

The Expulsion of Civilians from Areas which came under Israeli Control in 1967: Some Legal Issues

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One of the means resorted to by the Israeli Military Commanders in order to ensure security in the Administered Territories¹ is the expulsion (deportation) of civilians who endanger public order and safety. This measure has aroused much criticism on legal as well as political grounds. It is the purpose of this note to analyze the main legal issues involved from the point of view of both international law and the Israeli legal system. After a short description of the relevant rules of international law, the controversy over their applicability to the territories will be discussed. An examination of the place of the relevant international rules within the Israeli legal system will be followed by an analysis of the controversy surrounding their interpretation.

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¹ This note will deal with the West Bank, i.e. Judea and Samaria, and with the Gaza strip. The name 'West Bank' may imply a connection with Jordan, and the expression 'Judea and Samaria' has been interpreted as referring to historic claims. Therefore, the neutral expression 'Territories' or 'Administered Territories' will be used.

Originally both areas were part of Palestine under the British Mandate, and they were occupied in 1948 by Jordan and Egypt respectively. In 1967 they came under Israeli control as a result of the Six-Day War. The Gaza strip continues to be administered by Israel as an occupied territory, despite the conclusion of the Treaty of Peace between Egypt and Israel in 1979. 18 *International Legal Materials* (1979) 362. The Peace Treaty has not dealt with the status of the Gaza strip ('... without prejudice to the issue of the status of the Gaza strip' Article II) which according to the 1978 Camp David Framework for Peace in the Middle East, 17 *International Legal Materials* (1978) 1466, was to be included in the regime of autonomy which should have been established for the Palestinian inhabitants of the West Bank and Gaza. The continuation of the application of the laws of war and occupation has been sanctioned by Israel's Supreme Court: '... [A]s long as the military authority exercises control in the area, the powers granted to it and the restrictions imposed upon it by virtue of the laws of war, remain in effect, subject, of course, to any arrangement agreed upon by the authorized political bodies.' H. Ct. 102/82, 150/82, 593/82, 690/82, 271/83, *Tsemel et al. v. Minister of Defense et al.* (1988) 42(2) Piskei-Din 4, at 49. An English translation of the last-mentioned judgment has been published in 29 *International Legal Materials* (1990) 139.

As to the West Bank – Judea and Samaria – in 1988 King Hussein declared the disengagement of Jordan from the areas. 27 *International Legal Materials* (1988) 1637. No change has been introduced in the Israeli administration in the wake of this declaration.

This note will not deal with the Eastern neighbourhoods of Jerusalem, which also came under Israeli control in 1967, since they are not administered by the military government: these areas have come under regular Israeli law, jurisdiction and administration in 1967 by virtue of Israel's Law and Administration Ordinance. (Amendment No. 11) Law of 5727-1967 (21 Laws of the State of Israel, authorized translation into English 5727-1966/67, p. 75). On the status of Jerusalem, see, e.g., E. Lauterpacht, *Jerusalem and the Holy Places* (1968).

I. The Relevant Rules of International Law

Under Regulation 43 of the Regulations annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land (No IV), the occupying power is responsible for law and order in the area:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all 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.²

The occupant's powers are, however, restricted *inter alia* by those rules of international law which are intended to protect civilians against certain kinds of harsh treatment. The question is whether these rules prohibit the expulsion of persons whose presence in the area endangers public order and safety. The answer has to be looked for in conventional and customary rules concerning the laws of war and humanitarian law.

The above-mentioned 1907 Hague Regulations do not deal with the subject. Some authors have, however, maintained that, despite this silence, a prohibition of deportations was a 'self-understood rule.'³ It is, however, doubtful to what extent one may assume the existence of a rule to this effect despite the silence of the relevant Convention and of the *travaux préparatoires*, and in the absence of evidence on corresponding state practice.

The main provision dealing with the subject is to be found in Article 49 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No IV). The relevant parts read as follows:

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

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand...⁴

According to Article 147, unlawful deportation or transfer are among those acts which are considered to be grave breaches of the Convention.

The relevant states, i.e. Israel and her neighbours, are parties to this Convention and hence bound by it.⁵ However, thus far Israel has not transformed its provisions into internal law.⁶ Therefore it is important to inquire whether, and to what extent, the rule laid down by the above

² Schindler and Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (3rd ed., 1988) 63, at 88.

