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Israel's Expulsion of Islamic Militants
to Southern Lebanon

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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 Hamas¹ and Islamic Jihad militants from the Administered Areas² on December 16, 1992. Surprisingly, the Labor-led coalition of Prime Minister Yitzhak Rabin acted with the backing of the left-wing Meretz Party.³ For diverse reasons, virtually the entire political spectrum supported the government's dramatic edict. Moreover, immediately following the

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1. "Hamas" is an Arabic acronym meaning "zeal" or "fervor." The movement's full Arabic name is *Harakat al-Muqawama al-Islamiyya*, which means "the Islamic Resistance Movement." Boaz Ganor, *The Islamic Resistance Movement Hamas*, Matara, Nov. 20, 1991, at 1 (Isr. Gov't Press Office trans.).

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 1951, i.e. Judea, Samaria and Gaza.

3. The cabinet voted 14-0, with one abstention, to authorize the expulsions. David Makovsky, *Deportation Punishes Hamas, Assists the PLO*, Jerusalem Post, Dec. 18, 1992, at 4. The minister of energy, Professor Amnon Rubinstein, a civil libertarian who had formerly been the dean of the Tel Aviv University Law School, was among those who backed the government's action. David Bedein, *Hamas — the Israeli Dilemma*, Midstream, Jan. 1993, at 9. Minister of Education Shulamit Aloni, of the Citizens' Rights Movement, also supported the government's action. Ali Jarbawi & Roger Heacock, *The Deportations and the Palestinian-Israeli Negotiations*, 23(3) J. Palestine Stud. 32, 36 (1993). These Meretz Party leaders backed Prime Minister Rabin in the expectation that weakening Hamas would provide a boost for the PLO, Meretz's erstwhile peace partner. Yossi Melman, *Hamas: When a Former Client Becomes an Implacable Enemy*, L.A. Times, Dec. 20, 1992, at M2; see *Roundtable on the Expulsions and the Peace Process: Divisions Within the Israeli Peace Movement*, Tikkun, March/April 1993, at 33.

murders of seven Israeli soldiers and police officers by Hamas over twelve days,⁴ public opinion polls indicated that the government's action had the support of more than ninety percent of the population.⁵

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.⁶ 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.⁷

Palestinians reacted with anger and alarm.⁸ The Palestinian delegation to the peace talks then being held in Washington announced its withdrawal until Israel reversed the expulsion.⁹ Once the initial

shock wore off, however, the Palestinians found that the Israeli action had a marked unifying effect on their fragmented body politic.¹⁰ 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.¹¹ Although unintended by the Rabin government, the expulsions enhanced the popularity of Hamas among the Palestinians.¹²

The expulsion, which was unanimously upheld by the Israel Supreme Court, sitting as the High Court of Justice, in the landmark *Hamas Decision*,¹³ 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 415 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

4. B'Tselem, *Deportation of Palestinians From the Occupied Territories and the Mass Deportation of December 1992*, at 41 (1993).

5. Doug Struck, *Pragmatic Rabin Gambles on Expulsions to Strengthen Hand Politically*, Baltimore Sun, Dec. 21, 1992, at 3A.

6. Herb Keinon, *Israel Departs Over 400 Inciters; Court Issues 5-2 Ruling on Deporting Activists*, Jerusalem Post, Dec. 18, 1992, at 1. See Association for Civil Rights in Israel v. Minister of Defence, (HCJ 5973/92) (Jan. 28, 1993) (unpublished) (unofficial translation on file with the Isr. Gov't Press Office) [*Hamas Decision*]. In Israel, the government is represented in court proceedings by the State Attorney or one of the staff attorneys in the state attorney's office. State Attorney Dorit Beinisch and her staff attorneys, however, took the unusual step of refusing to represent the government in defending its action on the expulsions. In their place Attorney General Yosef Harish personally represented the government before the Supreme Court. David Clayman & Sylvia Horwitz, *Terror, Deportation and Justice*, Cong. Monthly, Feb. 1993, at 3-4.

7. Keinon, *supra* note 6.

8. Jarbawi & Heacock, *supra* note 3, at 38-40. 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: 1967-1982*, at 104 (1985). 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, expellees were sent to Jordan. *Id.* at 105-06. This attitude explains the utility of the measure. If the security service can threaten a repeat offender with expulsion, he may reconsider his subversive activities.

9. Clyde Haberman, *400 Arabs Ousted by Israel Are Mired in Frozen Limbo*, N.Y. Times, Dec. 19, 1993, at A5. However, in February the Palestinian delegation to the secret Oslo talks agreed to meet with its Israeli counterpart, despite the expellees' not having returned. Telephone Interview with David Makovsky, Reporter, *The Jerusalem Post* (Sept. 20, 1994); Barbara Victor, *A Voice of Reason: Hanan Ashrawi and Peace in*

the Middle East 216 (1994).

10. Jarbawi & Heacock, *supra* note 3, at 37-38. See also Robert Satloff, *Between the Deportations and the Peace Process*, reprinted in *Peacewatch: The Arab-Israeli Peace Process and U.S. Policy 9* (Judith Wrubel ed., 1994) (the expulsions transformed "the visceral feud between the fundamentalist Hamas and the nationalist PLO . . . into a *cause célèbre* for all Palestinians."). The PLO and Hamas issued for the first time a joint leaflet, calling for a *jihad* (or Holy War) against Israel. Bill Hutman, *Joint Hamas, PLO Handbill Calls for 'Jihad' Against Israel*, Jerusalem Post, Dec. 21, 1992, at 1.

11. The Palestinian Nat'l Covenant, art. 26, reprinted in *The Israel-Arab Reader* 370 (Walter Laqueur & Barry Rubin eds., 1984).

12. Joel Greenberg, *Oustings by Israel Raise Arab Militants' Esteem*, N.Y. Times, Dec. 20, 1992, at 14.

13. *Hamas Decision*, *supra* note 6.

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).¹⁴ 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,¹⁵ while Arabs were expelled to Lebanon, Syria and the Seychelles.¹⁶ The regulations continued in force during

14. The Defence (Emergency) Regulations, 1945, Palestine Gazette No. 1442, at 1058-98 (Supp. No. 2, 1945) [hereinafter DER]. In 1922, following the defeat of the Ottoman Turks in World War I, Great Britain was named the mandatory power for Palestine by the League of Nations. Great Britain continued to exercise sovereignty over what is now Israel and the Administered Areas until the Mandate concluded in 1948, pursuant to the United Nations partition resolution establishing the State of Israel. See generally *The Israel-Arab Reader* (Walter Laqueur & Barry Rubin eds., 1984). The DER were enacted by the British Mandatory authorities to control Arab and Jewish disturbances in Palestine. See Baruch Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945*, 8 *Isr. Y.B. on Hum. Rts.* 296 (1978) (historical development of DER). The regulations gave wide powers to the high commissioner of the Mandate to, for example, place individuals in administrative detention, prevent publication of books and impose curfews. The regulations were frequently criticized by leaders of the pre-state Jewish community. B'Tselem, *supra* note 4, at 15.

