Introduction

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ISRAEL: SUPREME COURT JUDGMENT IN
CASES CONCERNING DEPORTATION ORDERS

[April 10, 1988]

[...]

The Supreme Court Sitting As the High Court of Justice

H.C. 785/87

H.C. 845/87

H.C. 27/88

[...]

Judgment

Shamgar P. - Paras 1 to 3

1. These three petitions, which we have heard together, concern deportation orders under Regulation 112 of the *Defence (Emergency) Regulations*, 1945 [...].
   On March 13, 1988 we decided to dismiss the petitions [...]. The following are the reasons for the Judgment.

2. [W]e shall first examine the general contentions which essentially negate the existence of a legal basis for the issue of a deportation order to a resident of the above-mentioned territories. For if the conclusion will be that under the relevant law the issue of a deportation order is forbidden, then obviously there will be no need to examine whether a substantive justification exists for the issue of the specific order, through the application of this question to the factual data pertaining to each of the petitioners. [...]

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

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

[...]

c. My comments will relate to the following areas:
    1. The accepted approach to interpretation under internal Israeli law;
    2. Principles of interpretation applicable to international conventions;
    3. Interpretation of the above-mentioned Article 49.
d. *The accepted interpretation in our law: [...]*

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

e. *Interpretation in Public International Law:* Now the second question arises, which is: What are the rules of interpretation relevant to our matter that are used in public international law.

Israel has not yet ratified the Vienna Convention of 23 May 1969 on the Law of Treaties, which came into force in 1980 for those who joined it (hereinafter: the Vienna Convention). [**available on** http://untreaty.un.org [1]]

[...] Nonetheless, there is value, even if only for the sake of comparison, in an examination of the provisions of the Convention regarding interpretation.

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

"31. *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    a. any agreement relating to the treaty which was made between all the parties in connexion [sic] with the conclusion of the treaty; [...]

32. *Supplementary means of interpretation*

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

a. leaves the meaning ambiguous or obscure; or
b. leads to a result which is manifestly absurd or unreasonable." [...]

It seems that from the first part of Article 31 (1) one could conclude that the Convention sought to support that school of interpretation which emphasizes the text, as opposed to the alternative school of interpretation, no less accepted, which focuses on the intentions of the draftsmen of the Convention [...]. Yet, the second part of Article 31(1) and Article 32 form the bridge to the other theories of interpretation, also familiar to us from the earlier examination of our municipal law.

That is, the provisions of the Convention leave ample space to enable examination of the purpose which led to its making. It is even possible to reflect

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

[...]

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

f. [...] Beyond that: When for the purpose of the issue before us we adopt the interpretive approach as expressed in the specific area of law that we are presently discussing, namely public international law, we should recall Professor

> Yasseen's interpretive guidelines [...] from which emerges, *inter alia*, a stand rejecting the constriction of state authority and rejecting formalism, or an approach which ignores the special qualities of the field of law that we are discussing.

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

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

The relevant portions of the Articles state:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.
>
> ...
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

In *H.C. 97/79* (pp. 316-317) *[Abu Awaad v. Commander of the Judea and Samaria Region]*, Sussman P. comments regarding the argument that the application of Regulation 112 of the *Defence (Emergency) Regulations* is contrary to Article 49 of the Fourth Geneva Convention:

"...I have not found substance in the argument that the use of the above-mentioned Regulation 112 stands in contradiction to Article 49 of the Fourth Geneva Convention [...]. It is intended, as Dr. Pictet in his commentary on the Convention (p. 10) writes, to protect the civilian from arbitrary action by the occupying army, and the purpose of the above-mentioned Article 49 is to prevent acts such as the atrocities perpetrated by the Germans in World War II, during which millions of civilians were deported from their homes for various purposes, generally to Germany in order to enslave them in forced labour for the enemy, as well as Jews and others who were deported to concentration camps for torture and extermination.

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

...

