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Mark D. Allison

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THE HAMAS DEPORTATION: ISRAEL'S RESPONSE TO TERRORISM DURING THE MIDDLE EAST PEACE PROCESS

Mark D. Allison*

INTRODUCTION

The Declaration of Principles¹ and the Gaza-Jericho self-rule accord² between Israel and the Palestine Liberation Organization represent a giant leap forward in the international efforts to peacefully resolve the conflict over Israel's military administration of the occupied territories.³

* J.D. Candidate, 1995, Washington College of Law, The American University; M.A., 1992, The American University; B.A., 1990, Claremont McKenna College. The author thanks Mr. Justus R. Weiner, the Israel Colloquium, and the National Jewish Coalition for their assistance.

1. See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O. [hereinafter Declaration of Principles] (stating that Israel and the PLO agree to create a Palestinian interim self-government in the occupied territories until a permanent settlement is reached pursuant to U.N. Security Council Resolutions 242 and 338). The interim self-government will last for five years, in which time the Israeli military will continue to maintain security control in order to ensure public order and safety. *Id.* at arts. V, VIII; see also Ann Devroy and John M. Goshko, *Israel and PLO Sign Peace Pact*, WASH. POST, Sept. 14, 1993, at A1 (describing the signing of the Declaration of Principles in Washington, D.C.); Ruth Marcus and Thomas W. Lippman, *Ritual End To Decades of Conflict*, WASH. POST, Sept. 14, 1993, at A13 (detailing the highlights of the Declaration of Principles).

2. See John M. Goshko and Carlyle Murphy, *After Last Minute Dispute, PLO and Israel Sign Self-Rule Accord*, WASH. POST, May 5, 1994, at A1, A40 (describing the signing of the accord in Cairo requiring the withdrawal of Israeli troops from the Gaza Strip and Jericho and the transfer of civilian authority to the Palestinians). The self-rule accord finalizes the terms of the Declaration of Principles signed in Washington, D.C. in September 1993. *Id.*

3. See ESTHER COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES* 35 (1985) [hereinafter COHEN, *HUMAN RIGHTS*] (discussing the areas that constitute the occupied territories). The occupied territories are the areas captured by Israel in its defense during the Six Day War of 1967. *Id.* The occupied territories include the Gaza Strip, captured from Egypt, and the West Bank, captured from Jordan (known

Before negotiations for these historic agreements began, however, the Israeli Supreme Court⁴ (the Court) challenged the notion that the transfer of authority in the Gaza Strip and the West Bank to the Palestinians could result either from terrorism⁵ or international pressure. In a recent

in Israel as Judea and Samaria according to its biblical name). *Id.* Other territories occupied by Israel include the Sinai Peninsula (which was captured from Egypt in the Six Day War and returned in 1979 pursuant to the Camp David Accords), the Golan Heights (captured from Syria during the Yom Kippur War in October 1973 and later annexed by Israel), and East Jerusalem (also annexed by Israel). *Id.* Israel continues to administer the Gaza Strip and the West Bank until it is satisfied that a peaceful settlement is arranged in the Middle East that guarantees secure and recognized boundaries under United Nations Security Council Resolutions 242 and 338. Yitzhak Shamir, *Israel's Role in a Changing Middle East*, reprinted in THE ISRAEL-ARAB READER 640 (Walter Laqueur and Barry Rubin eds., 1984) [hereinafter Laqueur].

4. See Esther R. Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 471 n.1 (1986) [hereinafter Cohen, *High Court of Justice*] (discussing the various capacities of the Israeli Supreme Court). The Israeli Supreme Court serves two roles. *Id.* First, the Court provides for appellate review of civil and criminal appeals from the judgments of district courts. *Id.* Second, the Court sits as the High Court of Justice and reviews the decisions of public officials. *Id.*

It is not clear following the signing of the Gaza-Jericho self-rule accord whether the High Court of Justice maintains jurisdiction over the occupied territories. See Goshko and Murphy, *supra* note 2, at A40 (noting that the Palestinians will provide internal security for the territories, while Israel will provide security against external threats and maintain responsibility for the security of all Israelis and Israeli settlements). Since both parties to the self-rule accord are required to take necessary steps to prevent terrorist activity, including taking legal action, Israeli security orders and actions affecting the territories will likely continue to fall within the appellate jurisdiction of the High Court of Justice. See Declaration of Principles, *supra* note 1, art. VIII (describing the public order and safety jurisdiction of the Israeli military and the Palestinian police force); Goshko and Murphy, *supra* note 2, at A40 (outlining the responsibilities and authority of Israel and the Palestinians in the territories). Israel and the PLO have yet to resolve the size of the Jericho region which will determine the area of exclusive Palestinian authority. Goshko and Murphy, *supra* note 2, at A40.

Since the signing of the self-rule accord, Israel has completed the deportation of four former PLO leaders from the Gaza Strip, but no appeals to the High Court of Justice have yet occurred. *Israel Expels Four Former PLO Officers*, ROCKY MTN. NEWS, July 14, 1994, at 44A [hereinafter *PLO Expulsion*].

5. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1990 (1991). The State Department defines international terrorism for statistical purposes in the following manner: "[t]he term international terrorism means terrorism involving citizens or territory of more than one country. The term terrorist group means any group practicing, or that has significant subgroups that practice, international terrorism." *Id.* at v.

case,⁶ closely observed by the international community, the Israeli Supreme Court affirmed the broad powers of Israel's military authority in the occupied territories, and refused to provide refuge to terrorists at the expense of national security and innocent lives.⁷ Furthermore, the Israeli government has asserted that any resolution of the debate over the occupied territories must result from negotiations pursuant to U.N. Security Council Resolutions 242 and 338,⁸ and not from the use of terror and violence.

The occupied territories have long served to foment terrorism,⁹ lead-

The League of Nations attempted to define international terrorism in its 1937 Convention for the Prevention and Punishment of Terrorism. Justus R. Weiner, *Terrorism: Israel's Legal Responses*, 14 SYR. J. INT'L L. & COM. 183, 184 n.5 (1987) [hereinafter Weiner, *Terrorism*]. The Convention defined terrorism as all "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." S. QURESHI, *POLITICAL VIOLENCE IN THE SOUTH ASIAN SUBCONTINENT* 152 (1976), cited in Justus R. Weiner, *Terrorism: Israel's Legal Responses*, 14 SYR. J. INT'L L. & COM. 183, 184 n.5 (1987).

6. Association for Civil Rights in Israel v. Minister of Defence, H.C. 5793/92, ___ Piskei Din ___ (Decided Jan. 28, 1993) [English translation] (available from the Embassy of Israel in Washington, D.C.).

7. See *infra* notes 170-73 and accompanying text (describing the Court's refusal to restrain the military's broad powers under the facts of Association for Civil Rights in Israel v. Minister of Defence).

8. See Declaration of Principles, *supra* note 1, art. I (stating that the parties agree to create a permanent settlement with regard to the occupied territories based on United Nations Security Council Resolutions 242 and 338). The United Nations Security Council passed Resolutions 242 and 338 following the Six Day War of 1967 and the Yom Kippur War of 1973, respectively. S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., at 27 (1967); S.C. Res. 338, U.N. SCOR, 28th Sess., 1747th mtg., at 26 (1973). The resolutions called for the withdrawal of Israeli forces from the occupied territories in exchange for a lasting peace with secure and recognized boundaries. *Id.* Before the Declaration was signed, the Israelis and Arabs disagreed about the interpretation of these resolutions and whether Israeli withdrawal was preconditioned on the Arabs signing peace agreements. See FRED J. KHOURI, *THE ARAB-ISRAELI DILEMMA* 356-71 (discussing the negotiations for peace pursuant to Resolutions 242 and 338).

9. See Richard A. Falk and Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129, 129 (1991) (discussing the development of the Intifada and the conflict in the occupied territories). Since December 1987, the Palestinians residing in the occupied territories have engaged in an uprising known as the Intifada. *Id.* Between December 9, 1987 and December 1, 1992, over 15,000 people were killed or injured in the occupied territories as a result of the Intifada, including Israeli Defense Forces personnel, Israeli civilians, and local Palestinians. INCIDENTS IN

ing the Israeli government to respond with various weapons.¹⁰ One of the least used¹¹ and most criticized¹² tactics involves the deportation of suspected terrorists from the territories. The Israeli deportation policy,¹³ depending upon immediate action for maximum effectiveness,¹⁴ often requires the government to suppress the right of appeal until after execution of the deportation order. In such cases the Israeli Supreme Court attempts to balance the national security interests of the government with the humanitarian rights of deportees under international law.¹⁵

JUDEA, SAMARIA AND THE GAZA DISTRICT SINCE THE BEGINNING OF THE UPRISING 1, IDF SPOKESMAN'S UNIT, INFORMATION BRANCH (December 1992) [hereinafter INCIDENTS IN THE OCCUPIED TERRITORIES]. Despite the signing of the Declaration of Principles in Washington, D.C., a formal ending of the Intifada has not yet occurred.

10. See, e.g., Weiner, *Terrorism*, *supra* note 5, at 188 (discussing the criminalization of terrorist organizations through security measures under the Defence (Emergency) Regulations); Cheryl V. Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515 (1987) (discussing the use of detentions, curfews, demolitions, and deportations by Israeli security forces in response to the Intifada); Peter J. Morgan, *Recent Israeli Security Measures Under the Fourth Geneva Convention*, 3 CONN. J. INT'L L. 485 (1988) (discussing the use of deportations, detentions, curfews, and collective punishment in the administered territories); Shalev Ginossar, *Outlawing Terrorism*, 13 ISR. L. REV. 150 (1978) (discussing alternative punishments for terrorist activity, including the death penalty).

11. See INCIDENTS IN THE OCCUPIED TERRITORIES, *supra* note 9, at 9, 10 (showing that since the beginning of the Intifada through December 1992, over 32,000 Palestinians were detained, over 600 Palestinian homes or buildings were either sealed or demolished, and only 66 Palestinians were deported).

12. See, e.g., John L. Habib, *Israeli Deportations of Palestinians Under International Law*, 4 EMORY INT'L L. REV. 133 (1990) (criticizing Israel's deportation policy as violative of the Fourth Geneva Convention, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights); Wendy Olson, *UN Security Council Resolutions Regarding Deportations From Israeli Administered Territories: The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 24 STAN. J. INT'L L. 611 (1988) (criticizing Israel's deportation policy as violative of the Fourth Geneva Convention); Allison M. Fahrenkopf, *A Legal Analysis of Israel's Deportation of Palestinians From the Occupied Territories*, 8 B.U. INT'L L.J. 125 (1990) (criticizing Israel's deportation policy as violative of customary international law and the applicable domestic law of the occupied territories).

13. See OFFICE OF THE FOREIGN MINISTRY, TEMPORARY EXCLUSION ORDERS--LEGAL ASPECTS (undated) [hereinafter TEMPORARY EXCLUSION ORDERS--LEGAL ASPECTS] (outlining the legal arguments in support of the deportation of terrorists).

14. See *infra* note 224 and accompanying text (discussing the implications of the appeals process which can take as long as one year).

Balancing the interests of the government and the residents in the occupied territories has proved difficult, given the geo-political complexities of Israel's administration of the occupied territories. Israel remains under the same state of emergency imposed at her birth in 1948,¹⁶ and has since fought five wars over claims to her land.¹⁷ In the past, these circumstances led the Court to grant great deference to the military and the government for determining whether national security conditions warranted deportations and the right to appeal deportation orders.¹⁸

Only recently has the Court examined the government's deportation orders more closely,¹⁹ scrutinizing both the evidence²⁰ against the

15. See Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 55-57 (1991) [hereinafter Bracha, *Judicial Review*] (discussing the difficult process the courts have experienced in developing a balance between national security interests and individual liberties).

16. 2 ITON RISHMI 6 (1948) [Official Gazette], cited in Amos Shapira, *Judicial Review Without A Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 443 n.132 (1983). The state of emergency was declared on May 21, 1948. *Id.* at 443.