³ G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, vol. II: The Law of Armed Conflict* (1968) 228, 227

⁴ Schindler and Toman, *supra* note 2, 495, at 516. The text speaks of forcible transfers and deportation, but in the present Note the expression 'expulsion' will also be used. Interestingly, the various conventions on human rights use the expression expulsion (e.g., Articles 12-13 of the International Covenant on Civil and Political Rights, 1966, Article 3(1) of Protocol IV of 1964 to the European Convention on Human Rights, 1950, Article 22(5) of the American Convention on Human Rights, 1969) whereas in writings about humanitarian law the term 'deportation' is more common.

⁵ Israel, Jordan, Egypt and Syria are parties to the Convention since 1951, 1951, 1952 and 1953 respectively. See Schindler and Toman, *supra* note 2, at 557-562.

⁶ On the need for transformation into the Israeli legal system, see *infra*, section III, text accompanying note 38.

provision is part of customary international law and, as such, part of the Israeli legal system.⁷ As will be shown below, Article 49 has been the subject of differing interpretations.⁸

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) does not introduce any material change in this area and only repeats that deportation or transfer are grave breaches if committed willfully.⁹ Israel has neither signed nor acceded to Protocol I.¹⁰

II. The Controversy over the Applicability of the Fourth Geneva Convention

It thus follows that Article 49 of the 1949 Convention is the main provision to be studied. But a first and preliminary question arises as to whether this Convention does apply at all to the Territories under Israeli control.¹¹ The Government of Israel has maintained that it is doubtful whether these Territories are subject to the provisions of the Convention due to a precondition to its applicability to cases of occupation laid down by the *second* paragraph of Article 2 of the Convention:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of *the territory of a High Contracting Party*, even if the said occupation meets with no armed resistance...¹² [Emphasis added.]

According to the above opinion, since the West Bank and Gaza had been illegally occupied by Jordan and by Egypt respectively in 1948, and the West Bank was illegally annexed by Jordan in 1950, these areas cannot be considered to be part of 'the territory of a High Contracting Party' within the meaning of the second paragraph of the above quoted article.¹³ Moreover, it

⁷ See *infra*, section III, text accompanying note 41.

⁸ See *infra*, section IV.

⁹ Schindler and Toman, *supra* note 2, at 621.

¹⁰ Egypt has merely signed Protocol I, Jordan has signed and ratified it in 1979, and Syria has acceded in 1983, declaring, however, that this 'accession does not in any way constitute recognition of Israel or the establishment of any relations with her in respect of the implementation of the provisions of the said Protocol'. Schindler and Toman, *supra* note 2, at 701-703, 716.

¹¹ This question has been examined very thoroughly by Professor N. Bar-Yaakov in his leading article: 'The Applicability of the Laws of War to Judea and Samaria (The West Bank) and the Gaza Strip', 24 *Israel Law Review* (1990) (forthcoming). A similar question could be raised with regard to the 1907 Hague Regulations (see *ibid.*, and Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967', 84 *AJIL* (1990) 44, at 63, but for the purpose of the subject dealt with in this Note, only the Geneva Convention is relevant.

¹² *Supra* note 4, at 501.

¹³ See Shamgar, 'The Observance of International Law in the Administered Territories', 1 *Israel Yearbook on Human Rights* (1971) 262, at 263; *idem*, 'Legal Concepts and Problems of the Israel Military Government – The Initial Stage', in M. Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects* (1982) 13, at 33. On the status of Jordan on the West Bank, see also Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', 3 *Israel Law Review* (1968) 279. For a very interesting theory on this subject, see Rostow, 'Letter to the Editor in Chief', 84 *AJIL* (1990) 717, at 718-720.

seems that Israel fears that her consent to the applicability of the Fourth Convention would be considered as a recognition of Jordanian or Egyptian sovereignty over the areas.¹⁴

However, Israel decided to act *de facto* in accordance with the humanitarian provisions of the Convention and has made several declarations in international fora to that effect.¹⁵ Moreover, in certain matters Israel even goes beyond the provisions of the Convention, e.g. the non-application of the death penalty in spite of crimes of great cruelty and the granting to the inhabitants of the Territories of the possibility to submit petitions to Israel's Supreme Court against the Government and its officials.¹⁶

Israel's official attitude concerning the non-applicability of the Fourth Geneva Convention has been criticized *inter alia* by the UN Security Council and General Assembly,¹⁷ by the International Committee of the Red Cross,¹⁸ by the United States¹⁹ and by various writers.²⁰ According to Professor A. Roberts, the Convention does apply due to the *first* paragraph of Article 2 (quoted above) which, in his opinion, 'applies when a belligerent occupation begins during war,'²¹ and which does not include a reference to the territory of the High Contracting Party. In addition, he considers Israel's attitude to be inconsistent since 'similar objections could be, but seldom have been, made about the applicability of the Hague Regulations, which contain a similar assumption; namely, that occupied territory is "territory of the hostile state,"'²² or, in the French original: 'territoire de l'état ennemi.' However, according to a detailed analysis undertaken by Professor N. Bar-Yaacov, despite the lack of an express statement on the matter, 'the Government's position regarding the Hague Regulations is identical to its attitude on the applicability of the Geneva Convention.'²³

Lastly, Professor Roberts is of the opinion that there are precedents showing that states have considered the laws on occupation to be applicable 'even in cases that differ in some

¹⁴ M. Shamgar, *supra* note 13, at 37.