15. See B'Tselem, *supra* note 4, at 15.

16. *Id.*; Yuval Arnon-Ohana & Arye Yodfat, *The PLO: Strategy and Tactics* 20 (1981).

the Jordanian occupation of Judea and Samaria¹⁷ and the Egyptian occupation of the Gaza Strip.¹⁸

As a consequence of Israel's exercise of self-defense in the Six Day War of 1967, the Administered Areas came under Israeli control.¹⁹ The DER were brought in compliance with the Fourth Geneva Convention with the issuance of the Order Concerning Security Provisions of 1970.²⁰ Issued in parallel form in the different parts of the Administered Areas, this order sets forth a criminal code for security offenses.²¹ As required by international law, application of

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 513/85; 514/85), 39(3) *Piskei Din* [P.D.] 645 (1985). When Judea and Samaria were purportedly annexed by Jordan, it was declared that all existing enactments would remain in force. Annexation of the West Bank Law, No. 1093, 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, 141-43 (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 97/79), 33(3) *P.D.* 309, 315 (1979), excerpted in *Judicial Decisions Supreme Court of Israel*, 9 *Isr. Y.B. on Hum. Rts.* 309, 312-13 (1979); *Kawasme v. Minister of Defence* (HCJ 693/80), 35(1) *P.D.* 617 (1981), excerpted in *Judicial Decisions Supreme Court of Israel*, 11 *Isr. Y.B. on Hum. Rts.* 349 (1981) [*Kawasme 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 8, at 96.

19. See William V. O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, in 2 *The Arab-Israel Conflict* 75 (John N. Moore ed., 1974) (under international law, the Israeli initiation of hostilities in 1967 was a legitimate act of anticipatory self-defense).

20. IDF, Order No. 378, Judea and Samaria — 1970, 21 Proclamations, Orders and Appointments of the IDF's Command 733-65, partially translated in N. Shapiro-Libai, *Territories Administered by Israel, Military Proclamations, Orders and Judicial Decisions: Extracts*, 1 *Isr. Y.B. on Hum. Rts.* 419, 421 (1971).

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 orders²⁶ and

22. Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277 [hereinafter Hague Regulations]. See *infra* text accompanying notes 125-28.

23. Uzi Amit-Kohn et al., Israel, the "Intifada" and the Rule of Law 101 (1993) (IDF publication making distinction between preventive and punitive sanctions states that expulsion, administrative detention and restriction orders are deemed "preventive measures which are intended to enhance public safety and order by removing the person in question from a location in which he is expected or deemed likely to commit acts damaging thereto . . .") (emphasis in original).

24. *Id.* at 132.

25. Nasrallah v. IDF Commander in Judea and Samaria (HCJ 814/88), 43(2) P.D. 265, 271 (1989).

26. Regulation 110 of the DER empowers the IDF regional commander to issue a restriction order for a period not exceeding one year (three- or six-month orders are more typical), where necessary to ensure the welfare of the public, the defense of Israel, the maintenance of public order or the suppression of any uprising, rebellion or disturbance. In the Administered Areas, these orders are issued pursuant to the Order Concerning Security Provisions of 1970 (No. 378), as amended. Isr. Ministry of Defense, Proclamations Orders and Appointments (Judea and Samaria) No. 378, art. 85, in *Legislation in Judea and Samaria* 5, 14 (Zvi H. Preisler ed., 1987). The recipient of a restriction order is informed of the reasons for the order and has the right to petition the appeals committee that hears challenges that are brought against restriction orders. *Id.* If the appeal is rejected, the appellant may petition the Israel Supreme Court, sitting as the High Court of Justice. *Id.*

The restriction order is the least severe of the administrative legal measures used by Israel in the Areas. A restriction order may prohibit a person from leaving his town or village unless he obtains written permission from the police. It may also require the individual to report to a police station at specified times. Thus, restriction orders are used, *inter alia*, to prevent members of a terrorist organization from meeting.

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

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. & Int'l Relations Dep't, Isr. Ministry of Justice, to members of Amnesty Int'l, at 1 (1989) (file no. 164.1339 to 549, on file with Hum. Rts. & Int'l 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 safety measures concerning protected persons, it may, at 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. 3516, 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. Reicin, *Preventive Detention, Curfews, 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. & Int'l Relations Dep't, Isr. Ministry of Justice, Israel's Use of Administrative Detention, at 3 (Aug. 31, 1993) (file no. 164.1-549(2), on file with Hum. Rts. & Int'l Relations Dep't, Isr. Ministry of Justice, Jerusalem).

28. Sahin v. Regional Commander of the Gaza District (HCJ 159/84), 39(1) P.D. 309 (1984). See Itzhak Zamir, Attorney General, Deportation Orders in the Administered Areas, at 2 (Feb. 15, 1986) (file no. 164.1-260, on file with Isr. Ministry of Justice).

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, fifty-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

43. Reicin, *supra* note 27, at 534.

44. B'Tselem, *supra* note 4, at 17.

45. *Id.* (citing Defence Minister Ariel Sharon, 95 *Knesset Record* 1145 (1983); Palestine Hum. Rts. Info. Campaign, *A History of Expulsion* (unpublished press release, Dec. 17, 1992)); *see also* Israel Nat'l Section of the Int'l Commission of Jurists, *supra* note 36, at 5-12.

46. *See* Info. Dep't of IDF, *Monthly Statistics on Injuries to Israelis* (Mar. 1991) [hereinafter *Monthly Statistics*].

47. Amit-Kohn et al., *supra* note 23, at 131.

48. Dan Margalit, *Rabin: Gerushim — Mediniut Ye'ilah LeShmirat Seder BaShtahim* (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: Tzimtzanu Et Onesh Ha'girush, Safek Im Hu Ya'il* [Rabin: We've Reduced Use of the Punishment of Deportation, Doubts Whether it's Efficient], Hadashot, Jan. 25, 1989, at 3.

50. Struck, *supra* note 5, at 1; *see* Letter from Tamar Gaulan, 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* Amit-Kohn et al., *supra* note 23, at 134-35.

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. B'Tselem, *supra* note 4, at 97.

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 Yatom, 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.