17. See generally KHOURI, *supra* note 8 (describing the five Arab-Israeli wars since Israel's birth which include The War of Independence, The Sinai War of 1956, the Six Day War of 1967, the Yom Kippur War (also known as the October War) of 1973, and the invasion of Lebanon in 1982).

18. See Bracha, *Judicial Review*, *supra* note 15, at 40 (noting the prior reluctance of the Israeli Supreme Court to review security powers); Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375, 401-02 (1989) [hereinafter Zamir, *Human Rights*] (discussing the special status of national security in the Court's review of security powers).

19. See Cohen, *High Court of Justice*, *supra* note 4, at 499 (discussing the recent trend of scrutinizing decisions by the Military Commander, and referring to the Court's review of deportation orders implemented without the right to prior hearings).

20. See Bracha, *Judicial Review*, *supra* note 15, at 68 (discussing the Court's willingness to review intelligence information as evidence against a deportee through an *in camera* examination). One of the difficulties for the Court in reviewing decisions by security authorities is the use of privileged information gathered by intelligence services. *Id.* To overcome this problem, the Court developed the use of *in camera* review, through *ex parte* proceedings, which allows the Court to examine confidentially the relevant information and inquire into the significance of the evidence to the case. Itzhak Zamir, *The Rule of Law and the Control of Terrorism*, 8 TEL AVIV U. STUD. L. 81, 89 (1988) [hereinafter Zamir, *Rule of Law*]. This inquiry into the privileged evidence deters the government from abusing its powers because of the potential of disclosure to the Court. *Id.*; see also Shachshir v. Commander of the I.D.F. Forces in the West Bank, 43(1) Piskei Din 529 (1989), summarized in 25 ISR. L. REV. 130 (1991) (holding that where the government bases its deportation orders on privileged information, the Court must consider the circumstances and facts relating to the case in deciding whether to disclose the information); Matur v. Commander of the I.D.F. Forces in the West Bank, 43(3) Piskei Din 542 (1989), summarized in 25

deportees and the national security interests at risk.²¹ This new interventionist trend by the Court established a deportee's absolute right to appeal a deportation order.²² Nonetheless, in *Association for Civil Rights in Israel v. Minister of Defence*,²³ the Court broke from its previous interventionist approach and refused to restrain the government's power to immediately expel suspected terrorists without first providing hearings, and thus left the Military Commander with near complete discretion as to the necessity of such procedural rights.²⁴ The Court's decision reinforced the broad powers of security authority during national crises, and resolved any doubt about the Court's willingness to intervene on behalf of terrorists when it balances national security interests with humanitarian considerations under international law.²⁵

In *Association for Civil Rights in Israel v. Minister of Defence*, the Court held that immediate deportation, without prior hearings, of 415 members of the Hamas terrorist organization following the brutal murder of five persons in the Gaza Strip, was valid.²⁶ Although the Court found that the right to prior hearings was fundamental to natural justice,²⁷ the Court held that the Military Commander was empowered to

ISR. L. REV. 262 (1991) (holding that the Court may review privileged information used in issuing deportation orders in the absence of the petitioner, whether or not the petitioner agrees to such a form of review of the information); *Alshueybi v. Military Supervisor of the Judea and Samaria Region*, H.C. 19/86, 40(1) Piskei Din 219 (1986), summarized in 17 ISR. Y.B. HUM. RTS. 307 (1987) (establishing a balancing test, based on the risk to state security, for determining when information used in issuing deportation orders is disclosable to the petitioner).

21. See Zamir, *Human Rights*, *supra* note 18, at 404 (discussing the Court's landmark decision in the *Elon Moreh* case in 1979 which overturned the military's attempt to confiscate land for military necessity).

22. See, e.g., *Kawasme v. Minister of Defence*, H.C. 320/80, 35(2) Piskei Din 113 (1980), summarized in 11 ISR. Y.B. HUM. RTS. 344 (1981) (holding that the denial of a right to appeal a deportation order is grounds for annulment of the order); see also *infra* notes 102-13 and accompanying text (discussing the Court's examination in *Kawasme* of the right to appeal a deportation order before its execution).

23. See *infra* notes 114-66 and accompanying text (discussing *Association for Civil Rights in Israel v. Minister of Defence*).

24. See *infra* note 164 and accompanying text (stating that the Military Commander has sole responsibility for determining the conditions that warrant an exception to the right to prior hearings).

25. See *infra* notes 170-73 and accompanying text (discussing the role of the judiciary and the Court in providing checks on the power of the Military Commander to limit the right to prior hearings).

26. See *infra* notes 119-37 and accompanying text (discussing Hamas terrorist activity and the military's response with deportation orders).

27. See *infra* note 146 and accompanying text (discussing the right to prior

determine the conditions that warrant an exception to the right to prior hearings.²⁸ The Court held that this departure from the right to prior hearings was justified only in "concrete exceptional circumstances," but the Court neither defined nor determined whether such circumstances existed in this particular case.²⁹ The Court concluded that the Defence (Emergency) Regulations empower the Military Commander with discretion to allow deportees to file appeals only after their deportation orders are executed.³⁰

This Note examines the Court's decision in *Association for Civil Rights v. Minister of Defence*, and considers other approaches available to the Court for preserving an interventionist policy that permits the Court to protect humanitarian rights without sacrificing national security needs, focusing specifically on deportation proceedings.³¹ Part I discusses Israel's use of deportation under international law, and the Israeli Supreme Court's interpretation of the Fourth Geneva Convention and the Hague Regulations. Part II describes the use of deportation under domestic Israeli law through the Defence (Emergency) Regulations of 1945, and the development of the balance test that created the right to appeal deportation orders. Part III evaluates the Court's holding and rationale in *Association for Civil Rights in Israel v. Minister of Defence* with respect to both the right to prior hearings and the exception to that right, discussing how the Court's decision reflects a break from judicial interventionism. Part IV examines two approaches to the right to prior hearings in deportation proceedings that allow for an interventionist review and preservation of the result of *Association for Civil Rights in Israel v. Minister of Defence*. Part V concludes with two recommenda-

hearings as a fundamental concept of natural justice).

28. See *infra* note 164 and accompanying text (discussing the exclusive right of the Military Commander to define the circumstances that permit an exception to the right to prior hearings).

29. See *infra* notes 159-64 and accompanying text (discussing the Court's two alternative approaches to resolving the case in favor of the government, including the application of the exception of the right to prior hearings).

30. See *infra* notes 165-66 and accompanying text (discussing the Court's requirement that deportees receive an appeal to the advisory committee, and the international agreement to permit 101 deportees to return to the occupied territories in exchange for a halt in the United Nations' attempts to obtain sanctions against Israel).

31. This Note is limited to discussion of the right to prior hearings implicated by decisions of the security authorities in the occupied territories. For an excellent review of the right to be heard in non-security, administrative proceedings, see Baruch Bracha, *The Right to be Heard in Rule Making Proceedings in England and in Israel: Judicial Policy Reconsidered*, 10 FORDHAM INT'L L.J. 613 (1987).

tions to the Court for evaluating military orders in the occupied territories in light of the Declaration of Principles and the self-rule accord, and the gradual transfer of civil authority to the Palestinians.

I. DEPORTATIONS UNDER INTERNATIONAL LAW

An examination of the right to appeal deportation orders in Israel involves the threshold determination of whether there exists a right to deport. Commentators disagree on the legal status of deportations under international law.³² The two instruments for ascertaining the legality of deportations are the Fourth Geneva Convention³³ and the Hague Regulations.³⁴

A. THE FOURTH GENEVA CONVENTION OF 1949

Dispute over interpretation of the Fourth Geneva Convention centers around both its applicability to the Israeli occupied territories³⁵ and the intent of its drafters.³⁶ The Convention states that it applies to the occupation of territories of any "High Contracting Party."³⁷ Such parties include signatories to the Convention that were the legitimate sovereigns of territories now occupied by another state.³⁸ While Israel ratified the Fourth Geneva Convention,³⁹ the Convention does not apply to Israel's

32. See *supra* note 12 (noting legal commentators who criticize Israel's right of deportation under international law).

33. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. The Fourth Geneva Convention was created primarily to protect civilians during military occupation. COHEN, HUMAN RIGHTS, *supra* note 3, at 27.

34. Annex to the International Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.I.A.S. No. 539 [hereinafter Hague Regulations]. The Hague Regulations emphasize the military necessity of an occupying force. COHEN, HUMAN RIGHTS, *supra* note 3, at 27.

35. See Morgan, *supra* note 10, at 485 (noting that disagreements exist over the applicability of the Fourth Geneva Convention to the occupied territories).

36. See *id.* at 493-94 (discussing the dispute over the proper interpretation of the Fourth Geneva Convention with respect to deportations).

37. Fourth Geneva Convention, *supra* note 33, art. 2(2).

38. Lorch, *Symposium: Human Rights in Time of War*, 1 ISR. Y.B. HUM. RTS. 366, 366-67 (1971). Gerson asserts that discussion over the term "High Contracting Party" is unnecessary because Israel is not an occupier of the West Bank, but merely a trustee to the land in which the Palestinians are the legitimate sovereigns. Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 35, 39, 43 (1973).

39. See COHEN, HUMAN RIGHTS, *supra* note 3, at 44 n.51 (stating that Israel rat-

administration of the territories.⁴⁰ The international community refused to recognize the legitimacy of the Jordanian⁴¹ and Egyptian⁴² occupations of the West Bank and the Gaza Strip, respectively, prior to Israel's occupation in 1967. Thus, no internationally recognized, legitimate authority occupied the territories before Israel and therefore the Convention is not applicable to Israel in its administration of the territories.

The government and military, however, apply the Convention on a *de facto* basis for humanitarian purposes,⁴³ and require that all military personnel abide by the Convention when confronted by belligerent civilians in the occupied territories.⁴⁴ The Israeli Supreme Court holds that the *de facto* approach is merely a political decision⁴⁵ that affects neither the Convention's legal inapplicability⁴⁶ to the occupied territories nor its unenforceability in the courts.⁴⁷ According to the Court, the Convention only meets the requirements of conventional international law, and thus is not available for consideration by Israeli courts.⁴⁸

ified the Fourth Geneva Convention on July 6, 1951, subject to recognition of the Magen David emblem).

40. *Id.* at 45. Israeli application of the Fourth Geneva Convention would amount to a retroactive recognition of legitimate Jordanian and Egyptian sovereignty over the occupied territories. *Id.* Meron argues, however, that Israel is overly concerned with the retroactivity argument, and that the Fourth Geneva Convention only applies to persons, not territory. Theodor Meron, *Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106, 108-09 (1979).

41. Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 290 (1968). Only Great Britain and Pakistan recognized Jordan's annexation of the West Bank, and even the Arab League determined that the annexation violated the Arab League Charter. *Id.*

42. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 263-64 (1971). Egypt never claimed sovereignty over the Gaza Strip. Lorch, *supra* note 38, at 367.

43. Meron, *supra* note 40, at 108.

44. General Staff of the I.D.F., Order No. 33.0133; Military Justice Code No. 1.33, *The Authority of the Army in a Conquered Area, discussed in* Esther Rosalind Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 483 n.46 (1986).

45. *Kawasme v. Minister of Defence*, H.C. 698/80, 35(1) Piskei Din 617 (1980) (known as *Kawasme II*), summarized in 11 ISR. Y.B. HUM. RTS. 349, 351 (1981).

46. *Id.*; see also Shamgar, *supra* note 42, at 262 (stating that *de facto* observance of the Fourth Geneva Convention does not mean it is applicable by force of law).

47. See *Ayub v. Minister of Defence*, H.C. 606/78, 33(2) Piskei Din 113 (1979), summarized in 9 ISR. Y.B. HUM. RTS. 337, 341 (1979) (known as *the Beth El case*) (holding that the Fourth Geneva Convention only satisfies conventional international law and thus can only be invoked by the state).