¹⁵ For the various statements of the Government of Israel to this effect see Bar-Yaacov, *supra* note 11.

¹⁶ See, e.g., statement by Professor Y.Z. Blum, Israel's Representative to the United Nations, in Security Council Official Records, 34th Year, 2131st mtg; 19 March 1979.

¹⁷ See, e.g., United Nations General Assembly Resolution 43/58 of 6 September 1988, Section B; Security Council Resolution No. 607, of 5 January 1988.

¹⁸ See, e.g., International Committee of the Red Cross, Annual Report (1989) 88.

¹⁹ See, e.g., H.J. Hansel, the legal adviser to the State Department, in 72 *AJIL* (1978) 911, and US Department of State, Country Reports on Human Rights Practices for 1987, 100th Congress, 2nd Session 1189 (1988).

²⁰ The criticism was voiced by some experts in unambiguous terms, and by others more subtly. See, e.g., Roberts, *supra* note 11, at 66; Dinstein, 'The International Law of Belligerent Occupation and Human Rights', 8 *Israel Yearbook on Human Rights* (1978) 105, at 107; Meron, 'West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition', 9 *Israel Yearbook on Human Rights* (1979) 106, at 108-119; idem, 'Applicability of Multilateral Conventions to Occupied Territories', 72 *AJIL* (1978) 542, in note 31, at 548-549; Bothe, 'Belligerent Occupation', in R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law*, (1982) 64, at 65; E. Cohen, *Human Rights in the Israeli-Occupied Territories 1967-1982* (1985) 51-56; idem, 'Justice for Occupied Territory? The Israeli High Court of Justice Paradigm', 24 *Columbia Journal of Transnational Law* (1986) 471, at 497; Boyd, 'The Applicability of International Law to the Occupied Territories', 1 *Israel Yearbook on Human Rights* (1971) 258-261.

²¹ Roberts, *supra* note 11, at 64. See also idem, 'What is a Military Occupation?', 55 *British Year Book of International Law* (1984) 249, at 253. See also The Geneva Conventions of 12 August 1949, Commentary published under the general editorship of J.S. Pictet, IV Geneva Convention (1958) at 21.

²² Roberts, *supra* note 11, at 65.

²³ Bar-Yaacov, *supra* note 11.

respect from the conditions of application spelled out in the Hague Regulations and the Geneva Convention.²⁴ However, it seems that the rejection of the applicability of the Fourth Geneva Convention has rather been the rule and not the exception in the practice of states:

There are, in fact, so many situations in which the applicability of the Geneva Conventions ... has been denied that the not uncommon practice has been rejection of the law, rather than its formal recognition and implementation.²⁵

As to Israel's declaration that it will *de facto* apply the humanitarian provisions of the Fourth Convention, it has not been considered to be a satisfactory solution. First, because Israel has never clarified which provisions she would consider to be of a humanitarian nature.²⁶ Second, the rejection of the formal applicability has allegedly been one of the factors why Israeli courts have been reluctant to apply the provisions of the Convention.²⁷ However, as will be shown later, the question of the formal applicability of the Convention has neither been raised nor contested in the courts, and, to the contrary, the Supreme Court has in fact in many cases been acting as if it were applicable.²⁸ The impediment to its full implementation by the courts stems not from its non-applicability due to the status of the Territories, but from lack of transformation, as will be shown later. Third, the *ex gratia* application 'could be construed as carrying an implication that it [Israel] might unilaterally interpret, or eventually abrogate, its terms.'²⁹ However, disagreement over the interpretation can, and in fact does, arise, irrespective of whether the provisions are applicable *per se* or by a *renvoi* via the unilateral declaration.³⁰

The question may arise whether the provision against expulsion and deportation is of humanitarian nature. Although *prima facie* it has that quality, it may be argued that under certain circumstances the expulsion of a person who constitutes a severe threat and danger to the inhabitants or to the security forces, does not violate any humanitarian principles.³¹

III. The Place of the Relevant International Rules in Israeli Law

Under the legal system applicable in the Territories, deportation orders are issued by virtue of the Defense (Emergency) Regulations, 1945, originally enacted by the British mandatory authorities and still in force in Jordan and in Israel.³² Regulation 112 authorizes the Regional

²⁴ Roberts, *supra* note 11, at 65, and his article 'What is a Military Occupation?' *supra* note 21, at 253.