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

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.

62. Clyde Haberman, *Rabin Declares the Deportation Crisis at an End*, N.Y. Times, Feb. 4, 1993, at 7.

63. IDF Spokesman's Office, *The Return of Hamas and Islamic Jihad Operatives: Background Information 3* (unpublished press release, Sept. 9, 1993).

64. *Id.*

65. *Id.*

66. David Bedein, *Rabin's Hamas Compromise*, Midstream, Feb. 1993, at 4.

67. David Rudge & Yigal Kotzer, *PM: We won't let deportees threaten security*, Jerusalem Post, Dec. 16, 1993, at 1.

68. *Id.*

69. IDF Spokesman's Office, *supra* note 63, at 4.

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 41,808 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

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).

71. Gerhard von Glahn, *Law Among Nations* 15-22 (5th ed. 1986).

72. *Id.* at 682. 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 LRTWC 13 (1949).

73. See, e.g., B'Tselem, *supra* note 4, at 14.

74. Ernst Fraenkel, *Military Occupation and the Rule of Law* 129-31 (1944).

75. Georg Schwarzenberger, 2 *International Law* 165-66 (1968).

legal measure can effectively assure security.³¹ 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.³²

Although it was canceled in Israel proper,³³ 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.³⁴

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."³⁵

Under Israeli practice, before any expulsion order is issued, all the classified and unclassified material³⁶ relevant to the case are submitted for review by senior lawyers at the Ministry of Justice. Each

31. *Id.*

32. B'Tselem, *supra* note 4, at 26-29.

33. Emergency Powers (Detentions) Act, 1979, §12, 33 Laws of the State of Israel [L.S.I.] 89, 92 (1979).

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).

expulsion order is issued only upon the approval of the attorney general.³⁷

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.³⁸ That person may, according to the DER, petition an advisory committee, which can recommend that the order be set aside.³⁹ Under Israeli practice in effect since the first *Kawasme*⁴⁰ 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.⁴¹

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.⁴² Furthermore, the appellant may petition the Supreme Court, sitting as the High Court of Justice to override the decision of

37. Isr. Ministry of Foreign Affairs, 1989 State Department Human Rights Report 6 (1990) (unpublished response on file with Isr. Ministry of Foreign Affairs, Jerusalem).

38. Orders are generally of indefinite duration. In individual instances expelled persons have petitioned for readmission and their request has been granted. See Jon Immanuel, *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), 35(3) P.D. 113 (1981) [*Kawasme I.*] 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, 656-57 (1979).

41. *Kawasme I.*, 35(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.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

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.

62. Clyde Haberman, *Rabin Declares the Deportation Crisis at an End*, N.Y. Times, Feb. 4, 1993, at 7.

63. IDF Spokesman's Office, *The Return of Hamas and Islamic Jihad Operatives: Background Information 3* (unpublished press release, Sept. 9, 1993).

64. *Id.*

65. *Id.*

66. David Bedein, *Rabin's Hamas Compromise*, Midstream, Feb. 1993, at 4.

67. David Rudge & Yigal Kotzer, *PM: We won't let deportees threaten security*, Jerusalem Post, Dec. 16, 1993, at 1.

68. *Id.*

69. IDF Spokesman's Office, *supra* note 63, at 4.

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 41,808 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

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).

71. Gerhard von Glahn, *Law Among Nations* 15-22 (5th ed. 1986).

72. *Id.* at 682. 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 LRTWC 13 (1949).

73. See, e.g., B'Tselem, *supra* note 4, at 14.

74. Ernst Fraenkel, *Military Occupation and the Rule of Law* 129-31 (1944).

75. Georg Schwarzenberger, 2 *International Law* 165-66 (1968).

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."⁷⁶

Some authorities, including Yoram Dinstein⁷⁷ and Chaim Cohen,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,⁷⁹ William O'Brien,⁸⁰ Irwin Cotler⁸¹ and Thomas S. Kuttner⁸² 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,

76. Fourth Geneva Convention, *supra* note 27, art. 49, 6 U.S.T. at 3548.

77. Yoram Dinstein, *Girush Roshay Ha'arim MeYehuda* [Deportation of the Mayors from Judea], 8 Tel Aviv U. L. Rev. 158, 169 (1981).

78. Chaim Cohen, *Girush KeHalaha* [Proper Deportation], 2 Mishpat U'Mimshal 471 (1993).

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).

80. William V. O'Brien, *Law and Morality in Israel's War with the PLO* 256 (1991).

81. Irwin Cotler, *Deportations and the Law*, Jerusalem Post, Jan. 17, 1988, at 8.

82. Thomas S. Kuttner, *Israel and the West Bank: Aspects of the Law of Belligerent Occupation*, 7 Isr. Y.B. on Hum. Rts. 166, 213-17 (1977).

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.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."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."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).⁸⁶

Nevertheless, on several occasions since 1967, Israeli governments have voluntarily undertaken to comply with the humanitarian provisions⁸⁷ of the Geneva Conventions. The legal

83. Oscar M. Uhler et al., *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 278-79 (Jean S. Pictet ed., 1958).

84. See Stone, *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).

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 deeds 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.

86. *Affo v. IDF Commander of Judea and Samaria*, (HCJ 785/87; 845/87; 27/88) 42(2) P.D. 4, 38 (1988); *The Ruling of the Israel High Court of Justice on the Expulsion of Palestinian Agitators* 36 (1988) [hereinafter *Affo* translation] (unofficial translation) (available from Hum. Rts. & Int'l Relations Dep't, Isr. Ministry of Justice). See *infra* text accompanying notes 111-16.

87. Amit-Kohn et al., *supra* note 23, 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.

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.⁸⁸ 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.⁸⁹ 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.⁹⁰

The Israeli Supreme Court, in the cases of *Abu Awad*,⁹¹ *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.⁹²

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.⁹³ This

88. *Kawasme II*, *supra* note 17, at 627-28.

89. *Affo*, 42(2) P.D. at 77-78.

90. *Id.* at 67.

91. *Abu Awad v. Regional Commander of Judea and Samaria* (HCJ 97/79), 33(3) P.D. 309 (1979).

92. *Id.* at 316, 317.

93. *Affo* translation, *supra* note 86, at 30-31.

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."⁹⁴ 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.⁹⁵

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.⁹⁶ 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.⁹⁷

The United Nations Security Council holds the view that the Fourth Geneva Convention applies on a *de jure* basis to the Administered Areas.⁹⁸ The United Nations Security Council⁹⁹ and the General Assembly¹⁰⁰ have, on a number of occasions, urged Israel

94. Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, 340 (1969).