48. See Meron, *supra* note 40, at 111 (discussing the differences between custom-

Both the government and the Court agree, irrespective of the issue of applicability, that the Convention permits deportation for the purpose of maintaining public order and safety during the occupation.⁴⁹ Although Article 49 of the Convention prohibits deportations of protected persons regardless of motive,⁵⁰ the drafters' intent⁵¹ and the language of the Convention suggest that a narrow reading of this article is necessary.⁵²

The official commentary to the Convention notes that Article 49, written in the context of the Holocaust and World War II,⁵³ is intended only to prohibit deportations for the purpose of forced labor.⁵⁴ Other commentators, however, assert that the article applies generally to situations where deportees are expelled to more dangerous locations for the purpose of torture, extermination, or slave labor.⁵⁵ For example, the

ary and conventional international law, the latter requiring Knesset adoption for consideration by the domestic courts). Customary international law is binding on all countries, whether or not a signatory to the Convention which formalized it. *Id.* Conventional international law, however, is binding on only the signatories to the Convention. *Id.*

49. TEMPORARY EXCLUSION ORDERS--LEGAL ASPECTS, *supra* note 13, sec. 2.

50. Fourth Geneva Convention, *supra* note 33, art. 49, para. 1.

51. See INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958) [hereinafter Pictet, OFFICIAL COMMENTARY] (reporting on the drafting of the Fourth Geneva Convention).

52. See Kenneth J. Bialkin, *Interpreting Article 49*, THE NAT'L L.J., Oct. 31, 1988, at 13, 16 (stating that a broad and literal interpretation of article 49 would lead to perverse results).

53. Pictet, OFFICIAL COMMENTARY, *supra* note 51, at 278-79. The Commentary states:

There is doubtless no need to give an account here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhuman conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service.

Id. at 278-79.

54. Bialkin, *supra* note 52, at 13, 14.

55. JULIUS STONE, NO PEACE--NO LAW IN THE MIDDLE EAST 39 (1969). In discussing the limited reach of article 49, Stone asserts that:

[I]t seems reasonable to limit the sweeping literal words of Article 49 to situations at least remotely similar to those contemplated by the draftsman, namely the Nazi War II practices of large-scale transfers of populations, whether by mass transfer or transfer of many individuals, to more hostile or dangerous environments, for torture, extermination or slave labor.

language of Article 49, referring only to "protected" persons,⁵⁶ and the language of the Convention in Article 147, referring to "unlawful" deportations,⁵⁷ indicate the need for a narrow interpretation of the prohibition against deportations. Preventing an occupier from implementing deportations as a means of maintaining public order and safety in accordance with Article 64⁵⁸ would lead to dangerous results.⁵⁹ The Israeli Supreme Court therefore permits deportations under the Convention when security needs arise in the territories.⁶⁰

B. THE HAGUE REGULATIONS OF 1907

Israel does not dispute the applicability of the Hague Regulations to the administration of the occupied territories.⁶¹ Unlike the Fourth Geneva Convention language which defines occupation in terms of the legitimacy of a prior sovereign,⁶² Article 42 of the Regulations broadly de-

Id.

56. Fourth Geneva Convention, *supra* note 33, art. 49, para. 1; *see also* Naser Aziz Afu v. Commander of the Judea and Samaria Region, H.C. 845/87, 27(88) Piskei Din 785 (1988), *summarized in* 24 ISR. L. REV. 137, 144 (1990) (known as the *Affu* judgment) (affirming the narrow interpretation of article 49 due to the use of the term "protected person"). The Court stated that "the legislative object of a given provision of a statute or a convention is of prime importance for determining its scope." Naser Aziz Afu v. Commander of the Judea and Samaria Region, H.C. 845/87, 27(88) Piskei Din 785 (1988), *discussed in* John L. Habib, *Israeli Deportations of Palestinians Under International Law*, 4 EMORY INT'L L. REV. 133, 142 (1990).

57. Fourth Geneva Convention, *supra* note 33, art. 147; *see also* Bialkin, *supra* note 52, at 17 (asserting that the term "unlawful deportation" indicates the validity of lawful deportations).

58. Fourth Geneva Convention, *supra* note 33, art. 64, para. 2. Article 64 allows the military occupier to maintain orderly government in the territory and ensure security of the military occupier as necessary to fulfill its obligations under the Convention. *Id.*

59. Naser Aziz Afu v. Commander of the Judea and Samaria Region, H.C. 845/87, 27(88) Piskei Din 785 (1988), *summarized in* 24 ISR. L. REV. 137, 141 (1990). The Court in *Naser Aziz Afu* noted the absurd results if Article 49 provided an absolute prohibition on deportations, especially for terrorists. *Id.* The result from such a reading of Article 49 is that "[t]he physical presence in the [occupied] territory creates immunity from deportation." Bialkin, *supra* note 52, at 16.

60. *See* Naser Aziz Afu v. Commander of the Judea and Samaria Region, 845/87, 27(88) Piskei Din 785 (1988), *discussed in* John L. Habib, *Israeli Deportations of Palestinians Under International Law*, 4 EMORY INT'L L. REV. 133, 142 (1990) (holding that Article 49 permits deportations for reasons of military necessity).

61. COHEN, HUMAN RIGHTS, *supra* note 3, at 43.

62. *See supra* notes 37-42 and accompanying text (discussing the binding re-

finer an occupied territory as territory which is actually placed under the control of a hostile force.⁶³ In addition, Article 43 of the Regulations provides that the occupier shall take all measures necessary to ensure public order and safety.⁶⁴ Although the Regulations make no mention of deportations,⁶⁵ the Israeli Supreme Court holds that deportations are a legitimate exercise of the government's power under Article 43 to maintain security in the occupied territories.⁶⁶

A critical distinction between the applicability of the Hague Regulations and the Fourth Geneva Convention to the occupied territories is the former's standing as customary international law.⁶⁷ The Israeli Supreme Court holds that the Regulations fall under the category of customary international law, and thus are binding upon the government, regardless of whether Israel is a signatory to the Regulations.⁶⁸ One condition to the Court's adoption of the Regulations, however, is the requirement that no conflicting domestic legislation exists, in which case the domestic law would prevail.⁶⁹

quirements of signatories to the Fourth Geneva Convention).

63. Hague Regulations, *supra* note 34, art. 42.

64. *Id.* at art. 43. Article 43 states that "the [occupier] 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." *Id.*

65. See Pictet, OFFICIAL COMMENTARY, *supra* note 51, at 279 (noting that the Hague Regulations do not discuss deportations because of the presumption that such actions were no longer utilized in the international community).

66. Abu Awad v. Commander of the Judea and Samaria Region, H.C. 97/79, 33(3) Piskei Din 309, summarized in 9 ISR. Y.B. HUM. RTS., 343, 345 (1979). The Court stated that Article 43 of the Hague Regulations permits deportations as part of the military occupier's obligation to ensure public order in the occupied territories. *Id.*

67. Meron, *supra* note 40, at 111; see also Cohen, *High Court of Justice*, *supra* note 4, at 484-86 (discussing the distinction between customary and conventional international law, and noting that the Hague Regulations were declared customary international law by the International Military Tribunal at Nuremberg in 1945). Customary international law is determined by the consistent practice and the legal obligation of the international community. RESTATEMENT (REVISED) OF FOREIGN RELATIONS OF THE UNITED STATES 102(2) (Tent. Draft No. 6, 1985).

68. Attorney General of Israel v. Sylvester, 15 Ann. Dig. (1948), cited in ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 35, 58 n.50 (1985); see also Sheikh Suleiman Abu Hilu v. State of Israel, H.C. 302/72, 27(2) Piskei Din 169 (1972), summarized in 5 ISR. Y.B. HUM. RTS. 384, 386-87 (1975) (holding that customary international law guides the propriety of administrative acts of security authorities).

69. See Ayub v. Minister of Defence, H.C. 606/78, 33(2) Piskei Din 113 (1978), summarized in 9 ISR. Y.B. HUM. RTS. 337 (1979) (asserting the inviolability of Israeli internal-municipal law when challenged by conventional international law).

II. DEPORTATIONS UNDER THE DEFENCE (EMERGENCY) REGULATIONS OF 1945

Following the War of Independence in 1948,⁷⁰ Israel formally absorbed all pre-existing laws through the Law and Administration Ordinance.⁷¹ Among these laws were the Defence (Emergency) Regulations of 1945,⁷² promulgated by the British Mandatory powers that occupied Palestine before Israel's independence.⁷³ Ironically, these Regulations, which conferred tremendous authority in the High Commissioner to maintain public order and safety,⁷⁴ were primarily used by the British to prevent Jewish immigration to Palestine.⁷⁵

70. *Summary of the Report of the U.N. Special Committee on Palestine*, reprinted in THE ISRAEL-ARAB READER 108 (Walter Laqueur and Barry Rubin eds., 1984) (stating that in May 1948, the British Mandate over the area known as Palestine ended). As the Mandate was about to expire, the United Nations attempted to create a partition plan to divide Palestine between the Jews and Arabs. *U.N. General Assembly Resolution on the Future Government of Palestine*, reprinted in THE ISRAEL-ARAB READER 113 (Walter Laqueur and Barry Rubin eds., 1984). After the Arab residents of Palestine rejected the U.N. plan, the Jewish residents declared the state of Israel. STATE OF ISRAEL PROCLAMATION OF INDEPENDENCE, reprinted in THE ISRAEL-ARAB READER 125 (Walter Laqueur and Barry Rubin eds., 1984). The next day, troops from five Arab states attacked the Jewish state, resulting in the War of Independence. KHOURI, *supra* note 8, at 70.

71. Law and Administration Ordinance sec. 11, ITON RISHMI 1 (Supp. A) (1948), cited in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 56 n.81 (1991).

72. Defence (Emergency) Regulations, 1945, PALESTINE GAZETTE, Sept. 27, 1945, (No. 1442, Supp. 2). See Baruch Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945*, 8 ISR. Y.B. HUM. RTS. 296, 300 (1978) [hereinafter Bracha, *Defence Regulations*] (discussing the historical development of the Defence (Emergency) Regulations and their application by the Israeli security authorities). See also Bracha, *Judicial Review*, *supra* note 15, at 56 (noting the purpose of the Defence (Emergency) Regulations to promote state security and protect fundamental freedoms).

73. Bracha, *Defence Regulations*, *supra* note 72, at 299. The Defence (Emergency) Regulations were originally promulgated by the British as emergency legislation prior to World War II under Article 6 of the Palestine (Defence) Order in Council 1937. *Id.* New regulations were published in 1945 which raise the issue in this Note. *Id.*

74. *Id.* Article 6(2) of the original 1937 Regulations stated that the "Defence Regulations may . . . amend any law, suspend the operation of any law, and apply any law with or without modification." *Id.*; *supra* note 73.

75. See Bracha, *Defence Regulations*, *supra* note 72, at 299, 300 n.16 (stating that the Defence (Emergency) Regulations 102-107C were primarily designed to pre-

These Regulations, as adopted by Israel,⁷⁶ are a potent means for combatting terrorism by empowering the Military Commander⁷⁷ with measures to restrict personal freedoms within the occupied territories. The Military Commander may impose such security measures as police supervision,⁷⁸ detention,⁷⁹ deportation,⁸⁰ demolition,⁸¹ or close off an area within the territories.⁸² These powers have the force of law,⁸³ and can override Knesset legislation.⁸⁴

A. AUTHORITY TO ISSUE DEPORTATION ORDERS

The Military Commander is granted the power to issue deportation orders and to expel persons from the occupied territories under Regulation 112.⁸⁵ The Commander is required to evaluate military necessity

vent Jewish immigration to Palestine).

76. See COHEN, HUMAN RIGHTS, *supra* note 3, at 94 (discussing the dispute over the applicability of the Defence (Emergency) Regulations). Israel's adoption of the Defence (Emergency) Regulations, with respect to their application to the occupied territories captured in 1967, was a source of controversy because of the prior occupations by Jordan and Egypt. *Id.* Local law in the occupied territories remains in force except where its existence constitutes a threat to the occupier's ability to maintain security. *Id.* Israel denies Jordanian claims that the Defence (Emergency) Regulations were repealed by Jordanian law during its occupation following the War of Independence. See *Abu Awad v. Commander of the Judea and Samaria Region*, H.C. 97/79, 33(3) Piskei Din 309 (1979), summarized in 9 ISR. Y.B. HUM. RTS. 343-45 (1979) (holding that Jordan did not repeal the Defence (Emergency) Regulations during its occupation of the West Bank, and thus the Regulations are still valid).