²⁵ T. Meron, *Human Rights in Internal Strife: Their International Protection* (1987) 43.

²⁶ Roberts, *supra* note 11, at 66. See also Bar-Yaakov, *supra* note 11.

²⁷ Roberts, *supra* note 11, at 66, and *idem*, 'What is a Military Occupation?' *supra* note 21, at 283.

²⁸ See E. Nathan, 'The Powers of Supervision of the High Court of Justice over Military Government', in Shamgar (ed.) *supra* note 13, 109-170, at 114; M. Negbi, *Justice Under Occupation: The Israeli Supreme Court versus the Military Administration in the Occupied Territories* (1981) (in Hebrew).

²⁹ Roberts, *supra* note 11, at 66.

³⁰ On the effect of certain unilateral declarations in international law, see Eastern Greenland case, Permanent Court of International Justice, Series A/B, No. 53, 1933, at 53; *Nuclear Test* cases, 1974 International Court of Justice, Reports, 267, at 472; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*), *ibid.*, (1986) 3, at 130-132; Case Concerning the Frontier Dispute (*Burkina Faso/Mali*), *ibid.* (1986) 554, at 573-74.

³¹ See *infra*, Section III, Statements by Justice G. Bach, text accompanying notes 52 and 53.

³² See Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel* (1981) 67-68.

Commander to deport persons for reasons of security, and Regulation 108 limits this power to cases where the presence of the person to be deported might endanger security. Any person against whom a deportation order has been issued may appeal to a special Board, Regulation 112(8), and to Israel's Supreme Court sitting as a High Court of Justice. The Regional Commander exercises his power to issue deportation orders only in the most extreme cases, where in his opinion no other measures can effectively restore and maintain security in the region. All expulsion orders concern individuals, and there has been no case of mass deportation.

A considerable number of deportation orders have been contested in the Supreme Court.³³ The most detailed opinion on the subject was rendered by an increased bench of five Justices on 10 April 1988 in the case of *Affu et al. v. Commander of the IDF Forces in the West Bank et al.*³⁴

In order that the Court may have authority to deal with a petition against an expulsion on the basis of international law, three conditions have to be fulfilled: first, the rules of

³³ See, e.g., H. Ct. 606/78, 610/78, *Ayyub et al. v. Minister of Defense et al.*, (1979) 33(2) Piskei-Din 113; H. Ct. 97/79, *Abu Awad v. Commander of the Judea and Samaria Region*, (1979) 33(3) Piskei-Din 309; H. Ct. 698/80, *Kawassmeh et al. v. Minister of Defense et al.*, (1981) 35(1) Piskei-Din 617; H. Ct. 629/82, *Mustafa et al. v. Military Commander of the Judea and Samaria Region*, (1983) 37(1) Piskei-Din 158; H. Ct. 513/85, 514/85, *Nazal et al. v. Commander of the IDF Forces in the Judea and Samaria Region*, (1985) 39(3) Piskei-Din 645.

³⁴ H. Ct. 785/87, 845/87, 27/88, (1988) 42(2) Piskei-Din 4-78. For an English translation, see 29 ILM (1990) 139.

occupation must be applicable; second, the relevant rules have to be an integral part of the Israeli legal system; and third, they have to be the kind of rules that bestow upon the individual a right to claim their implementation.³⁵

It has already been mentioned that the question of the applicability of the rules on occupation has neither been raised nor contested in the Court. Instead, the Government has in fact agreed, since the early days of the occupation, that its acts relating to the Territories should be subjected to the judicial review of the Supreme Court under the rules of international law, irrespective of whether they formally apply.

As to the status of the relevant international rules on expulsions within the Israeli legal system, it depends on the general question concerning the place of the law of nations in Israeli law.³⁶ Since Israel has no written constitution nor a general written law on the matter, the relation between international law and Israeli law has been established by judicial precedent, and has been much influenced by the British system. Customary international law is automatically part of the law of the land unless it contradicts an express provision of the laws of Israel.³⁷ Declaratory treaties (i.e. those which are based on customary rules) also are part of the internal legal system by virtue of the custom which they codify. However, constitutive treaties (i.e. those which prescribe new rules), even those to which Israel is a party, and thus bound by them on the international plane, are not automatically part of the law of the land, and their incorporation requires an act of 'transformation' (i.e. an act transforming the international rule into national law), usually an enactment by the Knesset (Israel's parliament) or by an authorized minister.³⁸ There have, nevertheless, been a few cases where non-transformed treaties or even instruments of a non-legally binding nature have been relied upon.³⁹ In addition, a presumption in favour of the compatibility of Israel's laws with her international obligations is applied by the courts.

