expelled to Lebanon. Sarah Helm, Hamas has learnt the lessons of Lebanon, The Independent, Oct. 5, 1994, at 14.
of the covenant denounces all peace initiatives and claims that "[t]here is no solution to the Palestinian problem except through jihad."134

The Hamas Covenant is more a religious document than a political manifesto.135 Many of its thirty-six paragraphs consist of lengthy quotes from the Koran.136 It adopts anti-Semitic libels, such as accusing the Jews of instigating two world wars and the French and Russian revolutions, and of establishing international organizations such as the League of Nations, the United Nations and the Rotary and Lions Clubs as a means to control the world.137 Hamas has received generous financial, moral, political and military support from Iran.138

Hamas calls for the murder of Israelis.139 Its terrorist acts have included kidnapping and murdering IDF soldiers, planting explosives at military and civilian sites, shooting attacks and stabbing attacks.140 Hamas attacks on Palestinians have targeted for assassination hundreds of persons suspected of cooperating with Israeli authorities or of violating a fundamentalist Islamic moral code.141

Friction between Hamas and the PLO, the primary contenders for control over the intifada and competitors for the allegiance of the residents of the Administered Areas,142 has frequently resulted in the internecine killing of Palestinians by Palestinians. This phenomenon, which has become known as the "intrafada," has claimed 899 lives as of October 11, 1994.143 Much of this infighting has occurred between Yassir Arafat's Fatah faction of the PLO and Hamas.144 During the intifada, PLO leaders have openly acknowledged or avowed the killing of Arabs who are deemed "collaborators." PLO Chairman Yassir Arafat has been closely linked to many killings and death threats.145

During the period leading up to the expulsions, Hamas had carried out a large number of terrorist attacks. From March 1992 until the expulsions, Hamas and Islamic Jihad claimed they had carried out eleven attacks, and Israeli intelligence ascribed nineteen other attacks to the groups.146 Hamas's murder victims included a fifteen-year-old

134. Ganor, supra note 1, at 7. See Hamas Decision, supra note 6, at 5. Jihad is Arabic for "to strive" or "holy war against the non-Muslim." See David Pryce-Jones, The Closed Circle: An Interpretation of the Arabs 322 (1989). Jihad is one of the five central tenets of Islam and every Muslim is obliged to participate. Id.


136. Rapp Israel, "Islam's Hamas Cry, supra note 135.

137. Id. at 4-5; Raphael Israel, supra note 135, at 129.


140. Ganor, supra note 1, at 13-14. The Supreme Court found that "acts of kidnapping and murder expressed the central and dominant objective of the said organization, and of the Islamic Jihad organization and its factions, to bring about the liquidation of the State of Israel through Jihad [a holy war]." Hamas Decision, supra note 6, at 5.


1995] ISRAEL'S EXPULSION OF ISLAMIC MILITANTS 383
girl and elderly people over the age of seventy. In the week preceding the December 1992 expulsions, Hamas's Is al-Din al-Qassim death squads had claimed “credit” for the shooting deaths of five Israeli soldiers and the kidnapping and murder of the border policeman Nissim Toledano. Islamic Jihad also claimed responsibility for one of these killings.

Although it is much smaller than Hamas, Islamic Jihad is one of the most complex and dangerous of the Palestinian terrorist organizations. It has many groups in various Middle Eastern countries and some in Europe as well. Like Hamas, Islamic Jihad stayed outside the umbrella group called the Unified National Leadership of the Uprising during the intifada. It is also strongly opposed to the peace process. Islamic Jihad maintains the view that war against Israel and Jews in general is an essential prerequisite toward accomplishing the goals of Islam, and indoctrinates its youth to carry out suicide attacks by such methods as car bombs. Many of the intifada's most deadly attacks, such as the forcing of an Israeli bus en route to Jerusalem off a cliff, were perpetrated by Islamic Jihad militants.

Through their violent acts and strident ideology, the militants of Hamas and Islamic Jihad have captured the imagination of the Palestinian masses.

B. Procedural and Substantive Due Process

With this background in mind, the Hamas Court considered the legal impact of the absence of hearings prior to the expulsions. After restating the fact that the DER do not, by their terms, require a prior hearing, the Court noted that it considers the right to a prior hearing as one of the rules of natural justice, citing precedents from Jewish religious law as well as its own decisions. The Court stated that, from a legal standpoint, there are instances in which the security needs of the state justify immediate expulsion without the right to a prior hearing, based on a balance between the two considerations in a particular case. The Court referred to instances where it ruled that...