95. *Affo* translation, *supra* note 86, at 26 (emphasis in original).

96. *Affo v. IDF Commander of Judea and Samaria*, (HCJ 785/87; 845/87; 27/88) 42(2) P.D. 4, 32 (1988).

97. See Ruth Lapidot, *Expulsion of Civilians From Areas Under Israeli Control in 1967: Some Legal Issues*, 2 Eur. J. Int'l L. 97, 106-08 (1993).

98. See, e.g., S.C. Res. 726, U.N. SCOR, 47th Sess., 3026th mtg. at 5, U.N. Doc. S/Res/726 (1992); S.C. Res. 694, U.N. SCOR, 46th Sess., 2989th mtg. at 2, U.N. Doc. S/Res/694 (1991).

99. See, e.g., S.C. Res. 681, U.N. SCOR, 45th Sess., 2970th mtg. at 8, U.N. Doc. S/Res/681 (1990); S.C. Res. 641, U.N. SCOR, 44th Sess., 2883d mtg. at 14, U.N. Doc. S/Res/641 (1989); S.C. Res. 607, U.N. SCOR, 43d Sess., 2780th mtg. at 1, U.N. Doc. S/Res/607 (1988).

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 72, U.N. Doc. A/Res/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.¹⁰¹ This longstanding position found its most recent expression in Resolution 799, adopted on December 18, 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.¹⁰² Two days later, Israel rejected the Resolution as "one-sided" and charged that it ignored Israel's security concerns.¹⁰³ Most Israelis and many other observers¹⁰⁴ 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.¹⁰⁵ Even with the repeal

condition that his functions be "limited to municipal matters." A similar resolution was passed on December 11, 1980, demanding that Israel rescind expulsion orders against two Palestinian mayors accused of incitement against the state and supporting the PLO. G.A. Res. 35/122D, U.N. GAOR, 35th Sess., Supp. No. 48, at 89, 91, U.N. Doc. A/Res/35/122 (1980); see von Glahn, *supra* note 71, at 697-98; Cohen, *supra* note 8, at 105.

101. On January 5, 1988, the U.N. Security Council unanimously called on Israel not to implement expulsion orders. The United States supported this resolution but later abstained from a subsequent resolution urging Israel to rescind the expulsion orders. See S.C. Res. 607, *supra* note 99; S.C. Res. 608, U.N. SCOR, 43d Sess., 2781st mtg. at 2, U.N. Doc. S/Res/608 (1988).

102. S.C. Res. 799, U.N. SCOR, 47th Sess., 3151st mtg. at 6, U.N. Doc. S/Res/799 (1992).

103. Clyde Haberman, *Six Palestinians Killed by Troops*, N.Y. Times, Dec. 20, 1992, at 15.

104. One observer noted that "[b]y equating Israel's temporary deportations with very permanent ethnic massacres in Bosnia, or with Iraq's territorial marauding, persecution of Kurds and continuous military defiance of the U.N., the U.N. members and the Secretary General are conniving in a distortion of history, reality and morality." A.M. Rosenthal, *Dances With Wolves*, N.Y. Times, Jan. 29, 1993, at A27; see also Mortimer B. Zuckerman, *The PLO as Image Maker*, U.S. News and World Rep., Jan. 22, 1990, at 76.

105. See Harris O. Schoenberg, *A Mandate for Terror: The United Nations and the PLO 251-327* (1989). Another critic of the world body noted:

In spite of the multitude of wars, atrocities, and terrorist acts, many of which have been sponsored by terrorist states, the UN Security Council has still managed to devote some 30 percent of its meetings, and a full one-third of its resolutions to Israel. Strangely, until the time of the recent Gulf War, the Security Council had never warned, censured, or condemned a single Arab state. . . . To this point the UN Security Council has issued 31 expressions of concern, seven warnings, and 49 condemnations against Israel.

of the resolution equating Zionism with racism in 1991,¹⁰⁶ the U.N. still has evidenced a less than objective attitude towards Israel.¹⁰⁷

In late January 1993, the PLO circulated a draft resolution in the Security Council which sought to impose broad sanctions against Israel.¹⁰⁸ 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.¹⁰⁹ Pursuant to this understanding, all the expellees would be permitted to return by December 15, 1993.¹¹⁰

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.¹¹¹ Moreover, although Israel has signed and ratified the Fourth Geneva Convention,¹¹² 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.¹¹³ For this reason, expellees, as private individuals, would not have

J. Gerrish, *The Myth of UN Fairness to Israel*, 17 Jerusalem Dispatch 2 (1990).

106. G.A. Res. 46/86, U.N. GAOR, 46th Sess., U.N. Doc. A/Res/46/86 (1991) (repealing G.A. Res. 3379, determining "that Zionism is a form of racism and racial discrimination").

107. Meir Rosenne, *Double Standard*, Jerusalem Post, Jan. 11, 1993, at 6 (noting that the U.N. never condemns violence directed at Jews or Israelis).

108. David Hoffman, *Israel's High Court Lets Expulsions Stand*, Wash. Post, Jan. 29, 1993, at A17.

109. Clyde Haberman, *Israel to Return 100 Palestinians It Had Deported*, N.Y. Times, Feb. 2, 1993, at A1.

110. Rudge & Kotzer, *supra* note 67.

111. *Kawasme II*, *supra* note 17 (opinion of President of the Supreme Court Landau); *id.* at 647-48 (Kahan, J., concurring). But see *id.* at 638-45 (Cohn, J., dissenting).

112. See 30(1) Kitvei Amana at 559 (ratification by Knesset).

113. See Nissim Bar-Yaakov, *The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip*, 24 Israel L. Rev. 485, 504-05 (1990). The Geneva Convention has been incorporated into the standing orders governing the conduct of soldiers serving in the Administered Areas. Israel Defence Forces, General Staff Orders, Appendices No. 61-62 (1955) & Order 33.01333 (July 30, 1982).

standing to rely on article 49 in the domestic courts of Israel,¹¹⁴ since Israel, like Britain,¹¹⁵ follows the rule that constitutive treaties are not automatically incorporated into municipal law even though they bind the state in the international arena.¹¹⁶

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."¹¹⁷ 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.

Affo v. IDF Commander of Judea and Samaria (HCJ 785/87; 845/87; 27/88), 42(2) P.D. 4, 70, 76 (1988). See also *Guardian of Absentee Property v. Samra* (Civ. App. 25/55, 145/55), 10 P.D. 1825 (1956).

115. *Mortensen v. Peters*, 8 Sess. Cas. (J.) 93, 99 (H.C.J. 1906); *Chung Chi Cheung v. King*, 1939 App. Cas. 160, 167-68 (P.C. 1938).