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

Landau P. again referred to this subject in *H.C 698/80* [*Kawasme and Others v. Minister of Defence and Others*] at pp. 626-628. The following are the relevant

passages from his remarks:

> [...] Ms Langer has more forcefully repeated that same argument. In her opinion, the Court in *H.C. 97/79* ignored the difference between the first and second paragraphs of said Article 49: Whereas the prohibition against evacuating civilian populations generally carried out by displacement within the occupied territory is permitted for purposes of the population's security or for imperative military reasons, as is stated in the second paragraph of the Article, the prohibition against deportation beyond the border is absolute, 'regardless of their motive' as is stated in the latter part of the Article. The book *The Geneva Convention of August 12, 1949, Commentary* (Geneva, ed. by J.S. Pictet, vol. IV, 1958) 279 is cited. Regarding the prohibition against deportations, it states:
>
> 'The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2'. [...]
>
> It has been argued before us that one must distinguish between the reason for the prohibitions in Article 49 of the Convention, which was, as was said, founded in the memory of those atrocities, and between that which stems from the unambiguous wording of the prohibition in the first paragraph of the Article, which applies, according to its language, not only to mass deportation, but also to deportation of individuals. As opposed to this, one can say that the deportation of individuals was also carried out occasionally under the Hitler regime for the realization of the same policy which led to mass deportation, and therefore none of the provisions of Article 49 are in any way applicable to the deportation of persons who endanger public welfare – as this Court has ruled in *H.C. 97/79*. [...]
>
> [...]

But whatever the correct interpretation of the first paragraph of Article 49 of the Convention may be, the Convention, as Article 49 in its entirety, does not in any case form a part of customary international law. Therefore, the deportation orders which were issued do not violate internal Israeli law, nor the law of the Judea and Samaria Region, under which this Court adjudicates . ...

Ms. Langer recalled to us a passage from G. Schwarzenberger's book, *International Law as Applied by International Courts and Tribunals* (London, vol. II, 1968) 165-166, which was cited in [...] *H.C. 606, 610/78* [*Oyev and Others v. Ministry of Defence and Others*], at p. 121. The learned writer expresses the belief that the prohibition against the deportation of residents of an occupied territory is but 'an attempt to clarify existing rules of international customary law'. I assume that here too, the reference is to arbitrary deportations of population, akin to the Hitler regime. If the author was also referring to deportation of individuals in order to preserve the security of the occupied territory, then that is the opinion of an individual author, stated in vague terms with no substantiation whatsoever." [...]

h. *What were the considerations guiding the draftsmen of the Convention: An examination of Actes de la Conférence Diplomatique de Genève de 1949*, [...] shows incontrovertibly that in choosing the term "deportations", the participants in the deliberations referred to deportations such as those carried out during World War II. [...]

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

Article 49, which prohibited deportations was connected therefore with such provisions. As Pictet describes [...] [i]n his words: When one thinks about the millions

of people who were forcibly transferred from place to place during the last conflict (i.e. World War II – m.s.), and about their suffering, both physical and moral, one cannot but thankfully bless the text (of the Convention – m.s.) which put an end to these inhuman practices.

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

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

The conclusion, stemming from all of the above, is that the purpose which the draftsmen of the Convention had in mind was the protection of the civilian population, which had become a principal victim of modern-day wars, and the adoption of rules which would ensure that civilians would not serve as a target for arbitrary acts and inhuman exploitation. What 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.

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

internment in a concentration camp, or for recruitment for slave labour in the factories of the occupier or in agriculture. Moreover, it seems that the summons to slave labour was always on an individual basis.

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

The implications of this thesis are that Article 49 does not refer only to deportations, evacuations and transfers of civilian populations, as they were commonly defined in the period of the last war, but also to the removal of any person from the territory under any circumstances, whether after a legitimate judicial proceeding (e.g. an extradition request), or after proving that the residence was unlawful and without permission [...], or for any other legal reason, based upon the internal law of the occupied territory.

According to the said argument, from the commencement of military rule over the territory there is a total freeze on the removal of persons, and whosoever is found in a territory under military rule cannot be removed for any reason whatsoever, as long as the military rule continues. In this matter there would be no difference between one dwelling lawfully or unlawfully in the territory, since Article 49 extends its protection to anyone termed "protected persons", and this expression embraces, according to Article 4 of the Convention, all persons found in the territory, whether or not they are citizens or permanent residents thereof and even if they are there illegally as infiltrators (including armed infiltrators), [...].