147. Hamas Decision, supra note 6, at 5.
148. Is al-Din al-Qassim was a Syrian Muslim, who in the 1920s moved to Haifa, where he became the imam of a mosque. Al-Qassim told his congregation, "You are a people of rabbits, who are afraid of death and sacrifice and engaged in prattle. You must know that nothing will save us but our arms." See Prys-Jones, supra note 134, at 195. He launched a jihad against the British mandator authorities and against the Jews. In what was then the British Mandate of Palestine. Al-Qassim was killed in a battle in northern Samaria in 1935 and largely forgotten until Hamas, which styles itself after him, named its strike force in his memory. See Rafi Israel, Press Con. on Hamas, in Jerusalem (May 5, 1993), in Isr. Gov't Press Office, Press Bull., May 11, 1993, at 6.
149. Shortly after Sergeant Toledano was kidnapped on December 13, 1992, two masked men notified the Red Cross office in Ramallah that Hamas was holding him and that he would be killed unless Sheikh Ahmed Yasir, a senior Islamic militant from Gaza serving a prison term in Israel, was released by midnight on the same day. Several days later, the body of Sergeant Toledano was discovered near the Jerusalem-Jericho road. An autopsy revealed that he had been killed by strangulation and knife. Amit Kohn et al., supra note 23, at 134–35.
150. An underground Hamas leaflet published on December 14, 1992, stated:

We emphasize that the path of Jihad and martyrdom that the Hamas has adopted... is the only way to liberate Palestine, and it is the only way to destroy our enemy and shatter his arrogance. We have committed ourselves before Alass to continue in our Jihad, to escalate it, to develop it, and to surprise the enemy with our blessed military operations.

Id. at 138.
151. See Boaz Ganor, A Cancer Called the Islamic Jihad, Matar, June 4, 1991, at 1. Before Hamas began engaging in violence during the intifada, Islamic Jihad castigated it for its lack of commitment to the "armed struggle." Id.
152. Jabbawi & Heacock, supra note 5, at 1.
153. Jabbawi & Heacock, supra note 5.
154. Id. at 7.
156. Id. at 9. Suicide attacks continue to be a mainstay of Islamic Jihad. David Makovsky and Reines Marcus, At Least 19 Dead in Beit Lid Bomb Attack, Jerusalem Post, Jan. 23, 1996, at 1.
157. Danny Rubenstein, Anshei Acheh Ba'Shahim Aluinim LeHigeret Ahar P'eulat Ha'Hamas [Members of the PLO in the Territories May Be Dragged Into the Activity of Hamas], Ha'aretz, Dec. 15, 1992, at 1. The widespread support in the Administration for these acts may explain why no member of the Palestinian delegation to the Washington peace negotiations condemned the kidnap and murder of Toledano. See Belkin, supra note 3, at 9.
158. During the British Mandate, hearings challenging deportation orders were held after the expulsion had already been carried out and in the absence of the petitioner. Yahya, supra note 17, at 10.
159. Hamas Decision, supra note 6, at 17–18.
160. Id. at 25.
exceptional situations warrant departure from the norm of prior hearings:

Giving a right of prior hearing in the said circumstances, before implementing the order, meaning a delay in taking action for the period necessary to hold the hearing in this Court, ... constitutes a substantive risk to human life and substantive concern as to the frustration of the possibility of taking the necessary action. ... In this example the supreme value of preserving human life takes priority over the value of a right of hearing. This balance between these two values is the supreme value in our legal system.\(^{163}\)

Thus, the Court concluded that the absence of a prior hearing does not per se disqualify the individual expulsion orders.\(^{167}\) However, the Court stated that it need not determine whether the immediate expulsion action by the government was justified, since granting the right to a belated hearing would correct the procedural defect, if one had occurred.\(^{165}\) The Court ordered that the IDF make arrangements that would enable personal appearances by the expellees at their appeals hearings.\(^{166}\)

While the Court upheld the individual expulsion orders, it ruled that the global orders of the regional commanders authorizing the expulsions were invalid. By denying the right to a prior hearing without providing the reasons in each instance, as is required, the orders went beyond the authority of the military government:

Only concrete exceptional circumstances can create a different balance between the conflicting rights and values, and such circumstances were not detailed in the wording of the [orders]. ... It thereby sweepingly and in an overall way canceled the right of hearing and such power is not vested in the Military Commander.\(^{167}\)

Yet the expulsions were allowed to stand as individual orders, as authorized by DER Regulation 112.\(^{166}\) Even though the general orders denying the right to a prior hearing were not authorized by Regulation 112, the Court determined that, as applied to the individuals expelled in this case, Regulation 112 itself provided sufficient authority for each expulsion order until an appeal committee decision is made.\(^{169}\)