116. N. Feinberg, *Amanot Deklarativiyot ve Amanot Konstitutiviyot BeMishpat haBeynluemi* [Declaratory and Constitutive Treaties in International Law], 24 HaPraklit 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).

117. Fourth Geneva Convention, *supra* note 27, art. 5, 6 U.S.T. at 3520-21.

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.¹¹⁸

Additionally, article 147 declares that the "unlawful deportation or transfer . . . of a protected person" is a "grave breach" of the Convention.¹¹⁹ The use of the word "unlawful" implies that some expulsions are permitted under the Fourth Geneva Convention, despite the apparently categorical text of article 49.¹²⁰

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.¹²¹ 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.* art. 64, 6 U.S.T. at 3558.

119. *Id.* art. 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. 9, 3d Sess. 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-United Nations ambassador Chaim Herzog. Bar-Yaakov, *supra* note 113, at 486-87.

government's administration of the territories would be in accordance with the humanitarian provisions of the convention on a de facto basis.¹²²

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.¹²³ 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.¹²⁴

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.¹²⁵ 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*.¹²⁶

Many security experts believe that expulsion serves to preserve public order and safety.¹²⁷ 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.¹²⁸

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

122. In 1971, Attorney General (currently President of the Supreme Court) Meir Shamgar stated the government's position before the International Committee of the Red Cross:

The territorial position is thus *sui generis*, and the Israeli government tried before to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Geneva Convention to the territories under consideration, which, as stated, does not in my opinion apply to these territories, and decided to act *de facto* in accordance with the humanitarian provisions of the Convention.

Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 Isr. Y.B. on Hum. Rts. 262, 266 (1971). See also Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 Isr. L. Rev. 279 (1968). But see Thomas W. Mallison & Sally V. Mallison, *The Palestine Problem in International Law and World Order* 253 (1986).

123. Since article 2(2) of the Fourth Geneva Convention postulates a reversionary right of the legitimate ousted sovereign, and since Jordan gained possession of Judea and Samaria and Egypt of Gaza through the illegal use of force, no part of the Administered Areas has had a legitimate sovereign since the end of the British Mandate in 1948. See Blum, *supra* note 122, at 293-94. 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 Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 Harv. Int'l L.J. 1 (1973).

124. See Dinstein, *supra* note 77, at 167-68; Oliver M. Ribbelink, *Palestinian Higher Education in the West Bank: Academic Freedom and International Law*, Amsterdam Int'l Stud. 12, 17 (1990).

125. U.N. SCOR, 42d Sess., 2774th mtg. at 74, U.N. Doc. S/PV. 2744 (1987); U.N. SCOR, 43d Sess., 2780th mtg. at 11, U.N. Doc. S/PV. 2780 (1988).

126. Hague Regulations, *supra* note 22 (emphasis added).

127. See, e.g., the statement submitted by the government to the Court in the Hamas case, excerpted in B'Tselem, *supra* note 4, at 95-108. The statement argued that the escalating chain of Hamas and Islamic Jihad attacks was leading to a situation where personal security and public order were severely deteriorating, requiring swift and drastic action. The security officials advised the government that "only deportation of people significantly and continuously active in the infrastructure of the Hamas and Islamic Jihad organizations, in large numbers and immediately, would constitute an effective and appropriate response to the security threats posed by these terrorist organizations and the process endangering the public security and order both in the [Administered Areas and Israel]." *Id.* at 98.

128. See Abu Awad v. Regional Commander of Judea and Samaria (HCJ 97/79), 33(3) P.D. 309 (1979), excerpted in *Judicial Decisions Supreme Court of Israel*, 9 Isr. Y.B. on Hum. Rts. 343 (1979). This argument was originally advanced by Meir Shamgar, current president of the Supreme Court, while he was still the attorney general of Israel. Shamgar, *supra* note 122, at 275.

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."¹²⁹ Hamas formed as an offshoot of the Muslim Brotherhood.¹³⁰ The Hamas Covenant, published in August 1988, calls for the liberation of Palestine in its entirety, "from the sea [Mediterranean] to the river [Jordan]."¹³¹ Its ultimate goal is a great Islamic state throughout the Middle East, without any national

boundaries.¹³² 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.¹³³ Article 13

132. Bruce W. Nelan, *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 (1993). 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 23. From October 1993 to April 1994, 50 militants were sentenced to death by Egypt. Cairo, *Better and Worse*, Economist, Apr. 9, 1994, at 48.

In 1979, when fundamentalist revolutionaries took over the main mosque in Mecca, the Saudi government recaptured the mosque, killing hundreds and later beheading 63 surviving rebels. John K. Cooley, *Payback: America's Long War in the Middle East* 59-62 (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. Youssef M. Ibrahim, *Algeria is Seen Edging Toward Breakup*, 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 1982, 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, *Cauldron of Turmoil: America in the Middle East* 127-28 (1992). Moreover, bombings by Islamic-inspired terrorists have reached as far from the Middle East as New York, Bombay, London, Panama and Buenos Aires. *The Return of Terror*, Newsweek, Aug. 8, 1994, at 24.

133. 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., *Rabin: 2 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. 20, 1994, at 14.

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 Ganor, *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.

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 989 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.*

135. Rafi Israeli, *Islam's Hamas Cry*, Nativ, Mar. 1993, translated in Isr. Gov't Press Office, Selections from the Hebrew Press, at 4 (May 4, 1993). Israeli has noted that, unlike the PLO Covenant, which reads as an amendable political document, the Hamas Covenant "creates the impression of reflecting universal, eternal and Allah-given truths that are not liable to alterations, debates and questions." Raphael Israeli, *Fundamentalist Islam and Israel: Essays in Interpretation* 129 (1993).

136. Rafi Israeli, *Islam's Hamas Cry*, *supra* note 135.

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

138. Iran budgeted \$30 million for Hamas during 1993. Ehud Ya'ari, *The Metamorphosis of Hamas*, Jerusalem Rep., Jan. 14, 1993, at 24, 25. See also Elie Rekhess, *Iran Cozies Up to Hamas*, Jerusalem Post, Dec. 23, 1992, at 6.

139. Jon Immanuel, *Terrorist Given Life for Role in Soldiers' Deaths*, Jerusalem Post, Oct. 12, 1991, at 12. See also Michal Sela, *Hamas Leaders Accused in Murders of Sasportas and Sa'adon Go On Trial*, Jerusalem Post, Dec. 25, 1989, at 2.

140. Ganor, *supra* note 1, at 13-14. The Supreme Court found that "[a]cts 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.