The petitioners' submission rests essentially on one portion of the first paragraph of the Article, i.e. on the words "... transfers ... deportations ... regardless of their motive". That is, according to this thesis, the reason or legal basis for the deportation is no longer relevant. Although the petitioners would agree that the background to the

wording of Article 49 is that described above, the Article must now be interpreted according to them in its *literal* and *simple* meaning, thus including any forced removal from the territory.

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

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

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

> "Persons protected by the Convention are those who, at a given moment *and in any manner whatsoever*, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of *which they are not nationals* ."
>
> (emphasis added – m.s.)

The definition employs a negative test, i.e. for our purposes, anyone who is not an Israeli national and is found in a territory occupied by our forces, is *ipso facto* a protected person. This includes an infiltrator, spy and anyone who entered the territory in any illegal manner. [...]

The acceptance of the argument that the prohibition in Article 49 applies, whatever the motive for its personal application, means that if someone arrives in the territory

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

[F]rom the thesis offered by the petitioners, it would follow that an infiltrator for sabotage purposes could not be deported before or after serving his sentence. The same would be true, according to this approach, of a person who came for a visit over the open bridges, yet stayed beyond the expiration of his permit. The literal and simple interpretation leads to an illogical conclusion.

k. [...]

If [...] one accepts the proposed interpretation of the petitioners, according to which deportation means any physical removal from the territory, then the above would apply, for instance, to deportation for the purposes of extradition of the protected person, for this too requires removing a person from the territory. Laws, judicial decisions and legal literature use, in the context of extradition, the term deportation to refer to the stage of carrying out the extradition or the rendition. A murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction. [...]

l. Regarding the issue before us, the petitioners have directed our attention to the remarks of Pictet in *Commentary*, *supra*, at 368, who adopts the literal interpretation, according to which all deportations are prohibited no matter what

> the reason. One should see this interpretive view, which would apply Article 49 to as broad a group of circumstances as possible, in its context and within its limits. The desire for a literal and simple meaning, which may find expression in scholarly opinions in professional literature, does not bind the courts. Not only are there other and contradictory viewpoints [...], but, more essentially, the Court deals with the law as it exists and clarifies the meaning of a law or of a treaty, as appropriate by adopting accepted rules of interpretation [...].

Were we to adopt the rules of interpretation used in our law, we could not accept the thesis proposed by the petitioners. The Court would consider the flaw which the Convention was intended to correct [...]; would examine the material context and the structure of Article 49, which in its other provisions refers clearly and openly to evacuations and transfers of population [...], would attempt to lift the veil from over the legislative purpose in order to adopt it as a standard of interpretation [...]; and would be wary of and refrain from the adoption of a literal interpretation which is, so to speak, simple but in law and in fact so simplistic that it leads the language of the law or the Convention, as appropriate, to a range of applicability that confounds reason [...] e.g. the absolute prohibition against the deportation of an infiltrator or spy, since deportations are prohibited, as it were, “regardless of their motive”.

Essentially, even reference to the rules of interpretation of international conventions does not help the petitioners’ argument: For even the Vienna Convention does not submit to the literal interpretation, but rather sees the words of the convention “in their context and in the light of its object and purpose” (Article 31(1) of the Vienna Convention). The Convention permits us to examine the preparatory work and shies away from an interpretation whose outcome is “manifestly absurd or unreasonable”, and this description would apply at once to a prohibition against the deportation of an infiltrator [...].

[...]

m. By contrast with this answer to the petitioners' contention, the opposite question naturally arises, namely, what then is the alternate interpretation of the words "regardless of their motive".

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

The words "regardless of their motive" were intended to encompass all deportations of populations and mass evacuations for the purposes of labour, medical experiments or extermination, which were founded during the war on a variety of arguments and motives, including some which were but trickery and deceit (such as relocation, necessary work, evacuation for security purposes etc...). Furthermore, the draftsmen of the Convention took into account the existing right of the military government to utilize manpower during wartime (see Regulation 52 of the 1907 Hague Regulations which deals with compulsory services, and Article 51 of the Fourth Geneva Convention which even today permits the forcing of labour on protected persons), but sought to clarify that mass deportation, as it was carried out, is prohibited even when the motive is seemingly legitimate, except in the event of evacuation in accordance with the qualifications set out in paragraph 2 of Article 49. [...]

To summarize, this Court had the authority to choose the interpretation that rests upon the principles explained above over the literal interpretation urged by the petitioners.