Turning now to the international law of occupation, the 1907 Hague Regulations are regularly applied by the Supreme Court since they are part of a treaty which to a large extent is considered to constitute a declaratory codification.⁴⁰ However, with regard to the Fourth Geneva Convention the Court has been of the opinion that most of its provisions, including

³⁵ This third condition will not be discussed in this Note since it has not been dealt with by the Court in this context. In American legal terminology, one would say it is the question whether or not the rule is self-executing.

³⁶ Lapidoth, 'International Law Within the Israel Legal System', 24 *Israel Law Review* (1990) (forthcoming).

³⁷ E.g., Cr. Ap. 174/54, *Stampfer v. Attorney General*, (1956) 10 Piskei-Din 5; Cr. Ap. 336/61, *Eichmann v. Attorney General*, (1962) 16 Piskei-Din 2033; H. Ct. 69/81, 493/81, *Abu Itta et al. v. Commander of the Judea and Samaria Region et al.*, (1983) 37(2) Piskei-Din 197.

³⁸ E.g., C. Ap. 25/55, 145/55, 148/55, *Custodian of Absentee Property v. Samarah et al.*, (1956) 10 Piskei-Din 1825; *Reitzok v. Attorney General* (1959) 13 Piskei-Din 859; the *Affu* case, *supra* note 34; H. Ct. 253/88 *Sejdiyah et al. v. Minister of Defense* (1988) 42(3) Piskei-Din 801 (the *Ketsi'ot* case).

The requirement for a specific legislative act of transformation is usually justified by the fact that in Israel the Executive Branch is responsible for the conclusion of treaties and the Legislature plays only a minor role in the process. See Lapidoth, *supra* note 36.

It has, however, been maintained that no act of transformation is needed with regard to treaties concerning the laws of war, but this idea has not been followed by the Court; see Rubin, 'The Adoption of International Treaties into Israel Law by the Courts', 13 *Mishpatim* (1983) 210, at 230, 237, 240-241 (in Hebrew).

³⁹ E.g., C. Ap. 65/67, *Kurtz and Letushinski v. Kirschen*, (1967) 21(2) Piskei-Din 20 and other cases discussed in Lapidoth, *supra* note 36.

⁴⁰ See, e.g., Cr. Ap. 1/48, *Sylvester v. Attorney General*, 1 Pesakim 513; *Aa'reib v. Appeals Tribunal*, (1986) 40(2) Piskei-Din 57; H. Ct. 574/82, *Al Nawar v. Minister of Defense et al.*, (1985) 39(3) Piskei-Din 449. See also references in note 28.

Article 49, are of a constitutive nature and, hence, not part of the law of the land without specific transformation.⁴¹ So far, Israel has not fully transformed the provisions of the Convention into internal law, but nevertheless, according to the Orders of the General Staff of the army, the soldiers have to observe the rules of the four 1949 Geneva Conventions.⁴²

It is rather difficult to decide whether a certain provision of the Fourth Geneva Convention is of a declaratory or constitutive nature. As Professor T. Meron has put it:

[a]ll of the [1949 Geneva] Conventions contain a core of principles (e.g. the Martens clause) that express customary law. Of course, the identification of the various provisions as customary or conventional law presents the greatest difficulties. Neither international law nor scholarly studies provide a comprehensive foundation for identifying those rules in Geneva Convention No IV which are declaratory of pre-existing customary law [footnote omitted].⁴³

Among those who consider the prohibition against deportation to be a customary rule is Pictet's Commentary to the Fourth Geneva Convention which states that '... this point ... may be regarded today as having been embodied in international law.'⁴⁴ In support of this opinion, the Commentary refers to the Charter of the Nuremberg International Military Tribunal of 1945 and to its judgment. However, these texts dealt only with the crimes of the Nazis, and their drafters had in mind the mass deportations for forced labour and extermination; hence no conclusion should be drawn from these texts with regard to individual expulsions for security reasons.

Professor T. Meron is also of the opinion that Article 49 represents a customary rule, but, interestingly, he adds that '[a]lthough it is less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law.'⁴⁵ The author bases his conclusion concerning the customary nature of the provision on the fact that deportations have been universally condemned by the international community, reflecting *opinio juris*, and on the general rule against the expulsion of citizens included in various human rights conventions. He also points out that deportation was already prohibited under Lieber's Code of 1863⁴⁶ which has had a major influence on the development of the laws of war.