77. See Shapira, *supra* note 16, at 444 (explaining that the Military Commander is a high ranking officer, appointed by the Chief of Staff with approval by the Minister of Defence).

78. Defence (Emergency) Regulations, *supra* note 72, Reg. 110.

79. *Id.* at Reg. 111.

80. *Id.* at Reg. 112.

81. *Id.* at Reg. 119.

82. *Id.* at Reg. 125.

83. Shapira, *supra* note 16, at 444.

84. *Id.*

85. Defence (Emergency) Regulations, *supra* note 72, Reg. 112. The first three sections of Regulation 112 describe the powers of the High Commissioner (now the Military Commander) to effect deportations:

(t)he High Commissioner shall have the power to make an order under his hand (hereinafter in these Regulations referred to as "a Deportation order") requiring any person to leave and remain out of Palestine.

Id. Reg. 112(1).

The High Commissioner shall have the power by order under his hand to require any person who is out of Palestine to remain out of Palestine. A person

in determining whether to deport. Under Regulation 108,⁸⁵ the Commander may issue the deportation order under Regulation 112 if he "is of the opinion that it is necessary or expedient to make the order for securing the public safety, the defence of the area, the maintenance of public order or the suppression of mutiny, rebellion or riot."⁸⁷ The Israeli Supreme Court affirmed the validity of this criteria⁸⁸ when it upheld the deportation of three senior members of a terrorist organization.⁸⁹

B. APPEALING DEPORTATION ORDERS

Section 8 of Regulation 112 serves to limit the discretion of the Military Commander. It requires the establishment of an advisory committee to hear objections to the decisions of the Commander.⁹⁰ According to internal instructions handed down by the Israeli Defence Forces,⁹¹ these committees are chaired by a Supreme Court justice and must include two members of the public.⁹² After examining the evidence against a

with respect to whom such an order is published shall so long as the order is in force remain out of Palestine. An order under this regulation may be made subject to such terms and conditions as the High Commissioner may think fit.

Id. Reg. 112(2).

A person with respect to whom a Deportation Order is made shall leave Palestine in accordance with the order and shall thereafter so long as the order is in force remain out of Palestine.

Id. Reg. 112(3).

86. *Id.* at Reg. 108.

87. *Id.*

88. *Nazal v. Commander of the Judea and Samaria Region*, H.C. 513/85, 39(3) *Piskei Din* 645 (1985), summarized in 16 *ISR. Y.B. HUM. RTS.* 329, 330 (1986).

89. *See id.* (requiring the state to prove the evidence against the terrorists by clear, convincing and unequivocal information).

90. Defence (Emergency) Regulations, *supra* note 72, Reg. 112(8). Section 8 was not part of the original Regulations, but was created through the reforms of Regulation 111 and its section 4. Bracha, *Defence Regulations*, *supra* note 72, at 306. Regulation 111, relating to detentions, *supra* note 79, was repealed in 1979. Shapira, *supra* note 16, at 448 n.152. For further discussion on detention reform, and the establishment of advisory committees under Regulation 111, *see* Shapira, *supra* note 16, at 452-55 (discussing the movement for reform in detention law and procedures).

91. Bracha, *Defence Regulations*, *supra* note 72, at 306. The internal instructions guide the decision-making of the Military Commanders, but are not published. *Id.* at 306-07. The general purpose and direction of the internal instructions can be learned from the Instructions of the Attorney General with respect to Regulation 111. *Id.* at 306 n.41.

92. *Id.* at 308.

deportee, the committee makes recommendations to the Military Commander as to the deportee's final status,⁹³ which the Commander must accept without objection.⁹⁴

C. ISRAELI SUPREME COURT REVIEW

Although international law does not require an occupier's courts to review decisions of its own occupation forces,⁹⁵ in 1968 the Israeli Attorney General granted the residents of the West Bank and Gaza Strip the right to appeal deportation orders to the Israeli Supreme Court.⁹⁶ This new right was limited by the Court's deference to the government and the military.⁹⁷ In *Alyubi v. Minister of Defence*,⁹⁸ the Court employed only a good faith test in reviewing acts pursuant to security measures, and refused to examine the Military Commander's motive in issuing orders under the Defence (Emergency) Regulations.⁹⁹ The Court

93. *Id.*

94. *See id.* (stating that by virtue of the internal instructions of the IDF, *supra* note 91, the decisions of the advisory committees are accepted as binding).

95. Cohen, *High Court of Justice*, *supra* note 4, at 474. Article 66 of the Fourth Geneva Convention allows an occupying force to establish military tribunals and courts of appeals in the occupied territories to judge offenses. Fourth Geneva Convention, *supra* note 33, art. 66. The authority for the Supreme Court's review is based on Section 7(b)(2) of the Israeli Courts Law of 1957. 9 Laws of the State of Israel 157-58, *discussed in* Esther Rosalind Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 475 (1986).

96. Cohen, *High Court of Justice*, *supra* note 4, at 471-73. Although Supreme Court review over military authorities in the occupied territories was unprecedented, Attorney General Shamgar sought to protect human rights and compel the authorities to seek legal advice before implementing security orders. *Id.* at 472-73.

97. *See* Bracha, *Defence Regulations*, *supra* note 72, at 309 (discussing the Court's review of security orders as limited to a determination of whether the military authorities exceeded their powers, and whether the orders were bona fide).

98. *Alyubi v. Minister of Defence*, H.C. 46/50, 4 Piskei Din 220, *discussed in* Baruch Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945*, 8 ISR. Y.B. HUM. RTS. 296, 313 (1978).

99. *Id.* The Court in *Alyubi* stated:

The jurisdiction of this Court, in scrutinizing the competent authority's exercise of its power emanating from the Defence (Emergency) Regulations, 1945, is very limited. When the given Regulation empowers the competent authority to act against an individual in any case in which it "thinks" or "it seems to it" that there are conditions that require this, then that same Authority is the final Arbiter in determining the existence of these conditions. In such situations, this

held that the Regulations authorize the Military Commander to make the final determination as to the military necessity of issuing security orders based on the Commander's own subjective analysis.¹⁰⁰

D. RIGHT TO APPEAL DEPORTATION ORDERS BEFORE IMPLEMENTATION

The Defence (Emergency) Regulations do not specify whether the right to appeal exists before implementation of the deportation orders.¹⁰¹ In *Kawasme v. Minister of Defence*¹⁰² the Court examined this question in a manner consistent with its new interventionist trend. In *Kawasme*, three mayors from Judea and Samaria were immediately deported to Lebanon following the murder of six Jews returning home from their synagogue.¹⁰³ The mayors were not provided with the opportunity to appeal the deportation orders to the advisory committee pursuant to Regulation 112(8),¹⁰⁴ and their wives petitioned the Court seeking annulment of the orders.¹⁰⁵

Court's function is limited to examining whether the authority exceeded its power under the law by virtue of which it was empowered to act, if the said authority paid attention to the factors stated in the same law, and whether the authority acted in good faith. Since it is restricted to this limited jurisdiction, this Court is not to scrutinize the reasons encouraging the competent authority to issue the given Order.

Id.

100. *Id.* The Court affirmed its holding in *Alyubi* when it later applied its decision to deportation orders and refused to review the motivating factors of a military authority. *Haddad v. Minister of Defence*, H.C. 17/71, 25(1) Piskei Din 141, *discussed in* Baruch Bracha, *Restriction of Personal Freedom According to the Defence (Emergency) Regulations, 1945*, 8 ISR. Y.B. HUM. RTS. 296, 315 (1978).

101. Cohen, *High Court of Justice*, *supra* note 4, at 496-97. The lack of specific provisions in the Defence (Emergency) Regulations on the right to prior hearings has not prevented the Court from issuing injunctions to slow the deportation process and provide time for appeals. *Id.*

102. *Kawasme v. Minister of Defence*, H.C. 320/80, 35(2) Piskei Din 113 (1980), *summarized in* 11 ISR. Y.B. HUM. RTS. 344, 344 (1981).

103. *Id.*

104. *Id.* The Military Commander determined that prior hearings could jeopardize "public safety, security of the area, and/or the maintenance of public order" under the standards of Regulation 108. *Id.* The mayors were leaders of the National Guidance Council which was responsible for organizing strikes and demonstrations in the West Bank. Cohen, *High Court of Justice*, *supra* note 4, at 501-02.

105. *Kawasme v. Minister of Defence*, H.C. 320/80, 35(2) Piskei Din 113 (1980), *summarized in* 11 ISR. Y.B. HUM. RTS. 344, 345 (1981). The three mayors were deported to Lebanon and were not allowed to return to appeal their deportation or-

In his majority opinion, Justice Landau determined that natural justice granted all deportees the right to appeal their deportation orders before their implementation.¹⁰⁶ Landau rejected the military's argument that the urgent security needs following the assassination of the Jews mandated immediate action.¹⁰⁷ The Justice asserted instead that the government and the military were obligated to abide by the law in all circumstances, even in times of emergency.¹⁰⁸

The Court refused, however, to declare the deportation orders null and void.¹⁰⁹ Rather, through the remedy of *restitution in integrum*, the Court found that the deportees had the right to return to their respective positions prior to the government's illegal act.¹¹⁰ Thus, the Court granted two of the three mayors the right to appeal their deportation orders to the advisory committee.¹¹¹ For the third mayor, the Court re-

ders. *Id.* at 345.

106. *Id.* at 345.

107. *Id.* The Court stated that:

[E]ven if the respondents (the government) considered that, due to pressing security grounds, it was very desirable for the deportation to be carried out without any delay, this could not constitute a justification for their intentionally ignoring the duty to observe the law, which is binding on every authority of the State, including the Military Administration.

Id.

108. *Id.* at 346. Justice Landau asserted that:

the observance of the law is not a burden but a duty which must be performed in all circumstances. This duty is imposed on everyone who exercised authority in the State or on its behalf, not only in order to respect the right of every citizen and individual resident, whatever his crimes may be, but also - and perhaps mainly - in order to preserve the image of the State as a law-abiding State, for the sake of all its citizens. We have always relied on the fact that in our country the voice of law is never muted, even in times of hostilities about us, and this Court, ever since its first steps, has insisted on scrupulous observance of the rule of law even in time of emergency.

Id.

109. *Id.* The Court reasoned that the failure of the state to provide prior hearings does not implicate the need for an advisory committee review: only the deportee, upon his objection, can bring the issue before the committee. *Id.* Thus, the lack of a prior hearing is no different than a properly executed deportation order where the deportee acquiesces, leaving the right of appeal open to the discretion of the deportee.

Id.

110. *Id.* at 346-47. The Court terms this retroactive remedy as *restitutio in integrum*. *Id.* at 346. The appeal may be done by a written affidavit through an Israeli consul abroad, or through the international Red Cross. *Id.* at 347.

111. *Id.*

fused any remedy, concluding that the advisory committee would never accept his appeal because of his call for the annihilation of Israel.¹¹²

While Justice Landau indicated that an exception to the right to prior hearings existed during emergency conditions, he failed to delineate which conditions justified such an exception and whether the expulsions of the mayors indeed did amount to an exception in *Kawasme*. Justice Cahan, in his concurring opinion, argued that all three mayors were legally deported as a result of an emergency exception, but again did not indicate the terms for this exception.¹¹³

III. ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL v. MINISTER OF DEFENCE

The conflict in *Association for Civil Rights in Israel v. Minister of Defence*¹¹⁴ prompted international attention because of its implications on the Middle East peace negotiations occurring in Washington, D.C.¹¹⁵ Israel and her neighbors were discussing terms for a lasting peace in the region when violent terrorist acts in the occupied territories derailed talks.¹¹⁶ Consistent with Israel's hard-line policy on terrorism and the preservation of security in Israel and the territories,¹¹⁷ Israeli military officials immediately expelled 415 members of the Hamas ter-

112. *Id.* The Court applied the *el ard* criteria which allows the Court to reject judicial relief where an appellant opposes the existence of the state of Israel. Cohen, *High Court of Justice*, *supra* note 4, at 502.