Pursuant to the Court's decision, arrangements were made to handle appeals brought by any of the individual expellees. Fourteen appeal committees were established in accordance with the High Court's ruling. They were empowered with the authority, without the need to make recommendations to the regional commander, to cancel or shorten the duration of the temporary expulsion orders. Further appeals could be taken to the Supreme Court, sitting as the High Court of Justice. Petitioners were given the right to appear personally before the appeal committees and to be represented by their attorneys or family members. They could meet with their attorneys at the Aumriya crossing point to Lebanon, with the IDF providing transportation for their attorneys.\(^{170}\) A representative of the International Committee of the Red Cross could attend any hearing, both before the appeals committee and the Supreme Court. The expellees, however, rejected the entire appeal process.\(^{171}\)

The Court's decision was criticized on several grounds by former Supreme Court Justice Chaim Cohen, a leading Israeli civil libertarian.\(^{172}\) Cohen criticized the distinction the Court made between the individual expulsion orders and the general orders purporting to authorize the issuance of individual orders. If the government believed that the general orders were legally necessary, then the Court's invalidation of the general orders should necessarily void any action based upon them. Either both are legal, or else neither is, Cohen argued.\(^{173}\)

\(^{163}\) Id. at 23, quoting Association for Civil Rights in Israel v. The Commander of the Southern Command, 44(4) P.D. 628 (1990).

\(^{164}\) Id. at 25. While it is possible to view this balancing test as sophistry, I served as an ingenious approach that avoided throwing open the floodgates to easy temporary expulsions while at the same time conferring with precedent permitting immediate expulsions in especially grave circumstances.

\(^{165}\) Id. at 27.

\(^{166}\) Id. at 28.

\(^{167}\) Id. at 27 (emphasis in original).

\(^{168}\) Id.

\(^{169}\) Id. at 28.

\(^{170}\) Herb Keinon et al., Deportees Turn Down Offer of Legal Aid, Family Visits, Jerusalem Post, Jan. 26, 1993, at 1.


\(^{172}\) Cohen, supra note 78.

\(^{173}\) Id. at 472.
Cohen also takes issue with the Court's balancing test, as applied to this case. If the Court accepted the government's claim that allowing prior appeals would cause a general uprising and violence leading to pressure on Israel to cancel the expulsions, such violence and pressure would not be avoided by postponing the right to hearing. Cohen argued that international pressure should not be a proper consideration in arriving at a decision on due process claims. In any case, Cohen states, mass expulsions would be most likely in their sympathetic portrayal in the media, Israel belatedly likely to spark widespread violence, not the expulsion of any particular revealed some of the evidence it collected against them. One of the individual. Yet, though the Court stressed that each expulsion was permissible only on an individual basis, the decision appeared to allow violence following a mass expulsion. Rather than evaluate the possibility of unrest following each individual expulsion, the Court treated all of the expulsions as a single act in balancing the right to hearing against the danger of violence. In Cohen's view, this contradiction means the Court impliedly justified mass expulsions.

Yet this approach did reflect the underlying facts, and the Court must clear that the military commander had no authority to issue the mass expulsion order he issued in this case.

Another viewpoint recommends that the Court apply the "least restrictive alternative" test. Under this test, the Court must consider whether the challenged action results in the least restrictive limitation on the personal freedom of the petitioner in reaching the security goal. While theoretically attractive, the test would be difficult for the Court to apply, requiring that the Court substitute its judgment for that of the security officials responsible for public safety. For example, in the Hamas case, the chief of staff testified that they were no other options available and that the expulsion order was "necessary."