141. Ganor, *supra* note 1, at 13-14; see *Hamas Decision*, *supra* note 6, at 5; Danny Rubinstein, *The Hamas Alternative to the Peace Process*, Spectrum, Mar. 1993, at 14, 15.

142. Although their relative popularity varies in different parts of the Administered Areas, overall about 20-50% of the population supports Hamas, with most of the remainder identifying with either Fatah or the rejectionist factions of the PLO. Jon Immanuel, *PLO's Pain is Hamas's Gain*, Jerusalem Post, Sept. 29, 1991, at 5; see also Rafi Israeli, *supra* note 135, at 2.

143. Telephone Interview with IDF Spokesman's Office (Oct. 16, 1994). The murder of Palestinians by Palestinians is not an unprecedented phenomenon. During the 1936-1939 Arab Revolt against the British Mandate, approximately 4500 Palestinians were assassinated by Palestinians. See, e.g., Conor Cruise O'Brien, *The Siege: The Saga of Israel and Zionism* 240 (1986). After establishment of the PLO in 1964, violence became widespread, as various individuals and factions attempted to assert control. Between 1967 and 1971, internecine hostilities frequently erupted among the Palestinian population in the Gaza Strip, the victims of which were nearly always branded as "collaborators" with Israel. It is estimated that during those four years, more than one thousand Gazans were murdered or wounded by their fellow Palestinians. Arafat's deputy, Salah Khalef (a.k.a. Abu Iyad), in his book *Without a Homeland*, admitted to ordering the death of approximately 20 collaborators during the decade 1967-1977. Boaz Ganor, *Dispensing Justice in the Territories: The Murder of "Collaborators"*, Matara, Nov. 22, 1991, at 2 (Isr. Gov't Press Office trans.).

144. See Isr. Gov't Press Office, Selections from the Hebrew Press, *Danger of Breakup Threatening United Leadership of Uprising* 1-2 (July 15, 1990). Following the expulsions, in January 1993, the PLO's representative in France fled the country claiming that he was being hunted by a Hamas hit squad. *Upside-Down Justice*, Wall St. J., Jan. 28, 1993, at A14.

145. See *Masters of Double Talk*, Time, Aug. 7, 1989, at 30, 31; *Human Rights Ignored*, Jerusalem Post, May 21, 1991, at 4.

146. Prime Minister Yitzhak Rabin, Speech to Knesset (Dec. 21, 1992) (*excerpts in Press Bull. from Isr. Gov't Press Office*) (on file with the author). Another source reported that Hamas was responsible for the killing of 17 Israelis from June 1992 until the expulsions, as well as almost 50 murders of Palestinians deemed "collaborators." Melman, *supra* note 3.

girl and elderly people over the age of seventy.¹⁴⁷ In the week preceding the December 1992 expulsions, Hamas's *Iz al-Din al-Qassim*¹⁴⁸ death squads had claimed "credit" for the shooting deaths of five Israeli soldiers and the kidnapping and murder of the border policeman Nissim Toledano.¹⁴⁹ Islamic Jihad¹⁵⁰ also claimed responsibility for one of these killings.¹⁵¹

Although it is much smaller than Hamas, Islamic Jihad is one of the most complex and dangerous of the Palestinian terrorist organizations.¹⁵² It has many groups in various Middle Eastern countries and some in Europe as well.¹⁵³ Like Hamas, Islamic Jihad stayed outside the umbrella group called the Unified National

Leadership of the Uprising during the intifada.¹⁵⁴ It is also strongly opposed to the peace process.¹⁵⁵ Islamic Jihad maintains the view that war against Israel and Jews in general is an essential prerequisite toward accomplishing the goals of Islam,¹⁵⁶ and indoctrinates its youth to carry out suicide attacks by such methods as car bombs.¹⁵⁷ 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.¹⁵⁸

Through their violent acts and strident ideology, the militants of Hamas and Islamic Jihad have captured the imagination of the Palestinian masses.¹⁵⁹

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,¹⁶⁰ 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.¹⁶¹ 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.¹⁶² The Court referred to instances where it ruled that

147. *Hamas Decision*, *supra* note 6, at 5.

148. *Iz al-Din al-Qassim* was a Syrian Moslem, 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 scaffolds and engaged in prattle. You must know that nothing will save us but our arms." See Pryce-Jones, *supra* note 134, at 195. He launched a jihad against the British mandatory 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 forces in his memory. See Rafi Israeli, Press Conf. 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 Yassin, 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 knifing. Amit-Kohn et al., *supra* note 23, at 134-35.

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 Allah to continue in our Jihad, to escalate it, to develop it, and to surprise the enemy with our blessed military operations.

Id. at 135.

150. See Boaz Ganor, *A Cancer Called the Islamic Jihad*, Matara, 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.*

151. Jarbawi & Heacock, *supra* note 3, at 1.

152. See generally Ganor, *supra* note 150.

153. *Id.*

154. *Id.* at 7.

155. Isr. Gov't Press Office, Jerusalem, Daily Press Survey, at 1, translation of Guy Bechor, *Islamic Jihad for Palestine*, Ha'aretz, Mar. 2, 1993.

156. *Id.*

157. *Id.*

158. *Id.* at 9. Suicide attacks continue to be a mainstay of Islamic Jihad. David Makovsky and Raine Marcus, *At Least 19 Dead in Beit Lid Bomb Attack*, Jerusalem Post, Jan. 23, 1995, at 1.

159. Danny Rubenstein, *Anshei Ashaf BaShtahim Alulim LeHigarar Ahar Pe'ilut 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 Administered Areas 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 Bedein, *supra* note 3, at 9.

160. 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. Yahav, *supra* note 17, at 10.

161. *Hamas Decision*, *supra* note 6, at 17-18.

162. *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.¹⁶⁴ However, the Court stated that it need not determine whether this 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 112.¹⁶⁸ 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. 626 (1990).

164. *Id.* at 25. While it is possible to view this balancing test as sophistry, it served as an ingenious approach that avoided throwing open the floodgates to easy temporary expulsions while at the same time conforming 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 Keinson et al., *Deportees Turn Down Offer of Legal Aid, Family Visits*, *Jerusalem Post*, Jan. 26, 1993, at 1.

171. *HaMoked Opposed Deportations — December 1992*, *HaMoked* (HaMoked Center for the Defense of the Individual, Jerusalem, Israel), Aug. 1993, at 2.