113. *Kawasme v. Minister of Defence*, H.C. 320/80, 35(2) Piskei Din 113 (1980), summarized in 11 ISR. Y.B. HUM. RTS. 344, 347 (1981). Justice Cahan stated that the right to prior hearings depends upon the circumstances of the case. *Id.* at 347.

114. *Association for Civil Rights in Israel v. Minister of Defence*, H.C. 5793/92, ___ Piskei Din ___ (Decided Jan. 28, 1993) [English translation] 1 (available from the Embassy of Israel in Washington, D.C.) [hereinafter the *Hamas Deportation Case*].

115. See "We Will Fight For Peace Against Terror", NEAR E. REP., Jan. 4, 1993, at 1 (noting the remarks of Prime Minister Yitzhak Rabin to the Knesset on Dec. 21, 1992 discussing international criticism and attention focused on the Israeli decision to deport the Hamas terrorists, and the attempt to maintain Israel's commitment to the peace process in light of the violent attacks).

116. See EMBASSY OF ISRAEL, FOR YOUR INFORMATION: THE TEMPORARY EXCLUSION OF HAMAS OPERATIVES sec. 4 (undated) [hereinafter DEPORTATION TALKING POINTS] (stating that the goal of the terrorist acts against Israel was to destroy the Middle East peace negotiations).

117. *Id.* sec. 1.

rorist organization who were responsible for leading the violent acts¹¹⁸ and being held in Israeli detention centers.

A. HAMAS TERRORISM AND THE ISRAELI RESPONSE

According to the organization's charter,¹¹⁹ the goal of the Islamic fundamentalist Hamas is to exterminate all Jews and liberate Palestine from Zionist control.¹²⁰ The means of accomplishing this goal, through violent terrorist acts against targets in Israel and the occupied territories,¹²¹ includes the killing of both military personnel and civilians,¹²² without provocation.¹²³ As a consequence, Hamas leaders seek to prevent the Arabs from negotiating a peaceful settlement to the Middle East conflict with Israel.¹²⁴

In a one-week period in December 1992, Hamas was responsible for the murders of five people,¹²⁵ including the brutal kidnapping and killing of a border policeman that shocked the nation.¹²⁶ Hamas leaders applauded the violent death of the policeman and promised more killings in the future.¹²⁷

118. See *id.*, Talking Points Sec. (describing the acts that prompted the deportations).

119. EMBASSY OF ISRAEL, BACKGROUND PAPER: THE COVENANT OF THE "ISLAMIC RESISTANCE MOVEMENT" (HAMAS) (1992) [hereinafter HAMAS COVENANT].

120. *Id.*

121. See DEPORTATION TALKING POINTS, *supra* note 116, Talking Point Sec. (describing the "liberation of all Palestine, from the (Mediterranean) Sea to the (Jordan) River").

122. See INFORMATION BRANCH, IDF SPOKESMAN'S UNIT, THE HAMAS BACKGROUND, THE ISLAMIC JIHAD BACKGROUND, THE UPRISING - DATA 1, 7-9, (1992) [hereinafter HAMAS BACKGROUND] (describing recent terrorist attacks by the Hamas organization which includes kidnappings and murders of IDF soldiers and civilians); see also HAMAS COVENANT, *supra* note 119 (explaining that collaborators with Israel and imperialistic nations will be cursed for their betrayal of Islam).

123. See *Israelis React to the Toledano Murder*, NEAR E. REP., Dec. 28, 1992, at 1 [hereinafter *Toledano Murder*] (citing Hamas Leaflet No. 65 stating that "[e]very Jew is a settler and it is an obligation to kill him and take his property").

124. See HAMAS BACKGROUND, *supra* note 122, at 4 (discussing an interview with Ahmed Yasin).

125. See *Israel's Neighborhood*, NEAR E. REP., Dec. 21, 1992, at 1 (detailing the deaths and injuries as a result of Hamas attacks between December 7 and 15, 1992).

126. See *Toledano Murder*, *supra* note 123, at 1 (describing the brutality of the killing and the widespread denunciations across the entire Israeli political spectrum). In light of the brutal killings and the subsequent deportations of the Hamas terrorists, a national poll in Israel found 91% approval for the actions of the Israeli government. *Id.*

127. See HAMAS BACKGROUND, *supra* note 122, at 3 (stating that "it was not the

Fearing that a security breach existed in the occupied territories and more violence could follow,¹²⁸ the Military Commanders in Judea and Samaria and in the Gaza Strip issued temporary expulsion orders pursuant to Defence (Emergency) Regulation 112.¹²⁹ The deportation orders called for a maximum two-year expulsion¹³⁰ of 415 members¹³¹ of Hamas who were held in Israeli detention centers. Through relatives and attorneys, the deportees could appeal the deportation orders to the advisory committees after the orders were implemented.¹³²

first act, as our people are well aware - and it will not be the last, with the help of the Almighty").

128. See *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 23 (citing the Argument of the Minister of Defence, No. 31, stating that the presence of the terrorists in the occupied territories would lead to further violence).

129. See *id.* at 8-10 (quoting the Order for Temporary Exclusion). The exclusion orders were promulgated following votes by both the Ministerial Committee for National Security Matters, *id.* at 8, and the Israeli cabinet. *Toledano Murder*, *supra* note 123, at 1. The Israeli cabinet issued a statement following the vote in support of the deportation which read: "In light of the emergency situation and in order to preserve public order, the prime minister and defense minister is [sic] empowered to order officers in Judea, Samaria, and Gaza to issue orders for temporary expulsions without prior warning." Herb Keinon, *Court Issues 5-2 Ruling on Deporting Activists*, THE JERUSALEM POST, Dec. 18, 1992, at 1.

130. *Hamas Deportation Case*, H.C. 5792/93, ___ Piskei Din ___, at 9. The Israeli government argues that the removal of the Hamas terrorists does not constitute a deportation under Article 49 of the Fourth Geneva Convention, which speaks in terms of permanent displacement, because the state only seeks to exclude them temporarily for two years. TEMPORARY EXCLUSION ORDERS - LEGAL ASPECTS, *supra* note 13. This distinction is important for purposes of discussion of the proportionality of the punishment, *infra* notes 215-31 and accompanying text, but it is not relevant to discussion of the right to prior hearings. See also Steve Rodan, *The Legal Quandry: Deport First, And Hear the Appeal Later?*, THE JERUSALEM POST, Dec. 18, 1992, at 4 (quoting former attorney general Itzhak Zamir who believes that the "difference between deportation and limited exile . . . is semantics").

131. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 3 (quoting the Argument of the Minister of Defence, No. 49). The state detailed the background of the 415 deportees:

Involved are people, some of whom took part in the organisation and support of acts of violence or in the guidance, incitement, or preaching of such acts. The others assisted the activities of the said organisations in the sphere of economic or organisational infrastructure, the mobilisation of personnel, the raising and distribution of funds and also in the wording of proclamations and organising the dissemination thereof.

Id. at 13.

132. *Id.* at 9-10. The original exclusion order limited the right to appeal within 60 days of its implementation. *Id.* at 10. This requirement was revoked by amendment.

The deportation orders were executed on December 16, 1992, and then temporarily stayed due to a petition to the High Court of Justice challenging the validity of the orders.¹³³ The Court lifted the stay the next day with an *order nisi*,¹³⁴ requiring the government to justify its actions at a later date. The 415 deportees were then taken to an area north of Israel, controlled by Lebanese forces.¹³⁵ The forces refused entry of the deportees and left them stranded in an area known only as a "no man's land."¹³⁶ Fourteen of the deportees were returned to the

Id. at 12.

133. *Id.* at 12. See also Keinon, *supra* note 129, at 1 (discussing the Court's 5-2 decision to deport the Hamas terrorists and the legal maneuvering behind the implementation of the deportation orders).

134. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 12. An *order nisi* is a temporary decision by the Court that requires the government to respond usually within 30 days to justify its actions. Cohen, *High Court of Justice*, *supra* note 4, at 480.

135. See DEPORTATION TALKING POINTS, *supra* note 116, sec. 3 (describing the deportation procedure).

136. See Clyde Haberman, *400 Arabs Ousted by Israel Are Mired in Frozen Limbo*, N.Y. TIMES, Dec. 19, 1992, at 1, 5 (describing the area where the deportees were left as a "no man's land" between Lebanon and Israel); DEPORTATION TALKING POINTS, *supra* note 116, sec. 3 (noting the attempt by the Lebanese forces to exploit the deportations of the Hamas terrorists for political gain).

One of the preliminary issues that arose due to the deportation of the Hamas terrorists was whether the Israeli military actually completed the deportation. See Raine Marcus, *Lawyers File for Return of Deportees*, THE JERUSALEM POST, Dec. 20, 1992, at 2 (discussing the deportees' petition claiming that the deportation was not completed because the Lebanese refused entry of the deportees into Lebanese territory). The deportees argued through their attorneys that Israel remained responsible for the welfare of the deportees because they were effectively abandoned, and thus must be returned until another state has decided to accept them. *Id.* The government disputed the facts presented by the deportees and argued that the Lebanese army was in complete control of the area where the deportees were camped. HIGH COURT OF JUSTICE DECISION, EMBASSY OF ISRAEL (Dec. 23, 1992). The Court agreed with the government and rejected the petition, stating that merely because the Lebanese army has chosen to establish a roadblock which traps the deportees in a no man's land does not detract from the Lebanese army's responsibility for the deportees. *Id.*

Following the Court's decision, the Israeli government refused to permit a Red Cross convoy to pass through the security zone between Israel and Lebanon, citing the Israeli Supreme Court decision on the responsibility of the Lebanese government for the deportees. CABINET DECISION, EMBASSY OF ISRAEL (Dec. 25, 1992). The government also condemned the actions of the Lebanese government that allowed the media to interview and photograph the deportees for propaganda purposes, while at the same time, refusing to provide food and water to them. *Id.*

Israeli detention centers upon the government's finding that they were mistakenly expelled.¹³⁷

B. INTERNATIONAL REACTION

The United Nations Security Council issued Resolution 799¹³⁸ which condemned the Israeli deportations, and charged that Israel's action violated the Fourth Geneva Convention.¹³⁹ The Security Council asserted that the Fourth Geneva Convention prohibited the deportation of civilian populations,¹⁴⁰ and demanded that Israel both respect the sovereignty and integrity of Lebanon¹⁴¹ and immediately return the Hamas deportees to the occupied territories.¹⁴² The Arab states in the U.N. requested further action by the Security Council, and consideration was given to applying sanctions against Israel.¹⁴³ In anticipation of a deci-

137. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 13.

138. S.C. Res. 799, U.N. SCOR, 47th Sess., 3151st mtg. (1992) [hereinafter Resolution 799].

139. See David Bar-Illan, *The Deportations*, COMMENTARY, Mar. 1993, at 43 (discussing the U.N.'s condemnation and double standard approach to Israel). The Security Council never passed resolutions condemning other deportations of a much greater magnitude or for less legitimate purposes than the Israeli actions. See *id.* (noting the non-existence of any resolution expressing disapproval for the 300,000 Palestinians expelled from Kuwait following the Persian Gulf War, the ethnic expulsions from Bulgaria or the former Soviet Union, or the forced exile of millions from Africa). Michael Curtis notes that:

[i]t is symptomatic of the U.N.'s bias that it has found Israel not to be 'a peace-loving state,' when the [] Arab aggressors have made no efforts to resolve the [Arab-Israeli] conflict peacefully or to accept Israel as a state. Nor has the U.N. ever condemned the Arab aggressions against Israel or the terrorist actions of the P.L.O. and other Arab groups.

Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457, 464 (1991).

For a review of prior U.N. Security Council Resolutions condemning Israeli deportations, see S.C. Res. 726, U.N. SCOR, 47th Sess., 3026th mtg. (1992); S.C. Res. 694, U.N. SCOR, 46th Sess., 2989th mtg. (1991); S.C. Res. 681, U.N. SCOR, 45th Sess., 2970th mtg. (1990); S.C. Res. 641, U.N. SCOR, 44th Sess., 2883d mtg. (1989); S.C. Res. 608, U.N. SCOR, 43d Sess., 2781st mtg. (1988).