174. Id. at 473.
175. Id. at 474.
176. Id.
177. Hamas Decision, supra note 6, at 27.
179. Id. at 41.
180. Irwin Cotler, This case will reverberate for years, Jerusalem Post, Jan. 1993, at 4.
181. The developments were extensively covered by the world media, as, day after day from December 1992 to January 1993, correspondents from CNN, ABC, NBC and National Public Radio, among others, broadcast largely sympathetic human interest stories about the expellees and their struggle to return to their homes, or at least to prison in Israel. Media Wisdom and the Deportees, CAMERA Media Report (Committee for Accuracy in Middle East Reporting in America, Boston, Ma.), Spring 1993, at 8; David Bar-Ilan, The Lightning-Speed Rehabilitation of Hamas, Jerusalem Post, Nov. 11, 1994, at 9B; Yigal Carmo, The Story Behind the Handshake, Commentary, Mar. 1994, at 25, 26. The coverage was considered a public relations fiasco for Israel, as Lebanon manipulated events to depict the deportees in the most favorable light. Elaine Ruth Fletcher, Deportations Shake Israeli Government, Christian Sci. Monitor, Dec. 23, 1992, at 4 (public relations fiasco); Michael Oren, Don't Blame Israel for Throwing Out Extremists, USA Today, Jan. 5, 1993, at 13A (Lebanon allowed television cameras but not food to reach expellees). Interestingly, the expellees' media holiday ended abruptly in March 1993, when a group of Muslims, including two of Palestinian origin (Nidal A. Ayyad and Mohammed A. Salameh), were arrested as suspects in the World Trade Center bombing in New York. After the bombing, coverage changed from sympathetic to objective. Letters from Alex Safian, Senior Researcher, CAMERA National Media Resource Center, to Justus Weiner (Nov. 9 & Dec. 11, 1994) (on file with author); See Allison Mitchell, Letter Explained Motive in Bombing, Officials Now Say, N.Y. Times, Mar. 28, 1993, at 1, 26.
182. David Rudge, 46-Year Old Brought Back to Hebron; Sick Deported to Hospitalized in Zone; 9 More Mistaken Deportees to Return, Jerusalem Post, Jan. 10, 1993, at 1. In an interview while in Lebanon, Rantisi called Palestinian peace negotiators "traitors" who "would not escape the people's reckoning." Khaled Abu Toameh & Isabel Kershner, Watching His Words, Jerusalem Rep., Sep. 23, 1993, at 38. Other expellees were involved in terrorism, although generally in an organizational or command capacity rather than as gunners. Nu'usukh, for example, planned planting explosives on buses within Israel. In November 1992, he gave the bombs to a student of his at the college in Umm-al-Fahm, but the attempt failed.
one's family, friends, home and work. In an effort to mitigate the situation, Israel provided the 415 Hamas activists with warm clothing, blankets, food and money.183 They were transported as close as possible to their preferred destination, the Bekaa Valley in Lebanon, where fundamentalist Islamic organizations operate.

Only after the activists were several kilometers inside Lebanese territory was their progress toward the Bekaa Valley stopped by the Lebanese Army, apparently under Syrian184 and PLO pressure. Instead of assisting them to disperse in Lebanon elsewhere in the Arab world, as Lebanon had done in the past to other alleged Palestinian terrorists expelled by Israel, it chose to exploit their situation for propaganda gains.185

Islamic militants in Lebanon established contacts with the expellees immediately upon their arrival in southern Lebanon, where they participated in military training, including demolitions courses.186 From the very first day, the Lebanese Islamic groups supplied the expellees with encouragement and physical comfort, including generators, beds, clothing, portable televisions and radios, and cellular telephones.187

Worldwide Reaction

The United States State Department has long held the position that article 49 of the Fourth Geneva Convention absolutely forbids all expulsions from the Administered Areas.188 It maintained this position regardless of the acts prompting Israeli conduct and of the limited number of persons expelled.

The expulsions of December 1992 were factually different from previous Israeli expulsions in two ways. The number of persons involved was far greater than in prior cases, and the expulsions were for a fixed duration of no more than two years, rather than for an indeterminate period. Despite these changed circumstances, the U.S. delegate to the United Nations, Edward Perkins, remarked during the Security Council debate, "[w]e have consistently condemned deportation as we do now . . . ."189 In the same sentence, however, he balanced this criticism by adding: "[w]e cannot ignore and must equally strongly condemn the brutal murders of Israelis by Hamas which preceded these deportations, and is part of a deliberate strategy to undermine the peace process.190 Thereafter, when Security Council Resolution 799 came to a vote, the United States supported the Resolution.191 In Resolution 799, the United Nations Security Council reiterated its longstanding position that expulsions by Israel violate article 49 of the Fourth Geneva Convention.192 This action in all likelihood represented the official views of the overwhelming majority of United Nations member states.

The newly inaugurated U.S. president, Bill Clinton, was wary of a political clash with Israel over the expulsions.193 Moreover, he did not wish to offend the Arab states by casting a veto in the Security Council.194 Hence, the Clinton administration was able to negotiate a compromise, whereby Israel pledged to allow the phased early return of 183. Gaulan, supra note 51, at 2.
186. The new prime minister of Lebanon, Raifig Alharrir, used this opportunity to take a firm stance in the exercise of sovereignty, something Lebanon had seldom demonstrated since the outbreak of its civil war in 1975. Avidan, supra note 184, at 18.
188. Id.
191. Id.
192. Id.
193. See supra notes 98–110 and accompanying text.
of the expellees, and the U.S. agreed to veto any U.N. resolution calling for sanctions against Israel. 196

C.  