The lack of a provision against deportations in the 1907 Hague Regulations is overcome by those who hold the opinion that it is a customary rule by assuming that the silence of the

41 See, e.g., the judgments listed above in notes 33 and 34, and H. Ct. 393/82, *Jamat Askan v. Military Commander in the Judea and Samaria Region et al.*, (1983) 37(4) Piskei-Din 785, and the *Sejdiya* case listed above in note 38.

42 Appendices Nos. 61 and 62 to the General Staff Orders (1955). See also General Staff Orders 33.0133 of 30 July 1982. Moreover, even without transformation, the Supreme Court has in various cases reviewed the acts of the Military Commander in light of the provisions of the Fourth Geneva Convention, see Lapidoth, *supra* note 36.

For a general discussion of legislation implementing the Geneva Conventions, see Bothe, 'The Role of National Law in the Implementation of International Humanitarian Law', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 301.

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

44 Pictet's Commentary, *supra* note 21, at 279.

45 Meron, *supra* note 43, at 48-49

46 Lieber, 'Instructions for the Government of Armies of the United States in the field, promulgated as General Order No. 100 by President Lincoln', 24 April 1863, in Schindler and Toman, *supra* note 2, 3, at 7: 'Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.' Article 23.

Regulations 'was probably because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance.'⁴⁷ This assumption, however, is not convincing with regard to individual expulsions in view of the above remark that 'it is less clear that individual deportation was already prohibited in 1949.'⁴⁸

Some experts have expressed the opinion that the provision in Article 49 is partly declaratory and partly constitutive.⁴⁹

The question has been raised whether the declaration of the Government of Israel that it will implement the humanitarian provisions of the Fourth Geneva Convention has given the courts the authority to request the implementation of those provisions despite the lack of an act of transformation. The opinion of the majority of the Supreme Court, as expressed by President M. Landau, has been that it has no such authority:

The decision of the Government of Israel to comply in practice with the humanitarian provisions of the Fourth Geneva Convention ... is a political decision which does not bear upon the juridical level on which this Court must operate.⁵⁰

However, Justice G. Bach is of a different opinion. He considers that

this is a policy declaration which in principle binds the Government and there may be cases where, in the framework of the rules of administrative law, we will instruct the Government to abide by its commitments. However, each case will be examined according to its circumstances.⁵¹

But, while holding that most of the provisions of the Fourth Geneva Convention are of a humanitarian nature, Justice Bach doubts whether Article 49 fully belongs to that category:

Article 49 of the Convention is indeed primarily of a humanitarian nature, but it seems that this aspect will not prevail when it would prevent, due to its sweeping formulation, the expulsion of individuals whose removal has been decided upon because of their systematic incitement of other residents to acts of violence and because they constitute a severe danger to public order.⁵²

In another case Justice Bach expressed the opinion that the prohibition implied in Article 49 against detaining inhabitants of an occupied area in a detention camp located in the territory of the occupying power was not necessarily under all circumstances (i.e. with regard to 'persons who systematically incite to acts of violence') of a humanitarian nature, but he considered that Article 85 of the Convention which deals with the conditions of detention belongs to that category:

47 Pictet's Commentary, *supra* note 21, at 279.

48 Meron, *supra* note 45.

49 See dissenting opinion of Justice H. Cohn in H. Ct. 628/80, *Kawassmeh et al. v. Minister of Defense et al.*, (1981) 35(1) Piskei-Din 617; Dinstein, 'Expulsion of Mayors from Judea', 8 *Tel Aviv University Law Review (Iyyunei Mishpat)* (1981) 158 (in Hebrew).

50 The *Kawassmeh* case, *supra* note 49, at 627-28.

51 The *Affu* case, *supra* note 34, at 78 (English translation at 179). See also his opinion in the *Sejdiya* case, *supra* note 38.

52 The *Affu* case, at 78 (English translation at 179).

This is undoubtedly a provision of a clearly humanitarian nature, with respect to which, in my opinion, the Government should be requested to carry out its declared policy, namely, that it intends to abide by the humanitarian provisions of the international Conventions.⁵³

IV. The Controversy Concerning the Interpretation of Article 49

Although Israel's Supreme Court has considered itself to be precluded from applying Article 49 because of its conventional nature and lack of transformation, the Court has nevertheless given much thought to the search for the proper interpretation of this provision. Two possible interpretations have been submitted to the Court: either the article prohibits any expulsion, whether individual or collective, for whatever reasons or purpose, or it prohibits only forcible mass deportations for forced labour and similar illegal purposes, as practiced by the Nazis during World War II. The majority of the Court has favoured the second interpretation and has concluded that the expulsion of highly dangerous individuals is not contrary to Article 49. The Court has reached this conclusion since it has been of the opinion that the provision should be interpreted in light of the injustice it was intended to correct and in view of its object, namely, the prevention of the recurrence of the World War II atrocities:

... [T]he purpose which the draftsmen of the Convention had in mind was the protection of the civilian population, which had become a principal victim of modern-day wars, and the adoption of rules which would ensure that civilians would not serve as a target for arbitrary acts and inhuman exploitation. What guided the draftsmen of the Convention were the mass deportations for purposes of extermination, mass population transfers for political or ethnic reasons or for forced labour. This is the 'legislative purpose' and this is the material context.⁵⁴

The majority of the Court, led by President M. Shamgar, applied the teleological interpretation after examining the rules of interpretation of Israeli law and of international law. The Court was of the opinion that Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties permit a state to interpret treaties in view of their background and their object.⁵⁵ Moreover, the Court adopted Professor G.J. Starke's opinion that different parts of a treaty should 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 upon a party's sovereignty.⁵⁶ The Court found support for its interpretation in the context, namely, in the fact that the second paragraph of Article 49 deals with evacuation of a civilian population, and the two paragraphs are linked by the word 'nevertheless' (see text *supra*).⁵⁷

According to the majority, due to the broad definition of 'protected person' in Article 4, the adoption of a different interpretation for Article 49, i.e. one that would also prohibit individual expulsion for security reasons, would lead to absurd results since it would also include a

⁵³ The *Sejdiya* case, *supra* note 38, at 832.

⁵⁴ The *Affu* case, at 28 (English translation at 152). In Pictet's Commentary (*supra* note 44) it is also explained, that this was the reason for the adoption of the provision, at 378-279. In fact, many authors have dealt with deportations with World War II atrocities in mind, see, e.g., Oppenheimer-Lauterpacht, *International Law: A Treatise, vol. II: Disputes, War and Neutrality*, 7th ed. (1952) 441-443; Ch. Rousseau, *Le droit des conflits armés* (1983) 158-159.

⁵⁵ The *Affu* case, at 17 and 32 (English translation at 145 and 154)

⁵⁶ *Ibid.*, at 33 (English translation at 155).

⁵⁷ *Ibid.*, at 28 (English translation at 152).

prohibition on the expulsion of a person that had entered the area illegally, and would even be an obstacle to extradition.⁵⁸

The Court rejected the interpretation favoured in Pictet's Commentary: 'The prohibition is absolute and allows of no exceptions apart from those stipulated in paragraph 2 ...'⁵⁹ and relied on Professor Julius Stone's opinion which limits the prohibition in 'Article 49 to situations at least remotely similar to those contemplated by the draftsmen, namely, the Nazi World War II practices of large-scale transfers of population, whether by mass transfer or transfer of many individuals, to more hostile or dangerous environments, for torture, extermination or slave labour.'⁶⁰

The express reference in the Article to 'individual ... forcible transfers' did not change the Court's attitude: the majority considered that these expressions also referred to the World War II atrocities since the mass deportations were performed on the basis of individual summons.⁶¹ As to the words 'regardless of their motive,' the Court was of the opinion that they referred to the various motives and pretexts put forward by the Nazis in order to give the mass deportations a semblance of legitimacy.⁶²

Deputy President Ms. Ben-Porat underlined the need to interpret Article 49 in a manner which would not prevent the occupation authorities from fulfilling their obligation to ensure public order and safety in accordance with Regulation 43 of the 1907 Hague Regulations.⁶³

The teleological method of interpretation adopted by the Court has been criticized by various writers who consider it to be contrary to the rules of interpretation applicable in international law.⁶⁴

One of the members of the Supreme Court, Justice Bach, favoured a broader interpretation for the prohibition included in Article 49. In his opinion,

[t]he language of Article 49 is unequivocal and explicit. The combination of the words '*Individual or mass forcible transfers as well as deportations*' in conjunction with the phrase '*regardless of their motive*', (emphasis added), admits, in my opinion, no room to doubt that the article applies not only to mass deportations, but also to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional – 'regardless of their motive'.⁶⁵

He came to this conclusion since in his opinion

58 Ibid., at 29-31 (English translation at 152-153). On the question of the relationship between Article 49 and extradition, see M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts* (1982) 693.

59 Pictet's Commentary, *supra* note 21, at 279; the *Affu* case, at 31 (English translation at 154).

60 J. Stone, *No Peace No War in the Middle East* (1969) 17; the *Affu* case, at 23 and 31 (English translation at 149 and 154).