140. Resolution 799, *supra* note 138.

141. *Id.*

142. *Id.*

143. *Sanctions May Undermine Peace*, NEAR E. REP., Jan. 18, 1993, at 1. The United Nations has never levied sanctions against Israel since her birth. *Id.* The draft resolution passed through the U.N. by the Palestine Liberation Organization called for banning Israel from human rights meetings and banning foreign companies from doing

sion by the High Court of Justice, the United States sought to broker a compromise between Israel and the U.N., and refused to support any sanctions.¹⁴⁴

C. THE COURT'S DECISION: DEFERENCE TO MILITARY DISCRETION DURING NATIONAL EMERGENCIES

On January 28, 1993, the unanimous Court handed down its decision. In writing for the Court, President Shamgar¹⁴⁵ found that the right to prior hearings was fundamental to natural justice,¹⁴⁶ and that the temporary exclusion orders of the Military Commanders were void as con-

business in the occupied territories. Clyde Haberman, *Israel Rejects U.N. Chief's Proposals on Deportees*, N.Y. TIMES, Jan. 27, 1993, at A8. The Resolution was supported by demands from U.N. Secretary General Boutros-Ghali for Israel to repatriate the Palestinians. *Id.*

144. See David Makovsky and Allison Kaplan, *Security Council Will Delay Vote On Sanctions, Clinton Tells Rabin*, THE JERUSALEM POST, Jan. 24, 1993, at 1 (discussing the Clinton Administration's attempt to prevent a vote on sanctions against Israel in hopes that a political or legal solution would resolve the situation). See also Lisa Beyer, *No Surrender*, TIME, Feb. 8, 1993 at 51 (noting that the Clinton Administration hoped it would not have to face the dilemma of choosing between its loyalty to Israel and its interests in developing diplomatic relations with the Arab states as a result of the sanctions battle in the United Nations); *Senators Urge Christopher to Oppose UN Sanctions*, NEAR E. REP., Feb. 8, 1993, at 27 (listing 72 U.S. Senators who signed a letter dated January 29, 1993, addressed to Secretary of State Warren Christopher, urging the Clinton Administration to veto any United Nations effort to levy sanctions against Israel).

The United Nations Security Council eventually decided not to pursue sanctions in an effort to focus on the Middle East peace talks in Washington that were on hold during the deportation crisis. Clyde Haberman, *Rabin Declares the Deportation Crisis at an End*, N.Y. TIMES, Feb. 14, 1993, at 1, 7.

145. See Clyde Haberman, *Israel's Highest Court Upholds the Deportation of Palestinians*, N.Y. TIMES, Jan. 29, 1993, at A1, A9 [hereinafter Haberman, *Court Upholds Deportation*] (noting that President (the equivalent of Chief Justice in the United States) Shamgar ironically was once deported under the Defence (Emergency) Regulations during the British Mandate - the same Regulations he evaluated in his decision in *Association for Civil Rights in Israel v. Minister of Defence*).

146. See *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 17 (describing the development of the right to be heard in Israel). President Shamgar noted that the Defence (Emergency) Regulations do not indicate whether the right to an appeal should occur before or after the implementation of the deportation order. *Id.* But the President pointed out that the British Mandatory Power that created the Regulations did not provide a prior hearing for detentions under Regulation 111(4). *Id.* The advisory committee that hears appeals for deportations under Regulation 112(8) was the same that heard appeals for detentions. *Id.*

trary to Defence (Emergency) Regulation 112.¹⁴⁷ The Court, however, refused to invalidate the deportations,¹⁴⁸ and applied the remedy of *restitutio in integrum* to return the petitioner deportees to their prior position before the implementation of the orders.¹⁴⁹ Although the Court indicated that an exception to the right to prior hearings existed in "concrete exceptional circumstances," the Court failed to indicate whether those circumstances existed in this case, or what the bounds were for such an exception.¹⁵⁰

The Court relied heavily on its prior decision in *Kawasme v. Minister of Defence*¹⁵¹ to find that a right to prior hearings in deportation proceedings is: "not founded on statute, but on principles laid down by the courts which oblige every authority to act fairly. The denial of the right to apply to the [advisory] committee is similar to denying a person's right to a fair hearing."¹⁵² President Shamgar also referred to Jewish law¹⁵³ and developments in constitutional and administrative law¹⁵⁴ as foundation for the right to prior hearings.

The Court struggled to find precedent for exceptions to the right to prior hearings. The Court instead noted its prior decisions on other security measures,¹⁵⁵ the reasoning of legal commentators in

147. *Id.* at 29.

148. *Id.*

149. *Id.* at 30. The deportees were granted a right to appeal their deportation orders on an individual basis to the advisory committees in a manner to be determined by the government. *Id.* See *supra* note 110 and accompanying text (discussing the concept of *restitutio in integrum*).

150. *Id.* at 29.

151. *Kawasme v. Minister of Defence*, H.C. 320/80, 35(3) Piskei Din 113 (1980), summarized in 11 ISR. Y.B. HUM. RTS. 344; see *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 18-21 (discussing the decision in *Kawasme* and its implications on the right to prior hearings).

152. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 20.

153. *Id.* at 17-18, quoting *The Association for Civil Rights in Israel v. The Commander of the Southern Front*, H.C. 4112/90, 44(4) Piskei Din 626, 637-38. The Court referred to a passage from the Old Testament which states that a defendant should receive a hearing prior to punishment no matter how clear his guilt. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 18.

154. See *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 17 (describing the trend in favor of prior hearings which exists both in constitutional and administrative law).

155. *Id.* at 24. The Court referred to an exception to the right to prior hearings for demolitions laid down in *The Association for Civil Rights in Israel v. The Commander of the Central Command*, H.C. 358/88, 43(2) Piskei Din 529, and extended in *The Association for Civil Rights in Israel v. Commander of the Southern Command*,

England¹⁵⁶ and the United States,¹⁵⁷ and the holding of an English case.¹⁵⁸ Essentially, the Court chose not to make any decision on this difficult question. The Court determined that if an exception existed under Regulation 112(8), then the exclusion orders of the Military Commander were unnecessary because the power to deport was already vested in the Commander and therefore no further legislative action was required.¹⁵⁹ If, however, no exception existed, then the exclusion orders

H.C. 4112/90, 44(4) Piskei Din 626. These decisions were not limited to demolitions, and could apply to deportations. *Infra* notes 174-96 and accompanying text.

156. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 26. The Court mentioned the works of one British author who indicated the need for urgent state action without prior hearings in times of public health and safety emergencies. H.W.R. WADE, *ADMINISTRATIVE LAW* 451 (4th ed. 1977), *cited in* *Association for Civil Rights in Israel v. Minister of Defence*, H.C. 5793/92, ___ Piskei Din ___ (Decided Jan. 28, 1993) [English translation] 1, 26.

157. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 27. The Court referred to the recognized exception to the right to prior hearings in the United States in times of emergency, which is not limited to health or safety cases. B. SCHWARTZ, *ADMINISTRATIVE LAW* 210-11 (3d ed. 1976), *cited in* *Association for Civil Rights in Israel v. Minister of Defence*, H.C. 5793/92, ___ Piskei Din ___ (Decided Jan. 28, 1993) [English translation] 1, 27.

158. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 26. The Court discussed an English legal decision that upheld the deportation of an American journalist without a prior hearing, and without any disclosure of the evidence against the deportee. *R. v. Secretary of State for Home Department, ex parte Honsenball* (1977) *cited in* *Association for Civil Rights in Israel v. Minister of Defence*, H.C. 5793/92, ___ Piskei Din ___ (Decided Jan. 28, 1993) [English translation] 1, 26. The Court noted that this English decision was handed down during a time of peace in Great Britain, supporting the claim that a right to prior hearing could certainly be excused during a time of emergency if national security interests required such an action. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 26.

English cases have long served as guiding lights to the Israeli courts, in particular the critical decision in *Liversidge v. Anderson*. *Liversidge v. Anderson*, 3 All E.R. 338 (1941), *discussed in* Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 42-43 (1991). The court in *Liversidge* held that the Secretary of State had the absolute discretion to determine whether hostile elements existed which required detention, and the courts would not intervene merely to determine reasonableness. *Id.* at 42 n.8. Despite the acceptance of *Liversidge* among Israeli courts, the English courts often refuse to follow it. *Id.* at 43 nn. 11-15.

159. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___, at 28. The Court reasoned that the Temporary Exclusion Orders were in effect redundant use of power, and that the Military Commanders could rely on their vested power from Defence (Emergency) Regulation 112. *Id.* at 29. Thus the Court concluded that the exclusion orders "neither add nor subtract anything." *Id.* at 28.

were invalid, and the government would have to reinstate the deportees to their prior position before the implementation of the orders, as required by *Kawasme*.¹⁶⁰ Either way, the deportees were guaranteed a right to appeal their deportation orders, and thus no conclusion on whether an exception to prior hearings existed under the circumstances in *Association for Civil Rights in Israel v. Minister of Defence* was necessary.¹⁶¹

The Court, however, did find that insofar as the temporary exclusion orders attempted to alter the "general established norms of administrative law" by eliminating the right to prior hearings, the orders were invalid.¹⁶² The Court stated that: "[o]nly concrete exceptional circumstances can create a different balance between the conflicting rights and values, and such circumstances were not detailed in the wording of the Temporary Provisions."¹⁶³ The Court made no effort to define these "concrete exceptional circumstances." Instead, the Court found that the exclusive power to define the concrete exceptional circumstances belongs to the Military Commander:

[T]he power to find that there is an exception in a specific concrete case, in which the compulsion of reality obliges immediate action before granting the right of hearing, is in any event inherent in the authority to exercise the power in respect whereof the right of hearing is sought.¹⁶⁴

As a result of the Court's decision, the deportees were granted the right to appeal their deportation orders individually to the advisory committee.¹⁶⁵ An agreement reached between Israel and the international community, however, allowed one hundred-one of the deportees to re-

160. *Id.*

161. *Id.*

162. *Id.* at 29. The Court's analysis of this issue was unnecessary because it had already determined that the deportees had a right to appeal the deportation orders one way or another. *Id.* at 28. But insofar as the Court struck down an attempt by the Military Commanders to create general legislation that eliminates the right to prior hearings, such a decision is meaningless given that the Court preserved the Military Commander's power to determine the conditions of the exception to the right to prior hearings. See *infra* note 164 and accompanying text (describing the Military Commander's authority to find an exception to the right to prior hearings).

163. *Hamas Deportation Case*, H.C. 5793/92, ___ Piskei Din ___ at 29. The Court not only failed to mention what concrete exceptional circumstances justified an elimination of the right to prior hearings, but also failed to provide any guidance to the Military Commanders. *Id.*

164. *Id.* at 28.

165. *Id.* at 30.

turn to detention centers in the occupied territories in exchange for suspension of efforts to impose sanctions on Israel.¹⁶⁶

IV. ANALYSIS: THE COURT'S NON-INTERVENTIONIST DECISION AND THE PATH NOT TAKEN

The Court's decision in *Association for Civil Rights in Israel v. Minister of Defence* leaves open the question of what the government's burden of proof now is in justifying the implementation of deportation orders without prior hearings.¹⁶⁷ The Court's failure to delineate bounds to the exception for a right to prior hearings has created confusion even among legal scholars.¹⁶⁸ In addition, the impact of the Court's decision on the military and its use of force in the occupied territories remains uncertain.¹⁶⁹

Although the responsibility for checking the powers and authorities of the military does not always belong to the judiciary,¹⁷⁰ the court failed

166. See DECISION OF SPECIAL GOVERNMENT SESSION, EMBASSY OF ISRAEL (Feb. 1, 1993) (outlining the plan for returning 101 deportees according to the agreement worked out between Israel and the United States). The Israeli government stated that the decision to allow the return of the deportees was done for the sake of preserving the Middle East peace process. RABIN PRESS CONFERENCE REGARDING TODAY'S SPECIAL CABINET SESSION, EMBASSY OF ISRAEL (Feb. 1, 1993). The agreement, which was worked out by Secretary of State Warren Christopher, did not effect the return of the deportees immediately. *Skillful Diplomacy*, NEAR E. REP., Feb. 8, 1993, at 1. The deportees chose to remain in southern Lebanon until all were taken back. *Id.* But in mid-August 1993, the deportees announced their willingness to accept the Christopher plan, due apparently to the news blackout of the deportees' plight and the dying international outrage. Clyde Haberman, *At Lebanon Border, 395 Deportees Yield to Israel on Return*, N.Y. TIMES, Aug. 16, 1993, at A1, A3.