Humanitarian Issues

It is important to consider Israel’s legal alternatives to expulsion. Israel has chosen not to use the full array of security measures allowed under the Fourth Geneva Convention, including the most extreme of them — the death penalty. 197 When weighed against Israel’s legal options in attempting to obstruct the designs of militants associated with Islamic-inspired terrorist groups, namely, the imposition of the death penalty, very long terms of solitary confinement in prison or the expanded use of administrative detention, expulsion is arguably the most humane measure available. 198

Much of the local Palestinian population has suffered under the terror of Islamic fundamentalist extremists. Since the start of the intifada on December 7, 1987, more than 898 Arab residents of the Administered Areas have been murdered by intifada militants. 199 None of the victims was given the opportunity to appeal his “sentence.” None of them had the assistance of an attorney of his choice. None of the victims’ cases were taken up by human rights organizations. 200 Hamas death squads frequently abducted innocent local residents from their homes. Members of the squads brutally interrogated them, employing torture to extract a “confession” that they had “collaborated” with the Israeli authorities (or had acted contrary to strict Islamic morality). After “confessing,” the victim was usually murdered. Often, the bodies were mutilated and dumped on the doorsteps of the victim’s family. 201

It is appropriate to note, in this regard, that many countries deport individuals for various reasons, creating hardship often on a far greater scale than that experienced by Islamic militants expelled by Israel. In the United Kingdom, for example, persons suspected of involvement in terrorism have been routinely deported (or, in the local terminology, “excluded”) pursuant to the Prevention of Terrorism (Temporary Provisions) Acts of 1974, 1976, 1984, 1986 and 1989. 202 These acts empowered the British government to exclude from Great Britain, Northern Ireland, or the United Kingdom as a whole, persons involved in terrorism associated with the conflict over the future of Northern Ireland. The affected person must stay abroad for three years unless the order is revoked earlier, and even after a full three years the order can be renewed. As of the end of 1984, 327 individuals were excluded from Great Britain and another seven persons excluded from

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196 Slater, supra note 194. Israel’s reluctance to place the United States, its primary ally and diplomatic and financial backer, in the awkward position of contemplating a veto of an otherwise unanimous U.N. Security Council resolution, would likely militate against future use of expulsion. American understanding of Israeli predilection may have increased during the following months, as the harsh reality of Islamic-inspired terrorism demonstrated its worldwide reach on U.S. soil. In addition, the widely publicized World Trade Center bombing and the January 1993 shooting outside the CIA headquarters, senior Hamas operatives were discovered in a number of U.S. cities. See William M. Carley, Teen’s Murder Reveals U.S. Group Suspected of Ties to Abu Nidal, Wall St. J., May 16, 1993, at 1; Stephen Emerson, A Terrorist Network is America’s, N.Y. Times, April 7, 1994, at 1; Yosef Bodansky, Target America & the West Terrorism Today 312, 395–72 (1993).


198 Id. at 279–80.

199 See Telephone interview with IDF Spokesman, supra note 143. Although the intifada is in its sixth year and numerous human rights organizations have prepared dozens of reports about Israel’s conduct, only one report has been devoted to a critical analysis of the widespread “infrads” violence. See B’Tselem, supra note 29, at 13 n.4


201 See B’Tselem, supra note 29, at 101–43. The B’Tselem investigation found that the signing of the Israel-PLO Declaration of Principles intensified the Hamas-PLO dispute, one element of which remained the question of how to deal with collaborators. In the month following the signing of the declaration, at least twelve Palestinians were killed by other Palestinians, the majority by Hamas activists. Clearly, then, Hamas takes a principled stand — overt, consistent and unrelenting — in favor of killing collaborators.

... The leaders of the Palestinian organizations are well aware of the severe infringements of human rights that their colleagues are causing by using torture to interrogate suspected collaborators and executing them without trial.

Id. at 179–80.

Northern Ireland. A person who receives an exclusion order has only one avenue of appeal — within seven days, he may make a representation in writing to the secretary of state setting out the grounds for his objection and requesting an interview. The period during which such an appeal must be made is extended to fourteen days where he has consented to be excluded and is petitioning from outside the area of his exclusion. In considering these orders, British authorities do not take into account family and community ties.

In addition, during the Gulf War, the United Kingdom and the United States deported many Iraqis and other Arab nationals. Between September 1990 and January 1991, the United Kingdom deported 176 individuals, including 164 Iraqis. In 1991, the British Court of Appeals refused to consider the appeal of a Lebanese Palestinian deported by the authorities in the wake of the Gulf War, despite the fact that the secretary of state had not provided any grounds for the deportation.

No attempt will be made to analogize Israel’s action to widely practiced mass deportations. In recent years, 250,000 Palestinians were forced out of Kuwait after the Gulf War, close to a million Yemenis deported from Saudi Arabia during the same period, 500,000 Tuaregs driven from their homes in Mali into the desert or neighboring Mauritania during 1993–1994, nearly two million black Sudanese expelled by the Islamist government militia, more than four million refugees expelled from various parts of the former Yugoslavia during “ethnic cleansing” campaigns, and thousands more transferred in Armenia, Akhkhazia, Afghanistan, Rwanda and Bulgaria.