61 The *Affu* case, at 28 (English translation at 152).

62 Ibid., p. 32-33 (English translation at 154-155).

63 Ibid., p. 67 (English translation at 175).

64 See, e.g., Dinstein, 'Deportation from Administered Territories', 13 *Tel Aviv University Law Review (Iyyunei Mishpat)* (1988) 403 (in Hebrew); E. Gnesa, *Die von Israel besetzten Gebiete im Völkerrecht – Eine besetzungsrechtliche Analyse* (1981) 181; Meron, *supra* note 43. These authors are of the opinion, that since Article 49 is clear, there is no need nor authority to have resort to the *travaux préparatoires* and other supplementary means of interpretation, if they lead to a different interpretation.

65 The *Affu* case, *supra* note 34, at 70 (English translation at 177).

[w]e must not deviate by way of interpretation from the clear and simple meaning of the words of an enactment when the language of the Article is unequivocal and when the linguistic interpretation does not contradict the legislative purpose and does not lead to illogical and absurd conclusions.⁶⁶

According to Justice Bach, there are other means than expulsion by which the occupying power can ensure public safety and order in the Territories, in accordance with Regulation 43 of the 1907 Hague Regulations.⁶⁷

V. Conclusion

This analysis has shown that the controversy over the expulsion of civilians from the territories under Israeli military administration raises difficult legal questions: are those territories subject to the international laws on occupation? Is the prohibition against expulsion included in the Fourth Geneva Convention an absolute one or is it limited to certain kinds of expulsion? Is this prohibition – whatever its scope – merely a rule of international treaty law, or is it also a general rule of customary law? Hopefully the above analysis may help to clarify the issues.

The refusal of Israel's Supreme Court to implement Article 49 of the Fourth Geneva Convention does not stem from a rejection of the applicability of the Convention, but from the lack of transformation of its terms into municipal law. Moreover, the very fact that the Court went to great length to analyze and interpret Article 49 shows that, even in the absence of a formal incorporation, the Court has in practice been considerably influenced and guided by the Convention and has tried to interpret Israeli law in accordance with its provisions. This trend can also be discerned in other cases that deal with different matters, where the Court has in fact measured the acts of the Military Government by the yardstick of the Fourth Convention.⁶⁸

Although the Court has formally refused to implement Article 49 and has limited its meaning to mass deportations, the power of the Military Commander to expel or deport is certainly not unlimited, and its exercise is subject to review by the Court, which will scrutinize each case carefully: it will verify the reasonableness of the order and its legitimacy under Israeli administrative law (which includes the principles of natural justice) and international customary rules. Moreover, the mere existence of the Court's review power constitutes a powerful incentive for the military authorities to reduce the cases of expulsion as far as possible.

As to the more general problem concerning the implementation of the Fourth Geneva Convention by Israeli courts, it is submitted that it can be dealt with in one of three ways: first, the Supreme Court can abandon the principle which requires formal transformation of all constitutive treaties;⁶⁹ second, parliament can adopt a specific law on the incorporation of the

⁶⁶ Ibid., p. 71 (English translation at 178).

⁶⁷ Ibid., p. 74 (English translation at 179). see also Dinstein and Gnesa, *supra* note 64.

⁶⁸ E.g., H. Ct. 500/72, *Al Tin v. Minister of defense et al.*, (1973) 27(1) Piskei-Din 481; H. Ct. 673/88, *Al Saudi et al. v. Head of the Civil Administration in the Gaza strip*, (1987) 41(3) Piskei-Din 138, and H. Ct. 13/86, *Shahin et al. v. Commander of IDF Forces in the Area of Judea and Samaria et al.*, (1987) 41(1) Piskei-Din 197 – on family reunification; H. Ct. 87/85, *Arjiv et al. v. Commander of IDF Forces in the Area of Judea and Samaria et al.*, (1988) 42(1) Piskei-Din 353 (when considering whether an appellate instance above the military tribunals in the Territories should be established). There have, however, also been cases where the Court has disregarded the Convention, e.g., *Jabber v. Military Commander of the Central Region and Minister of Defense*, (1988) 42(2) Piskei-Din 522 (concerning the demolition of a room).

⁶⁹ Lapidoth, *supra* note 36. This could of course also be achieved by a law of the Legislature.

Fourth Geneva Convention,⁷⁰ and third, the Supreme Court can increase its reliance on the Convention on the basis of the presumption that Israel's law conforms to her international commitments.

⁷⁰ Bar-Yaacov, *supra* note 11. The author also mentions the possibility to include the Fourth Geneva Convention in the legal system of the territories by means of orders issued by the Military Commanders of the region.