167. See Zeev Segal, *Justices Speak Loudly on Right to be Heard*, THE JERUSALEM POST, Jan. 29, 1993, at 4 (stating that "[i]n the future, the government must have a very strong case to choose a deportation option without allowing the deportee to be heard in advance").

168. See *id.* (stating that while the Court "refrained from saying whether the circumstances justified immediate deportation in the current case," the Court decision "eliminated any possibility" that the military could execute immediate deportation orders without granting prior notice to deportees).

169. But see Baruch Bracha, *Addendum: Some Remarks on Israeli Law Regarding National Security*, 10 ISR. Y.B. HUM. RTS. 289, 295-96 (1980) (finding that despite the broad discretion granted by the courts to the military in exercising powers under the Defence (Emergency) Regulations, the security forces have not abused their security authority). Much of the security forces' discretion is limited by internal guidelines handed down by the Executive Branch. *Id.* at 296.

170. See Zamir, *Rule of Law*, *supra* note 20, at 84 (asserting that the judiciary is

to provide any guidance in its decision. Instead the Court left it to the military authorities to determine the conditions for the right to prior hearings, and any exceptions thereto.¹⁷¹ The Court's decision also implicitly rejected other approaches to resolving this case which would have provided judicial limits to the discretion of the military authorities. Thus, the Court's decision reflected a turn away from the interventionist trend that had been building since the late 1970's.¹⁷² With its rejection of these alternative paths, the Court sent a strong message to terrorists that, irrespective of the peace process or international pressure, public order and safety for military personnel and civilians will override the procedural humanitarian rights of those participating in terrorist activity.¹⁷³

Two alternative approaches existed for the Court to resolve the unanswered question about the bounds to an exception to prior hearings in deportation proceedings. If adopted, these approaches would have permitted the Court to maintain an interventionist role consistent with the purposes for which jurisdiction over the occupied territories was granted, and served to preserve the government security interests. Both approaches, if applied under the facts of *Association for Civil Rights in Israel v. Minister of Defence*, would have warranted an outcome identical to that reached by the Court.

First, the Court has created exceptions to prior hearings for other security measures which could apply to deportation orders. Second, the Court has examined military discretion according to three methods of judicial review which offer the Court the opportunity to develop a consistent approach to balancing the relevant interests and liberties in deportation proceedings. The Court implicitly rejected both of these alternatives however by not addressing them in their opinion.

only one of the branches responsible for limiting the discretion of security forces). Former Attorney General Itzhak Zamir believes that the legislature also has a duty to "define conditions, procedures, and controls, to the extent practical, so that security powers are not abused." *Id.*

171. See Rodan, *supra* note 130, at 4 (quoting former Attorney General Itzhak Zamir who commented before the Court's decision that "[t]he [M]ilitary [C]ommander is like God, like a prime minister, a king").

172. See *supra* notes 19-22 and accompanying text (discussing the Court's interventionist policy during the 1970's).

173. See Haberman, *Court Upholds Deportation*, *supra* note 145, at A1, A9 (noting that the decision jeopardizes the Middle East peace process).

A. EXCEPTIONS TO THE RIGHT TO PRIOR
HEARINGS IN OTHER SECURITY MEASURES

The Court cited the case of *Association for Civil Rights in Israel v. Commander of the Central Front*¹⁷⁴ in support of its claim that valid exceptions to the right to prior hearings exist in Israeli case law.¹⁷⁵ That case involved the Military Commander's implementation of a demolition order to destroy homes under Defence (Emergency) Regulation 119 without prior notice.¹⁷⁶ The Military Commander argued that any delay in action weakened the deterrent effect of the order.¹⁷⁷ The Court rejected this argument due to the "severe and irreversible character" of a demolition,¹⁷⁸ but established an exception. Then-Justice (now President of the Court) Shamgar stated the bounds to this exception:

Indeed, there are military and operational circumstances, in which judicial review cannot be reconciled with the conditions of place and time or with the nature of the circumstances; for instance, when a military unit is carrying out an operation, in the course of which it has to remove an obstacle or to overcome resistance or react on the spot to an attack on military forces or on civilians which occurs at the same time, or in similar circumstances in which the competent military authority finds immediate action to be an operational necessity. By the very nature of the matter, there is no room, in such circumstances, to postpone the military action which is required on the spot.¹⁷⁹

This exception is not limited to Defence (Emergency) Regulation 119, and is applicable to other governmental security measures.¹⁸⁰ But due

174. *Association for Civil Rights in Israel v. Commander of the Central Front*, H.C. 358/88, 43(2) Piskei Din 529 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 75-81 (1991). Note that in the translation from Hebrew to English, the words "front" and "command" are often interchanged.

175. See *supra* note 155 (noting the Court's reference to *Association for Civil Rights in Israel v. Commander of the Central Front*).

176. *Association for Civil Rights in Israel v. Commander of the Central Front*, H.C. 358/88, 43(2) Piskei Din 529 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 75 (1991).

177. *Id.* at 76.

178. *Id.*

179. *Id.* at 76-77.

180. Bracha, *Judicial Review*, *supra* note 15, at 77.

to the narrow facts described by Shamgar, the courts must refrain from applying the exception where the security measure is irreversible.¹⁸¹

The Court has previously erred in applying the Shamgar exception laid out in *Commander of the Central Front*.¹⁸² Justice Elon, in writing for the Court in *Association for Civil Rights in Israel v. Commander of the Southern Front*,¹⁸³ interpreted Justice Shamgar's exception as applying to *any* circumstances of immediate military necessity.¹⁸⁴ Justice Shamgar however stated that the exception is only applicable in those circumstances *similar* to the immediate necessity of removing obstacles or overcoming resistance during military operations.¹⁸⁵ As a result, the Court mistakenly broadened Shamgar's exception to include national security interests.¹⁸⁶

181. *Id.* at 77-78. The "severe and irreversible character" of a security measure raises the issue of whether the "temporary" exclusion of the deportees in *Association for Civil Rights in Israel v. Minister of Defence* is relevant to the right to prior hearings. The Israeli government highlighted the importance of the term "temporary." TEMPORARY EXCLUSION ORDERS—LEGAL ASPECTS, *supra* note 13, at 1. But the Court in *Association for Civil Rights in Israel v. Minister of Defence* did not take any time to discuss the relevance of the word "temporary" in the deportation order, most likely because Defence (Emergency) Regulation 112 is explicit about the power of the Military Commander to exclude any person from Israel for any length of time deemed necessary. Defence (Emergency) Regulations, *supra* note 72, Reg. 112(2) and (3); *supra* notes 85-89 and accompanying text.

182. See Bracha, *Judicial Review*, *supra* note 15, at 79 (discussing the erroneous interpretation of Justice Elon in *Association for Civil Rights in Israel v. Commander of the Southern Front*).

183. *Association for Civil Rights in Israel v. Commander of the Southern Front*, H.C. 4112/90, 44(4) Piskei Din 626, discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L. L. 39, 78-81 (1991).

184. *Id.* at 79.

185. See *supra* note 179 and accompanying text (discussing the Shamgar exception to the right to prior hearings in *Association for Civil Rights in Israel v. Commander of the Central Front*).

186. See Bracha, *Judicial Review*, *supra* note 15, at 77 (stating that national security concerns alone do not create an exception to the right to prior hearings). In examining the language of Justice Shamgar's exception in *Commander of the Central Front*, it is clear that he was referring to military operations, such as those during combat circumstances. *Association for Civil Rights in Israel v. Commander of the Central Front*, H.C. 358/88, 43(2) Piskei Din 529 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 76 (1991). Bracha distinguishes national security concerns from military needs in the context of the military administration over the occupied territories, and identifies the Palestinian uprising activity that interrupts the regular maintenance

The outcome in *Commander of the Southern Front* was likely due to the Court's broad interpretation of the exception to the right to prior hearings.¹⁸⁷ In that case, the Military Commander issued a demolition order, without a prior right of appeal, four days after the murder of an army officer in the occupied territories.¹⁸⁸ Justice Elon focused on the "substantial risk to human life and [the] real apprehension" created by the delay for a prior hearing.¹⁸⁹ Elon found that "in such a situation, the supreme principle of safeguarding human life is preferable to that of a right to a hearing."¹⁹⁰

Yet, the Military Commander in *Commander of the Southern Front* chose to wait four days before implementing the demolition order, leaving sufficient time for the petitioners to obtain attorneys and file appeals with the advisory committee.¹⁹¹ Under these circumstances,

of public order as only a national security concern (but Bracha never elaborates as to what differences exist between national security interests and military needs). *Id.*

187. See Bracha, *Judicial Review*, *supra* note 15, at 81 (stating that the Israeli Supreme Court did not adhere to the narrow context of the exception laid out in *Commander of the Central Front* when delivering the decision in *Commander of the Southern Front*).

188. Association for Civil Rights in Israel v. Commander of the Southern Front, H.C. 4112/90, 44(4) Piskei Din 626, discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L. L. 39, 78 (1991).

189. *Id.* at 80.

190. *Id.*

191. *Id.* Bracha notes that in *Commander of the Central Front*, the petitioners argued for a 48-hour delay in the demolition order to provide sufficient time for obtaining an attorney and filing an appeal to the High Court. Bracha, *Judicial Review*, *supra* note 15, at 80 n.193. Bracha further points out the words of Justice Shamgar:

[A]n order under regulation 119 ought to include a notice allowing the addressees of the order the possibility to choose an attorney and apply to the military commander before the order is carried out, within a specified time, and that subsequently, if they wish, they should be given a further period, also specified, to apply to this Court before the order is carried out.

Association for Civil Rights in Israel v. Commander of the Central Front, H.C. 358/88, 43(2) Piskei Din 529 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 80 n.193 (1991).

Bracha correctly asserts that "the length of the period depends on the degree of urgency of military requirements." Bracha, *Judicial Review*, *supra* note 15, at 81 n.193.

In Association for Civil Rights in Israel v. Minister of Defence, the Court temporarily granted a petition from the deportees to stay their deportation orders *before* their execution. Keinon, *supra* note 129, at 1. The Court heard testimony from the

even if immediate military necessity existed, the four-day delay confirms that available time existed to suspend the demolition order and provide a prior hearing.¹⁹² Since the effectiveness of a security order's deterrence is irrelevant,¹⁹³ the Court's only option for preserving the Military Commander's authority in this case was by expanding Justice Shamgar's exception to the right to prior hearings.

Under either the narrow or broad reading of Justice Shamgar's exception, the facts of *Association for Civil Rights in Israel v. Minister of Defence* justified its application. The Hamas terrorists were responsible for five deaths in one week,¹⁹⁴ and promised more.¹⁹⁵ The government had a right and duty to preserve security in the occupied territories. With grave risks to human life, no time existed for a delay in action in order to provide hearings. The dangerous environment created by the terrorist activity impeded the ability of the Israeli Defence Forces to maintain public order, as required by the Hague Regulations, thus necessitating the removal of precisely those barriers envisioned in Justice Shamgar's exception.¹⁹⁶ The circumstances in *Association for Civil*

state and the petitioners' attorneys for ten hours, beginning at 5:00 a.m. *Id.* Finally, the Court lifted the stay and issued an *order nisi*. *Id.*

Thus, the real controversy in *Association for Civil Rights in Israel v. Minister of Defence* was not the right to prior hearings for the deportees, because they, in effect, received one, but whether the state had an obligation to provide the hearings in the first place. This became the central issue as a result of the petitioners' assertions that the Israeli government attempted to execute the deportations in the middle of the night when the media could not observe the activity. *See id.* at 4 (noting that the government attempted to implement the deportations in secret).