The worldwide governmental criticism of Israel’s use of expulsion appears hypocritical in the absence of commensurate, and in some cases any, condemnation of these far more egregious cases. Despite the vocal opposition of many governments to Israel’s action, not one stepped forward to admit these individuals, even on a temporary basis. This is true as well of the Muslim and Arab states in the region, which, despite their rhetorical commitment to Islamic unity, are more aware than most Western governments of the grave threat the Islamic militants would constitute to domestic public order. Recent upheavals in Algeria, Lebanon, Egypt and Jordan amply demonstrate the problematic nature of Islamic fundamentalist terrorism. In fact, every secular government from North Africa to the Persian Gulf faces a challenge from Islamic fundamentalists.

VI. CONCLUSIONS AND OUTLOOK

A. Legal Issues and Political Consequences

Joshua Schoffman, the attorney for the Association for Civil Rights in Israel who challenged the temporary expulsions before the high court, expressed satisfaction with the Supreme Court’s decision. Undoubtedly, he had reason to be pleased with the result. Although the expellees were not immediately returned from Lebanon, a new temporary form of expulsion, stripped of procedural due process safeguards, was declared invalid as violative of principles of administrative law and natural justice. Interestingly, the government

204. Id. at 248–52 (text of 1984 act).
205. Id. at 72.
206. Iraq attempted to organize a major anti-Western terrorist force and threatened attacks against U.S. and other installations worldwide. Bodzany, supra note 196, at 101–02. Arafat claimed control over the anticipated attacks and characterized them as part of the Palestinian contribution to the pan-Arab struggle led by Saddam Hussein. Id. at 108. On January 14, 1991, Arafat urged his followers to strike deep in the West and all over the world. Id. Ultimately, some 500 attacks, half directed at American targets, were carried out between mid-January and mid-March 1991. Id. at 111.
210. See Mark Fitz, Blacks and Arabs Clash in Forgotten African Lente, Jerusalem Post, Aug. 17, 1984, at 5.
213. See supra note 132.
214. Nelan, supra note 133.
also expressed gratification, as the practice of immediate individual expulsion in exceptional circumstances was upheld under DER Regulation 112. Moreover, the Hamas and Islamic Jihad militants would have to appeal their orders from a safe distance.

Regarding the legality of expulsion under local and international law, there will continue to be two opposing positions. One is embodied in the jurisprudence of the Israeli Supreme Court, most notably in the Affo, Kawasme I and Kawasme II cases, as well as the \textit{Hamas Decision}, supported by a number of scholars, who recognize the legality of expulsion both as a matter of Israeli administrative law and as a matter of international law, provided appropriate safeguards are employed. Nearly all other governments, including that of the United States, the United Nations and some scholars, including Yoram Dinstein\footnote{Dinstein, supra note 77.} and Theodor Meron,\footnote{Theodore Meron, \textit{Human Rights and Humanitarian Norms as Customary Law} (1989).} take the opposing view.

Given the doctrine adhered to by Israel, that international treaties are not self-executing (that is, that the Knesset must enact legislation before a treaty may be enforced by the courts), the refusal of the Israel High Court of Justice to apply the Fourth Geneva Convention on a de jure basis is reasonable. However, if one accepts the view that Israel’s voluntary commitment to comply with the humanitarian provisions of the Fourth Geneva Convention is binding upon the state, then the Court’s allowance of individual expulsion orders is justifiable if one looks beyond the literal language of article 49, at other provisions of the Fourth Geneva Convention, legislative history and principles of interpretation of treaties. Perhaps the fairest assessment of this difficult issue, on which distinguished scholars have differed, is to say that it is part of the perplexing legal inheritance of the positive law tradition. An answer to this riddle may emerge from the Israeli-Palestinian peace process, which, if successful, may obviate the need for further expulsions.

B. Effect on the Peace Process

It is possible to question, but impossible to answer with certainty, if the temporary expulsion of the Hamas and Islamic Jihad militants facilitated the Israel-PLO Declaration of Principles on Interim Self-Government Arrangements and the Agreement on the Gaza Strip and the Jericho Area. In the immediate aftermath of the expulsions, the government of Prime Minister Rabin rendered itself immune from criticism that it was soft on terrorism, an immunity which translated into greater freedom in policymaking. Also, it can be argued that disrupting the leadership of these two anti-peace organizations for a year decreased the frequency of their lethal attacks on Israelis. The public’s willingness to pursue compromise with the PLO was likely augmented as a consequence. The threat of “intrafada” assassination was likewise dramatically reduced, thereby diminishing the risks run by those Palestinians who rallied behind PLO Chairman Arafat in his diplomatic efforts.