This Court has done so in *H.C. 97/79* [...]. [...]

Shamgar P. - Paras 4 to 14

4. a. This Court has indicated in its judgments that the above-mentioned Article 49 is within the realm of conventional international law. In consequence of this determination, the petitioners have now raised a new thesis which holds that this Court's approach [...] is founded in error. This approach holds that the rules of conventional international law (as opposed to customary international law) do not automatically become part of Israeli law, unless they first undergo a legal adoption process by way of primary legislation. [...]

   b. The petitioners submit that not only does customary international law automatically become part of the country's laws (barring any contradictory law), but that there are also parts of conventional international law which are automatically incorporated, without the need for adoption by way of legislation as a substantive part of Israeli municipal law. These are those parts of conventional international law which are within the realm of "law-making treaties". [...]

5. [...]

   b. The legal situation in Israel: Israeli law on the question of the relationship between international law and internal law – that is in order to settle the question of whether a given provision of public international law has become part of Israeli law – distinguishes between conventional law and customary law [...].

[...]

According to the consistent judgments of this Court, customary international law is part of the law of the land, subject to Israeli legislation setting forth a contradictory provision. [...]

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

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

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

c. [...]

The clear meaning of these remarks is that the adoption of international treaties – in order to incorporate them as part of internal law and in order to open them to enforcement through the national tribunals – is conditional upon a prior act of the legislator. As we shall see, international treaties may constitute a declaration of the valid customary law – but then their content will be binding by virtue of the said customary status of the rule found therein and not by virtue of its inclusion in the treaty. [...]

d. [...]

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

1. Its provisions are adopted by way of legislation and to the extent that they are so adopted, or,
2. The provisions of the treaty are but a repetition or declaration of existing

customary international law, namely, the codification of existing custom. [...]

e. If we apply what was said above to the issue before us, we must remember that Article 49 has been categorized in our judgments as conventional law which does not express customary international law. [...]

Regarding the fact that Article 49 did not reflect customary law, Landau P. adds at p. 629:

> "In fact the occupation forces in the Rhineland in Germany, after World War I, used the sanction of deportation from the occupied territory against officials who broke the laws of the occupation authorities or who endangered the maintenance, security or needs of the occupying army: Fraenkel, *Military Occupation and the Rule of Law*, Oxford University Press, 1944. Under this policy the French deported during the armistice following that war 76 officials and the Belgians – 12, and during the dispute over the Ruhr (1923) no less than 41,808 German officials were deported (*ibid.*, at 130-131). In the face of these facts, it is clear that the prohibition against the deportation of civilians did not constitute a part of the rules of customary international law accepted by civilized states, as if the Geneva Convention simply gave expression to a pre-existing law." [...]

7. [...]

c. [...]

[C]ountries, which are signatories to the treaty, are obligated to adhere to their said obligations in relations among themselves; however, in the system of relations between the individual and government, one can lean in court only upon rules of customary public international law. This approach formed the basis for Witkon J.'s remarks in *H.C. 390/79* [*Dvikat v. Government of Israel and Others*], when he said at p. 29:

"One must view the Geneva Convention as part of conventional international law; and therefore – according to the view accepted in common law countries and by us – an injured party cannot petition the court of a state against which he has grievances to claim his rights. This right of petition is given solely to the states who are parties to such a convention, and even this litigation cannot take place in a state's court, but only in an international forum."

d. Mr. Rubin questions [...] whether grounds exist to assume that the Hague Regulations were considered at the time of the Convention's signing as merely an international obligation undertaken by the state becoming a party to the Regulations and that *only subsequently* did they turn into binding customary international law and as such a part of the internal law. The answer to this question emerges, in my view, from the words of the International Tribunal in Nuremburg, which stated the following in its judgment:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention (Hague Convention Concerning the Laws and Customs of War on Land) expressly stated that it was an attempt 'to revise the general laws and customs of war' which it thus recognized to be then existing, but *by 1939 these rules laid down in the Convention were recognized by all civilised nations and were regarded as being declaratory of the laws and customs of war. ...*" (*I.M.T. Judgment, supra*, at 65).

(emphasis added – m.s.)