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 a hearing. Cohen argued that international pressure should not be a proper consideration in arriving at a decision on due process claims.¹⁷⁴ In any case, Cohen states, mass expulsions would be most likely to spark widespread violence, not the expulsion of any particular individual. Yet, though the Court stressed that each expulsion was permissible only on an individual basis, the decision appeared to justify the lack of prior hearings by considering the possibility of violence following a mass expulsion.¹⁷⁵ 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 a hearing against the danger of violence. In Cohen's view, this contradiction means the Court impliedly justified mass expulsions.¹⁷⁶ Yet this approach did reflect the underlying facts, and the Court made clear that the military commander had no authority to issue the mass expulsion order he issued in this case.¹⁷⁷

Another viewpoint recommends that the Court apply the "least restrictive alternative" test.¹⁷⁸ Under this test, the Court is to consider whether the challenged action results in the least restrictive limitation on the personal freedom of the petitioner in reaching the security goal.¹⁷⁹ 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 there were no other options available and that the expulsion order was "necessary."¹⁸⁰

174. *Id.* at 473.

175. *Id.* at 474.

176. *Id.*

177. *Hamas Decision*, *supra* note 6, at 27.

178. Mark Allison, *The Hamas Deportation: Israel's Response to Terrorism During the Middle East Peace Process*, 9 Am. U. J. Int'l L. & Pol'y (forthcoming 1994) (manuscript at 40, on file with author).

179. *Id.* at 41.

180. Irwin Cotler, *This case will reverberate for years*, Jerusalem Post, Jan. 1993, at 4.

V. HUMANITARIAN CONSIDERATIONS AND WORLDWIDE REACTION

The Expellees in Lebanon

Contrary to their portrayal by leading broadcast and print media, the expellees were not a group of pious, innocent men.¹⁸¹ In light of their sympathetic portrayal in the media, Israel belatedly revealed some of the evidence it collected against them. One of the releases was a video tape of the expellees' spokesman, Dr. Abdul Rantisi, exhorting a frenzied mob in Gaza to violence against Jews.¹⁸²

Yet expulsion, even for a temporary period, is a measure that results in a significant amount of suffering, especially separation from

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-Illan, *The Lightning-Speed Rehabilitation of Hamas*, Jerusalem Post, Nov. 11, 1994, at B5; Yigal Carmon, *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 3 (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, 35.

182. David Rudge, *46-Year Old Brought Back to Hebron; Sick Deportee 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 Faisal al-Husseini and Hanan Ashrawi "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 gunmen. Na'uf Takruri, 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-El-Fahm, but the attempt failed. Roni Shaked & Aviva Shavi, *Hamas 236* (1994) (Hebrew original).

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 Beka Valley in Lebanon, where fundamentalist Islamic organizations operate.

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

Islamic militants in Lebanon established contacts with the expellees immediately upon their arrival in southern Lebanon, where they participated in military training, including demolition courses.¹⁸⁷ From the very first day, the Lebanese Islamic groups supplied the expellees with encouragement and physical comforts, including generators, beds, clothing, portable televisions and radios and cellular telephones.¹⁸⁸

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.¹⁸⁹ It maintained this position regardless of the acts prompting Israel's 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 . . ." ¹⁹⁰ 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."¹⁹¹ Thereafter, when Security Council Resolution 799 came to a vote, the United States supported the resolution.¹⁹² In Resolution 799, the United Nations Security Council reiterated its longstanding position that expulsions by Israel violate article 49 of the Fourth Geneva Convention.¹⁹³ 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.¹⁹⁴ Moreover, he did not wish to offend the Arab states by casting a veto in the Security Council.¹⁹⁵ Hence, the Clinton administration was able to negotiate a compromise, whereby Israel pledged to allow the phased early return

183. Gaulan, *supra* note 51, at 2.

184. See Dan Avidan, *The Banishment and the Peace Talks*, Spectrum, Mar. 1993, at 16-17.

185. *Upside Down Justice*, Wall St. J., Jan. 28, 1993, at A14; See Jarbawi & Heacock, *supra* note 3, at 33. Lebanon had previously accepted Israeli expellees. Clyde Haberman, *Israel Expels 400 from Occupied Lands; Lebanese Deploy to Bar Entry of Palestinians*, N.Y. Times, Dec. 18, 1992, at A1.

186. The new prime minister of Lebanon, Rafiq Alharir, 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 17. Syria's calculated cynicism was demonstrated by its coercing Lebanon not to permit the expellees to leave the border area nor to allow the Red Cross to send organized supplies to reach them, although journalists were permitted to visit them regularly. Syria has long aspired to exercise control over Lebanon, and to this end has had Syrian troops in Lebanon since 1975. Since 1988, Syria has consolidated its domination of the Beirut government, which seldom acts independently in its relations with Israel. Pinhas Inbar, *Assad Joins the Card Table, with Lebanon as His Ace*, Jerusalem Post, July 30, 1993, at B2.

187. Rudge & Kotzer, *supra* note 67.

188. *Id.*

189. See, e.g., U.S. Dep't of State, Country Reports on Human Rights Practices for 1988, at 1379 (1989); U.S. Dep't of State, Country Reports on Human Rights Practices for 1990, at 1480 (1991).

190. *Security Council Resolution Slams Expulsion*, Jerusalem Post, Jan. 12, 1993, at 1.

191. *Id.*

192. *Id.*

193. See *supra* notes 98-110 and accompanying text.

194. Robert Slater, *Rabin of Israel 454-55* (rev. ed. 1993).

195. See Lisa Beyer, *No Surrender*, Time, Feb. 8, 1993, at 51.

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 989 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 was taken up by human rights organizations.²⁰⁰ Hamas death squads frequently abducted innocent local residents from

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 predicament 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 to 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 Tie to Abu Nidal*, Wall St. J., May 16, 1993, at 1; Stephen Emerson, *A Terrorist Network in America?*, N.Y. Times, April 7, 1994, at 1; Yossef Bodansky, *Target America & the West*, Terrorism Today 312, 368-72 (1993).

197. Justus R. Weiner, *Human Rights in the Israeli Administered Areas During the Intifada: 1987-1990*, 10 Wisc. Int'l L.J. 185, 252-53 (1992).

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 "intrafada" violence. See B'Tselem, *supra* note 29, at 13 n.8.

200. David Bedein, *Betselem: Can it Condemn "Collaborator Murders"?*, Midstream, July 1993, at 5.

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

201. See B'Tselem, *supra* note 29, at 101-48. The B'Tselem investigation found that

[t]he 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.

202. Prevention of Terrorism (Temporary Provisions) Act, 1974 (Eng.) (renewed and amended in 1976, 1984, 1986, 1989); see also David Booner, *Combatting Terrorism in Great Britain: The Role of Exclusion Orders* 1982 Pub. L. 262. The United Kingdom, speaking on behalf of the European Community, appealed to Israel not to follow through on the ordered expulsions. Haberman, *supra* note 185.