However, after the expulsions, many new recruits joined Hamas and Islamic Jihad, widely perceived as being the most militant opposition to Israel.\footnote{Carnon, \textit{supra} note 181 (expellees “were becoming folk heroes”).} Also, the expellees received training in explosives and further indoctrination while in southern Lebanon, with predictable consequences following their return.\footnote{Rudge & Keizer, \textit{supra} note 67; Hela\textit{, supra note 133 (Hamas activists learned suicide bombing techniques while in Lebanon).}}

Interestingly, it is possible to contend that were it not for the growth of Hamas and Islamic Jihad, the two parties to the Israel-PLO Declaration of Principles would never have come together.\footnote{David Makovsky, author of a book on the secret Israel-PLO negotiations in Oslo, believes that the aftermath of the expulsions helped encourage the Israeli government to negotiate with the PLO, as Israeli officials discovered that the expulsions strengthened the connections between Palestinians in the Administered Areas and Hamas. Telephone Interview with David Makovsky, \textit{supra} note 9.} The popularity of the Islamic radicals may have convinced Prime Minister Rabin that it was time to strike a deal with the PLO, a lesser evil, while there still was a PLO.\footnote{Nelan, \textit{supra} note 132.} Concurrently, PLO Chairman Yassir Arafat, sensing that the radicals were gaining on him, may have decided that the best way to stay in control was to recognize tangible achievements from his decades-long domination of Palestinian politics, by reaching a compromise with Israel.\footnote{Nelan, \textit{supra} note 132.}

An alternate assessment is that the expulsions interfered with the progress of the eighth and ninth rounds of Washington talks, by putting the Palestinian delegates in a dilemma — while they may have
opposed the views of the Islamic extremists, they found it necessary to publicly champion their return to avoid being accused of a sell-out. 224 Indeed, despite the Palestinian delegates' energetic public stance favoring return of the expellees, a Hamas underground leaflet that was distributed in the Administered Areas in May 1993 called for the assassination of the members of the pro-PLO delegation for renewing the talks in Washington without first securing the return of the expellees. 225 Privately, however, the PLO began its secret talks with Israel in January 1994. 226 These talks, which commenced in London and were moved to Oslo, paved the way for the Declaration of Principles. In the author's view, however, had the two rounds of talks in Washington been more productive, Israel would never have found it necessary to forsake the bilateral talks for the secret, direct talks with the PLO that were simultaneously underway in Oslo.

C. Outlook

Israel's government clearly miscalculated. While Lebanon had no obligation to permit entry to the expellees, never before had it refused to absorb individuals in similar circumstances. Although previous expulsions by Israel had been protested by the Palestinians, the International Committee of the Red Cross, and the United Nations General Assembly and Security Council, these protests had always subsided relatively quickly. 227 Anticipating that worldwide antipathy for Islamic militants would limit the resistance to a fait accompli, the government of Prime Minister Rabin was rudely awakened to its error.

As worldwide opposition grew, unity within Prime Minister Rabin's governing coalition as to the wisdom of the expulsion began to crumble. In the initial vote in the Ministerial Committee for National Security, only Justice Minister David Libai abstained. A short time later, however, the rank and file of the Meretz, the left-wing coalition partner of Prime Minister Rabin's Labor Party, began expressing disapproval of their minister's action. 228 This dissent was mirrored in the Knesset when the cabinet vote over resupplying the expellees was narrowly won (8 to 6) by the prime minister. 229

Members of the opposition parties in the Knesset lambasted the apparent ineptitude of the government's implementation of a policy they had long urged it to adopt. 230 Other contentious issues, such as the source of the leak that enabled the Association for Civil Rights in Israel to initially block the expulsion, the role of the Supreme Court and the reason why a few expellees were sent into exile by mistake, were widely debated by the Israeli public. 231

Despite the decision of the Supreme Court upholding the expulsions as individual orders, in the author's opinion it appears highly unlikely that the government of Prime Minister Rabin will again resort to expulsion. 232 This assessment should hold, regardless of the threat or provocation, for both temporary and indeterminate expulsion orders. The international political cost simply appears to be too great. Even a possible future government led by the right-of-center Likud Party, which currently leads the opposition in the Knesset,

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223. Bar-Illan, supra note 222, at 56.
231. Dan Eisenberg, Rabin Blames Lebanon for March by Hamas; Government Easily Defeats No-Confidence Bid, Jerusalem Post, Dec. 22, 1992, at 1; Dan Eisenberg, Rabin: Deal does not contradict expulsion decision, Jerusalem Post, Feb. 4, 1993, at 1. A Labor Party Knesset member observed:
(1) The majority [of Israelis] would say it was a good move, but politically it went wrong. They should have been put in small groups in many different places in the Middle East. Putting all 400 in one spot in bad weather with the whole world media following them was a bad move technically.