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

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

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

The deportation order [...] reads as follows:

> "By virtue of my authority under Regulation 112 (1) of the *Defence (Emergency) Regulations*, 1945, and my authority under any law or security legislation, and whereas I believe the matter is necessary to ensure the security of the Region, public welfare and public order, I hereby order that:

Abd al Nasser Abd al Affo Muhamad Abd al Aziz, [...] be deported from the Region.

[He] is a senior operative in the 'National Front' organization, who has been sentenced three times in the past to prison terms for his terrorist activity. He is about to finish a third prison term of five years and three months. During his stay in prison, he assiduously continues his hostile activity in order to further the purposes of the organization." [...]

13. *H.C. 845/87:* (a) Abd al Aziz Abd Alrachman Ude Rafia, born in 1950, is a resident of Gaza.

On November 15, 1987 a deportation order was issued against him which included the following reasons:

> "This order is issued since the above serves as a spiritual leader of the Islamic Jihad movement in the Gaza Strip, which supports a violent Islamic revolution on the Iranian model, armed struggle and the liberation of Palestine through Jihad. In the framework of his sermons in the mosques, he calls for action against the Israeli rule by military struggle."

Immediately upon receipt of this order, the petitioner was arrested and jailed in Gaza. The petitioner applied to the Advisory Committee [...].

[...]

The Committee noted in its reasoned and detailed decision the following, *inter alia*:

> "The applicant is mentioned as responsible for the Islamic Jihad in the Gaza Strip and perhaps beyond that area. He is depicted as a guide of that organization and as an influential figure among the residents of the area in general and among those who belong to that organization in particular. They look to him constantly and often wait by his doorway to hear his words. He acquired his status through his activities as a lecturer at the university and as a preacher in the mosque, where he delivered extreme religious and nationalist addresses laden with incitement and hatred against Israeli rule. These contained on occasion calls for violent struggle, including encouragement of civil disorder and even extreme acts of violence, such as murder. There is no doubt, therefore, that the applicant constitutes an actual danger to the security of the Region and its inhabitants and to the maintenance of public order; and that the deportation order was given, therefore, within the framework of considerations enumerated in Regulation 108 of the Regulations.
>
> ...
>
> The question remains whether in the applicant's case, the most severe step, namely deportation, is in order.
>
> In view of the applicant's "history" and personality, we are convinced that the answer to this question is affirmative. [...]

Even placing him in prison, such as in administrative detention, will not counter his influence. There are grounds for fearing that precisely in such a place he will be even more accessible to the extremists among his followers and that his stay in prison will have a most dangerous and negative influence on what takes place both within the prison and outside it.

The most efficient and suitable measure in this case is, therefore, to deport the applicant outside the Region and the country.

Even if he were free to go about in a foreign land and no one would constrain him, his harmful influence on the Region would be immeasurably smaller and less perceptible and immediate than would be the case, were he to walk about in our midst." [...]

I, therefore see no grounds for the intervention by this Court in the decision of respondent [...].

14. a. *H.C. 27/88*: (a) The petitioner J'mal Shaati Hindi is a resident of Jenin and is studying at Al Najah University. On 1 December 87 a deportation order was issued against him [...].

[...]

d. The petitioner complained about the legal procedure, in the framework of which classified evidence was presented to the Advisory Committee in his absence and in the absence of his counsel. On a similar issue the Court has stated in [...] *H.C. 513, 514/85 and H.C.M. 256/85* [*Nazzal and Others v. Commander of I.D.F. Forces in the Judea and Samaria Region*] at p. 658:

"The petitioners complained that they were not privy to the secret material that was presented to the Advisory Board, but as this Court has already explained regarding

a similar case in *A.D.A. 1/80*, this is the sole reasonable arrangement that strikes a balance between the two interests, which are: On the one hand maintaining an additional review of the considerations and decisions of the Military Commander; and on the other hand preventing damage to State security through disclosure of secret sources of information. It indeed does not provide an opportunity to respond to every factual contention and the Advisory Board (or a court under given circumstances) must take this fact into consideration when it examines the weight or the additional degree of corroboration of the information. However, the legislator could not find a more reasonable and efficient manner to guard against the disclosure of secret information in circumstances where such is vital in order to prevent severe damage to security; [...]."