Northern Ireland.²⁰³ 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.²⁰⁴ In considering these orders, British authorities do not take into account family and community ties.²⁰⁵

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.²⁰⁶ 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.²⁰⁷

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;²⁰⁸ close to a million Yemenis deported from Saudi Arabia during the same period;²⁰⁹ 500,000 Tuaregs driven from their homes in Mali into the desert or neighboring Mauritania during 1993–1994;²¹⁰ nearly two million

203. Clive Walker, *The Prevention of Terrorism in British Law* 69–70 (1986).

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. Bodansky, *supra* note 196, at 101–03. 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 200 attacks, half directed at American targets, were carried out between mid-January and mid-March 1991. *Id.* at 111.

207. *R. v. Secretary of State for the Home Dep't (ex parte Cheblak)*, 2 All E.R. 319; 1 W.L.R. 890 (1991). See Eyal Benvenisti, *Girush V'Nishma [Deport, and then Hear]*, 1 Mishpat U'Mimshal 441, 449 (1993).

208. See Ann M. Lesch, *Palestinians in Kuwait*, 20(4) J. Palestine Stud. 42, 53 (1991); see also Rubin, *supra* note 132, at 260.

209. Muhammad Faour, *The Arab World After Desert Storm* 28 (1993).

210. See Mark Fritz, *Blacks and Arabs Clash in Forgotten African Lands*, Jerusalem Post, Aug. 17, 1994, at 5.

black Sudanese expelled by the Islamist government militia,²¹¹ more than four million refugees expelled from various parts of the former Yugoslavia during "ethnic cleansing" campaigns,²¹² and thousands more transferred in Armenia, Abkhazia, 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.²¹³ 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.²¹⁴

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.²¹⁵ 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

211. Clarisse Lucas, *Thousands of Refugees Expelled From Khartoum*, Agence France Press, July 28, 1994, available in LEXIS, Nexis Library, AFP File.

212. James O. Jackson, *The Balkans: Unfinished Business*, Time, June 20, 1994, at 20, 21.

213. See *supra* note 132.

214. Nelan, *supra* note 133.

215. David Hoffman, *Israel's High Court Lets Expulsions Stand*, Wash. Post, Jan. 29, 1993, at A17.

also expressed gratification,²¹⁶ 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 Israel Supreme Court, most notably in the *Affo*, *Kawasme I* and *Kawasme II* cases, as well as the *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 Dinstein²¹⁷ and Theodor Meron,²¹⁸ 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

216. Susan Hattis Rolef, *Deportation Questions Persist*, Jerusalem Post, Feb. 1, 1993, at 6.

217. Dinstein, *supra* note 77.

218. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 46 (1989).

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.²¹⁹ Also, the expellees received training in explosives and further indoctrination while in southern Lebanon, with predictable consequences following their return.²²⁰

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.²²¹ 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.²²² 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.²²³

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

219. Carmon, *supra* note 181 (expellees "were becoming folk heroes").

220. Rudge & Kotzer, *supra* note 67; Helm, *supra* note 133 (Hamas activists learned suicide bombing techniques while in Lebanon).

221. Nelan, *supra* note 132.

222. 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, *supra* note 9.

223. Nelan, *supra* note 132.

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*,²²⁸ 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

224. See Jarbawi & Heacock, *supra* note 3, at 40-44.
 225. *Hamas Calls for the Killing of Negotiators*, Jerusalem Post, May 9, 1993, at 2.
 226. Barbara Victor, *A Voice of Reason: Hanan Ashrawi and Peace in the Middle East* 216 (1994).
 227. Jarbawi & Heacock, *supra* note 3, at 32.
 228. Makovsky, *supra* note 3 (cabinet ministers believed any condemnation of the expulsions would be pro forma).

disapproval of their minister's action.²²⁹ 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.²³⁰

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.²³¹ 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.²³²

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.²³³ 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,

229. Teddy Preuss, *Overkill*, Jerusalem Post, Dec. 22, 1992, at 6; Tikkun, *supra* note 3, at 34-35; Jarbawi & Heacock, *supra* note 3, at 35-37; David Bar-Illan, *The Deportations*, Commentary, Mar. 1993, at 43.

230. Bar-Illan, *supra* note 229, at 36.

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:

[T]he majority [of Israelis] would say it was a good move, but technically 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.

232. Jarbawi & Heacock, *supra* note 4, at 36-37. See also Michael Rotem, *Mistakes in Deportations Blurred the Reason for Them*, Jerusalem Post, Jan. 1, 1993, at 4.

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.²³⁴ 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,²³⁵ 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.²³⁶ 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

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, 1995, at 6.

235. Chairman Arafat's historic September 9, 1993, 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.

Letter of Yassir Arafat to Prime Minister Rabin, Sept. 9, 1993, reprinted in *Isr. Ministry of Foreign Affairs, Declaration of Principles on Interim Self-Government Arrangements* 38 (1993) (emphasis added).

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. Lamia Lahoud, *PA Believed Unlikely to Crack Down on Hamas in Response to Bombing*, Jerusalem Post, Oct. 21, 1994, at 2; Lisa Beyer, *A Wary Brotherhood*, Time, June 20, 1994, at 34.

are followed by muted releases.²³⁷ Hamas members have even been recruited to the Palestinian police, apparently in an effort to broaden support for Arafat and his administration.²³⁸

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 IDF'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.²³⁹ 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

237. Yigal Carmon, *Gaza Comes to Tel Aviv*, Jerusalem Post, Oct. 25, 1994, at 6; but see *Arafat's Police Fire on Islamic Militants in Gaza*, Int'l Herald Tribune, Nov. 19-20, 1994, at 1.

238. Jon Immanuel et al., *Hamas Recruits May Be Common Among Palestinian Police*, Jerusalem Post, Oct. 11, 1994, at 2. The PLO has taken these actions despite its obligation under its agreement with Israel to take all measures necessary to safeguard Israelis. See *Agreement on the Gaza Strip and the Jericho Area*, art. XVIII, May 4, 1994 (on file with Isr. Ministry Foreign Affairs).

239. In January 1995, U.S. President Clinton froze all funds held in U.S. banks by Hamas, Islamic Jihad and other Islamic extremist groups, as well as by two Jewish right-wing extremist organizations. See Hillel Kuttler, *U.S.: We don't favor Rabin*, Jerusalem Post, Jan. 30, 1995, at 2.

not hundreds, more Israeli and Palestinian lives will be lost.