Tikkun, supra note 3, at 38.
233. See Clyde Haberman, Israel Seizes Hundreds of Arabs Linked to Militant Group, N.Y. Times, Apr. 20, 1994, at A7 (describing arrest of Hamas activists following series of lethal attacks by Hamas on Israeli buses, noting that there was no talk of expelling any of the persons arrested). After reaching an agreement with the United States which permitted the expellees to return earlier than initially ordered, Prime Minister Rabin maintained that despite the compromise, Israel preserved its right to expel dangerous individuals. Clyde Haberman, Deportees' Return Defended By Rabin, N.Y. Times, Feb. 4, 1993, at A7.
would likely draw similar conclusions from the bitter political price that Israel paid for expelling the Islamic militants. Simply put, the measure's security value appears to be outweighed by its political repercussions. Moreover, though Hamas has not changed its objectives and methods, the number of Palestinians under Israeli jurisdiction has been reduced significantly since Israel turned over Gaza and Jericho to the Palestinian Authority in May 1994. As the peace process continues, more of the Palestinian population will come under the jurisdiction of Palestinian self-rule, and Israel will be unlikely to have the opportunity to expel those who threaten the security of Israel.

Although the Palestinian Authority, led by the PLO, is committed to act against Hamas violence, it, too, is unlikely to use expulsions. The PLO has been reluctant to interfere with Hamas' anti-Israel violence, even by disarming Islamic extremists under the jurisdiction of the Palestinian Authority. The primary response of the Palestinian police has been to make noisy public arrests of Hamas and Islamic Jihad activists following their murder of Israelis, which are followed by muted releases. Hamas members have even been recruited to the Palestinian police, apparently in an effort to broaden support for Arafat and his administration.

There are several possible options Israel could take in its fight against Hamas and Islamic Jihad, each with its own particular legal/political/strategic calculus. Legal measures such as longer prison terms, greater use of administrative detention or house demolition and the institution of the death penalty, have a certain utility, insofar as they may be appropriate punishments and effective deterrents. But, as in the case of expulsion, these measures may have prohibitive political costs, both in the domestic and international contexts. Another option is to increase intelligence gathering in order to prevent attacks from occurring in the first place. This is difficult due to the closed nature of Islamic organizations and the IDP's withdrawal from areas where many of the attacks originate. Closing mosques, schools and social clubs which are centers of Islamic fundamentalist recruitment and incitement would be another option, but of course Israel would be criticized for abrogating freedom of religion and association. Sharply curtailing the number of Palestinians who commute daily to their jobs in Israel has in the past temporarily reduced the incidence of terrorism, but this option would be self-defeating in the long run as increased unemployment and poverty would enhance the popularity of the Islamic extremist organizations. Certainly other countries could take steps to intercept Hamas and Islamic Jihad funds which flow from its supporters in the West and Arab states to operatives in the Gaza Strip and elsewhere. Whatever measures Israel decides to implement, whether they are some combination of the ones mentioned above or other thus far untested options, they will have to be both creative and efficient. If the activities of Hamas and Islamic Jihad go unchecked, not only may the peace process be derailed, but dozens, if

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234. However, former Israeli President Chaim Herzog, who is considered somewhat left of center, raised the possibility of expelling entire families of suicide bombers in the aftermath of a string of such attacks by Hamas and Islamic Jihad. Chaim Herzog, Excess Zeal Can Be Dangerous, Jerusalem Post, Jan. 27, 1996, at 6.

235. Chairman Arafat's historic September 9, 1995, letter to Prime Minister Rabin, which made possible the breakthrough in relations, states:

The PLO renounces terrorism and other acts of violence, and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators.


The term "PLO elements" lacks precision. While it clearly commits Arafat to exercise authority over members of the PLO to prevent them from engaging in terror, his commitment was vague regarding other Palestinian factions. As to attacks by Hamas, for example, Arafat appears only to have agreed to speak out publicly against violence and terrorism and work to create positive conditions for Israeli-Palestinian co-existence.

236. Lamis Lahoud, PA Believed Unlikely to Crack Down on Hamas in Response to Bombing, Jerusalem Post, Oct. 21, 1994, at 2; Lisa Beyor, A Wary Brotherhood, Time, June 20, 1994, at 34.
not hundreds, more Israeli and Palestinian lives will be lost.