The Committee examined, on this occasion as well, what would be the maximal information that it could place at the disposal of the petitioner without damaging vital security interests, and one has no cause for complaint against the Committee. We have nothing to add in this matter, because we have not examined the secret material and in any case do not know its details. [...]

Therefore, I would dismiss the petitions and set aside the orders issued on their basis. [...]

Bach J.

1. I concur in the final conclusion that my esteemed colleague, the President, has reached regarding these petitions; however, on one point of principal importance I must dissent from his opinion.

The issue concerns the proper interpretation of Article 49 of the Fourth Geneva Convention (hereinafter "*The Convention*"). [...]

[...]

5. After examining the question in all its aspects, I tend to accept the position of the petitioners on this matter, and my reasons are as follows:
    a. The 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 – g.b.), admits in my opinion no room to doubt, that the Article applies not only to mass deportations but to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional – "regardless of their motive."
    b. I accept the approach, which found expression in Sussman P.'s judgment in *H.C. 97/79*, namely that the Convention was framed in the wake of the Hitler period in Germany, and in face of the crimes which were perpetrated against the civilian population by the Nazis during World War II. Similarly, I would subscribe to the opinion that one may consider the historical facts accompanying the making of a convention and the purpose for its framing in order to find a suitable interpretation for the articles of the convention. Even the Vienna Convention, upon which Professor Kretzmer relied in this context, does not refute this possibility [Article 31] [...].

[...] I find no contradiction between this "historical approach" and the possibility of giving a broad interpretation to the Article in question.

The crimes committed by the German army in occupied territories emphasized the need for concluding a convention that would protect the civilian population and served as a lever (and quasi "trigger") for its framing. But this fact does not in any way refute the thesis that, when they proceeded to draw up that convention, the draftsmen decided to formulate it in a broad fashion and in a manner that would, *inter alia*, totally prevent the deportation of residents from those territories either to the

occupying state or to another state.

The text of the Article, both in terms of its context and against the backdrop of the treaty in its entirety, cannot admit in my opinion the interpretation, that it is directed solely towards preventing actions such as those that were committed by the Nazis for racial, ethnic or national reasons.

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

c. The second portion of Article 49 supports the aforesaid interpretation. Here the Convention allows the evacuation of a population *within the territory*, i.e. from one place to another in the occupied area, if it is necessary to ensure the security of the population or is vital for military purposes. It teaches us that the draftsmen of the Convention were aware of the need for ensuring security interests, and allowed for this purpose even the evacuation of populations within the occupied territories. The fact that in the first portion this qualification was not introduced, i.e. the deportation of residents beyond the borders for security reasons was not permitted, demands our attention.
d. Additionally, a perusal of other articles of the Convention illustrates an awareness by the draftsmen of the security needs of the occupying state and indirectly supports the aforesaid broad interpretation of Article 49.

This is what the first part of 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."

I accept Professor Kretzmer's contention that Articles 78 and 49 should be read together and that one should infer from them as follows: Where a person poses a foreseeable security danger, one may at most restrict his freedom of movement within the territory and arrest him, but one cannot deport him to another country. [...]

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

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

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

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

e. A clear direction is discernible in the Convention. The freedom of movement of a "protected person" can be limited, and he can even be arrested without trial, if

it is necessary in order to protect public security or another vital interest of the occupying state; this is in addition to the possibility of placing him on trial, punishing him and even condemning him to death. But the “protected person” cannot be deported; for the moment deportation to another country is carried out, the occupying state has no further control over him, and he therefore ceases to be a “protected person”.

f. [...]

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

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

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

non-existent, since the petitioners are, by all opinions, permanent residents of the territories controlled by the I.D.F.; and if the Convention under discussion applies to those territories, then they are undoubtedly included in the definition of “protected persons”.

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

7. Despite the aforesaid I concur with the opinion of my esteemed colleague, the President, that these petitions should be dismissed. [...] I do not see any grounds for deviating from the rule that was established and upheld in an appreciable number of judgments under which Article 49 of the Convention is solely a provision of conventional international law as opposed to a provision of customary international law. Such a provision does not constitute binding law and cannot serve as a basis for petitions to the courts by individuals. [...]
8. I would further add that I see no grounds for our intervention in the decisions of the respondents in this matter for the sake of justice. [...]

I have not ignored the fact that representative of the state have declared on a number of occasions before this Court, that it is the intention of the Government to honour as policy

the humanitarian provisions of the Convention. [...]

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

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

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

Rendered today 23 Nissan 5748 (April 10, 1988)

Discussion

1.
    a. Are all provisions of Convention IV purely treaty-based? Are some customary law? Is Art. 49 of Convention IV customary law? How is this assessed? How could it be assessed, taking into account that 164 out of 170 States were bound

in 1985, as Contracting Parties, to respect that provision? Should one assess the practice of the 6 States not party to the Convention? Does the Court not assess instead whether Art. 49 was customary in 1949? Or in 1923? Was there no development in customary law between 1949 and 1988?

b. Why is the status, whether conventional or customary, of Art. 49 relevant to the Convention's applicability in this case if Israel is party to Convention IV?

c. May a State adopt the Israeli system under which international treaties to which Israel is party are not automatically part of Israeli law, but only become so if there is implementing legislation? Has Israel an obligation to adopt such legislation? Does IHL oblige Israel to allow the Conventions to be invoked before its courts? May Israel invoke its constitutional system, the absence of implementing legislation, or this decision of its Supreme Court to escape international responsibility for violations of Convention IV? (GC IV [2], Arts 145 [3] and 146 [4])

d. Are the Hague Regulations applicable in this case? As conventional or as customary law?

e. Is Art. 49 of Convention IV self-executing? Is the answer to this question relevant in this case? Does such a question, however, explain e.g. the inclusion of Arts 49/50/129/146 or 48/49/128/145 respectively, concerning national legislation, in the four Conventions?

2.

a. Assuming applicability of the Conventions to Israel, do the deportations violate Art. 49 of Convention IV? To what cases of deportations does the Court consider Art. 49 applicable? Why? Is this understanding consistent with the "ordinary meaning to be given to the terms of the treaty"? (Vienna Convention on the Law of Treaties, Art. 31(1)) Why does the Court determine that the "ordinary meaning" of Art. 49 leads to "manifestly absurd or unreasonable" outcomes, allowing for supplementary means of interpretation? (Vienna Convention on the Law of Treaties, Art. 32(b))

b. Could you conceive of different wording for Art. 49(1) that would more clearly prohibit individual deportations than the present wording? Is the result of the literal interpretation (that individual deportations are prohibited, regardless of

their motive) unreasonable in light of the object and purpose of Convention IV? Do Pictet's and other drafters' recollections of the mass deportations by Nazi Germany mean that they wanted Art. 49 to cover only such deportations? Would such an intention be decisive for today's interpretation of the rule?

c. In his separate opinion, how does Bach interpret Art. 49? If the majority had adopted Bach's opinion, would the deportations addressed in this case still occur? Why?

3. Israel has declared that, regardless of whether it is legally bound by the Geneva Conventions, in
general it intends to honour the humanitarian provisions of Convention IV. What are these humanitarian provisions? Do articles prohibiting deportation not constitute humanitarian provisions? Or only in certain instances? Are the three petitioners in this case protected persons according to Art. 4 of Convention IV? Does a literal interpretation of Arts 4 and 49 lead to an absurd result in the case of the three petitioners?

4.

a. Petitioners objected to the evidentiary use of "classified material", as it denied their right to a fair trial, e.g., para. 14(d) of the majority's opinion. Notwithstanding a determination concerning utilization of "classified material", would Art. 49 permit deportations following a legitimate judicial proceeding?

b. Is deportation not permissible when repeat offenders (such as the present petitioners) place the public order and safety of the occupied territory at risk and no alternative measures appear available? (HR, Art. 43; GC IV [2], Art. 49 [5])

5. May protected persons never be transferred, according to Convention IV? Is this how Art. 49 distinguishes between deportation and evacuation? What is this distinction? (See also GC IV, Art. 78 [6])

6. Are the deportations condoned by the High Court of Justice grave breaches of IHL? (GC IV, Art. 147 [7])

Links

[1] https://treaties.un.org/

[2] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDo
[3] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A6EB6B4F840AF8E0C12563CD00
[4] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD00
[5] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=77068F12B8857C4DC12563CD005
[6] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0DFFF94F559B0D17C12563CD0
[7] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F8D322BF3C0216B2C12563CD0