192. Bracha, *Judicial Review*, *supra* note 15, at 80.

193. *Association for Civil Rights in Israel v. Commander of the Central Front*, H.C. 358/88, 43(2) Piskei Din 529 (1989); *see supra* notes 179-80 and accompanying text (explaining that deterrence is not a factor when severe and irreversible security measures are implemented). The Military Commander in *Commander of the Southern Front* was apparently aware of the distinction between deterrent measures and preventive measures when he issued the demolition order in dispute in that case. *See* Bracha, *Judicial Review*, *supra* note 15, at 79 (quoting the Military Commander who stated that "this was not a 'punitive-deterrent' action under regulation 119, but rather a case of 'urgent and immediate military necessity'").

194. *See supra* notes 127-28 (discussing the killings that prompted the Hamas deportations).

195. *See* Clyde Haberman, *Two Israeli Soldiers Ambushed in Gaza*, N.Y. TIMES, Jan. 31, 1993, at A7 (describing the first success of the Hamas activists since their deportations in attacks against Israeli security personnel, despite their isolation in the no-man's land).

196. *See* Joel Himelfarb, *Israel Combats Hamas Terror Network*, NEAR E. REP.,

Rights in Israel v. Minister of Defence therefore warranted the military's security measures as a means of preserving life--a goal which must outweigh the right to prior hearings under either a narrow or broad reading of Justice Shamgar's exception.

B. REASONABLENESS, PROPORTIONALITY, AND NECESSITY

When the Court examines substantive legal issues emanating from the use of security measures, the Court evaluates the military authority's discretion according to standards of reasonableness, proportionality, and necessity.¹⁹⁷ Generally these approaches are important methods for limiting the broad decision-making power given to the military under the Defence (Emergency) Regulations, but are not traditionally used by the Court for examining procedural aspects of the right to prior hearings.¹⁹⁸ The distinction between substantive and procedural legal requirements is important. Substantive measures such as deportation or detention are preventive in nature, and are designed to maintain public order and safety.¹⁹⁹ On the other hand, procedural measures, such as

Feb. 8, 1993, at 28 (reporting that since the deportation orders were executed and the Hamas activists removed from the territories, the Israeli Defence Forces have succeeded in combatting the Hamas terrorist network in the occupied territories, including the arrest of Hamas activists and the discovery of a cache of weapons).

197. Bracha, *Judicial Review*, *supra* note 15, at 83-91.

198. See, e.g., *Kawasme v. Minister of Defence*, H.C. 320/80, 35(2) Piskei Din 113 (1980), summarized in 11 ISR. Y.B. HUM. RTS. 344 (1981) (holding that the right to prior hearings is absolute in all circumstances, and the remedy of *restitutio in integrum* will apply when that right is violated); *Association for Civil Rights in Israel v. Commander of the Central Front*, H.C. 358/88, 43(2) Piskei Din 529 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 75-81 (1991) (holding that the right to prior hearings may be suspended due to operational necessity of the military, which is applied on a case-by-case basis).

199. See *Weiner, Terrorism*, *supra* note 5, at 194 (noting that the Defence (Emergency) Regulations are not punitive measures, but are used only to prevent further harm or illegal activity). Specifically, the Regulations are used only when criminal proceedings are not available or expedient for protection of the state's interests. *Id.*

The government reiterated this point and stated that the deportations in the *Hamas Deportation Case* were necessary to protect military personnel and prevent further violence, but not to punish the terrorists. TEMPORARY EXCLUSION ORDERS--LEGAL ASPECTS, *supra* note 13, sec. 2.

The Israeli Supreme Court explained the purpose of Regulation 110 with regard to its application:

[T]he power defined in Regulation 110 cannot be used to punish a person for past acts or serve as a substitute for criminal proceedings. The power is pre-

suspending the right to prior hearings, add the element of urgency, and are therefore designed only for immediate preventive activity for the security of military personnel and civilians.²⁰⁰ Certain aspects of the Court's three standards of judicial review, however, are applicable to an examination of the procedural right to prior hearings.

1. Reasonableness and the Near Certainty Test

Under the reasonableness test, the Court determines whether the military authority gave appropriate weight to the importance of the personal liberty at issue when issuing a security order.²⁰¹ One component of this test requires the military authority to have "near certainty"²⁰² that failure to institute the security order will result in a "real and substantial injury to state security."²⁰³ The Court discussed the near certainty test in *Schnitzer v. Chief Military Censor*.²⁰⁴ In that case, the military pro-

ventative, that is to say it is directed towards the future and may only be used in order to avert an anticipated danger. It is of course possible that the evaluation of a situation with regard to the future is based on acts done in the past; it could hardly be otherwise, for a logical conclusion drawn by the holder of power must be based on facts, and no facts, whether they concern acts that were brought to completion or whether they point to preparation for the commission of acts endangering public safety or the defence of the state.

Baranseh v. O.C. Central Command, H.C. 242/81, 36(4) Piskei Din 249-50 (1981), cited in Justus R. Weiner, *Terrorism: Israel's Legal Responses*, 14 SYR. INT'L L. & COM. 183, 194 n.56 (1987). See also Bracha, *Defence Regulations*, *supra* note 72, at 313 n.64 (discussing the preventive-punitive distinction in *Al Kuri v. Chief of Staff*, H.C. 95/49, 4 Piskei Din 34A, 46).

200. See generally Defence (Emergency) Regulations, *supra* notes 70-84 and accompanying text (describing the discretion empowered in the Military Commander in terms of public safety and state security). The right to prior hearings goes beyond these needs, and as Justice Shamgar pointed out in his exception to the right to prior hearings, time is of the essence for excusing this procedural right. *Supra* note 179 and accompanying text. See also *Association for Civil Rights in Israel v. Commander of the Southern Front*, H.C. 4112/90, 44(4) Piskei Din 626, discussed in Baruch Bracha, *Judicial Review of Security Measures in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 80 (1991) (finding that the right to prior hearings is absolute "unless the [security measure] is required straight away and without delay owing to urgent military and security requirements").

201. Bracha, *Judicial Review*, *supra* note 15, at 83.

202. *Id.* at 57. While Bracha uses the term "near certainty," the Court in *Schnitzer v. Chief Military Censor* refers to "proximate certainty." *Schnitzer v. Chief Military Censor*, H.C. 660/80, 42(4) Piskei Din 617 (1988), summarized in 24 ISR. L. REV. 304, 305 (1990). The difference is likely due to confusion in translation.

203. Bracha, *Judicial Review*, *supra* note 15, at 57.

204. *Schnitzer v. Chief Military Censor*, H.C. 660/80, 42(4) Piskei Din 617 (1988),

hibited, under Defence (Emergency) Regulation 87(1), a publication that criticized the director of the Mossad and announced the date of his replacement.²⁰⁵ The Military Censor determined that such a publication would threaten the functioning of the intelligence service.²⁰⁶ The Court struck down the Military Censor's action, and affirmed the critical importance of a free press and free speech in a democratic society.²⁰⁷ The court measured the likelihood that the publication would endanger state security and considered the degree of injury it would cause,²⁰⁸ and found only a remote possibility of damage to state security.²⁰⁹ In another case involving free speech and communication, the Court also applied the near certainty test, but added that the test should be applied in light of the circumstances of time and place.²¹⁰

Within the context of suspending the right to prior hearings in deportation proceedings, the Court need only determine whether near certainty exists as to continued violence and danger to human life if the deportations are not immediately executed. In *Association for Civil Rights in Israel v. Minister of Defence*, the pattern of violence and murder,²¹¹ in addition to the statements of the deportees that more violence and murder was to follow,²¹² constituted sufficient grounds under the near certainty test to justify the Military Commanders' refusal to provide prior

summarized in 24 ISR. L. REV. 304 (1990).

205. *Id.*

206. *Id.* at 304-07. The Military Censor's rationale for disapproving the publication at issue was that revealing functions of the Director of the intelligence service would damage the efficiency of his work, and thus jeopardize state security. *Id.* at 306.

207. *See id.* at 306-07 (discussing the Court's assertion that the public had a right to know about the appointment of a new director of the intelligence service, and that given the method of judicial review employed by the Court, the censor inappropriately prevented the publication of this important information).

208. *Id.* The Court determined that the appropriate question for applying the near certainty test "is always whether the degree of damage, set off by the probability that it will not occur, justifies the restricting of a human right to prevent that danger." *Id.*, quoting Neiman v. Chairman of the Central Committee for the Elections to the 11th Knesset, 39(2) Piskei Din 225 (1985).

209. Schnitzer v. Chief Military Censor, H.C. 660/88, 42(4) Piskei Din 617 (1988), summarized in 24 ISR. L. REV. 304, 306 (1990).

210. L.S.M. Law in the Service of Man v. Commander of the I.D.F. in Judea and Samaria, H.C. 270/88, 42(3) Piskei Din 260 (1988), summarized in 24 ISR. L. REV. 310 (1990).

211. *See supra* notes 125-26 and accompanying text (discussing the Hamas terrorist attacks that killed five persons in one week).

212. *See supra* note 127 and accompanying text (discussing the Hamas statement promising more violence).

hearings. This test is not one of absoluteness, but of circumstance, and should not serve in a self-defeating manner. Justice Barak, in *Schnitzer*, cautioned against the danger of allowing efforts to protect personal liberties to overshadow national security interests because "democracy has to exist to preserve itself."²¹³

Justice Barak's concern that national security is necessary to protect democracy resulted in an inconsistent application of the near certainty test.²¹⁴ Nonetheless, the test provides the Court with a foundation for an exception to the right to prior hearings in deportation proceedings in circumstances similar to those described in *Association for Civil Rights in Israel v. Minister of Defence*.

2. Proportionality and the Less Restrictive Alternative Test

The proportionality test requires that the military authority impose security measures that bear a "direct relationship" to the expectation of danger.²¹⁵ A component of the direct relationship requirement is the

213. *Schnitzer v. Chief Military Censor*, H.C. 660/88, 42(4) Piskei Din 617 (1988), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 57 (1991).

214. See Bracha, *Judicial Review*, *supra* note 15, at 58 (noting that the Court has not applied the near certainty test in all cases where the freedom of speech conflicts with security considerations). The inconsistency is due to the nature of the security measures employed and the potential risk to the state. See *id.* at 59 (discussing that the Minister of the Interior need only have an "apprehension which has not been disproven" under the Emergency (Foreign Travel) Regulations of 1948 in order to restrict foreign travel).

215. See *Atmallah v. Commander of the Northern Command*, H.C. 672/87, 42(4) Piskei Din 708, 710 (1988), summarized in 19 ISR. Y.B. HUM. RTS. 373 (1989) (describing how the proportionality test is applied to different security measures). The *Atmallah* Court stated:

Restriction orders may be of different types, and they also vary in the extent of harm they cause. An order for "house arrest" . . . is not the same as an order which limits freedom of movement to a certain area. And an order defining a certain area to which a certain person is to be restricted has not the same impact on a person who has been "deported" to such area. An order prohibiting a person from travelling abroad is not the same as an order restricting such person's freedom of movement within the state . . . But any interference with such freedom of movement of whatever degree must be the outcome of considering the two principles, one vis-a-vis the other, and the conviction that interference is imperative for achieving the security aim. It means that there has to be a direct relationship between the measure adopted and the extent of danger expected from the person against whom a restriction order has been issued.

"less restrictive alternative" test,²¹⁶ which compels the military authority to utilize a security measure that produces the least restrictions on personal liberties in reaching the security goal.²¹⁷

The Israeli Supreme Court applied the less restrictive alternative test in *Tamimi v. Minister of Defence*.²¹⁸ In that case, the Military Commander issued an order that limited the right of attorneys in the Judea and Samaria region to join a bar council.²¹⁹ The Court found that the Military Commander's concern over the hostile elements participating in the council did not warrant the destruction of the organization's independence.²²⁰ The Court determined that other alternatives were available to the Military Commander.²²¹

The less restrictive alternative test is well suited for the Court in evaluating the military authority's power to suspend the right to prior hearings in deportation proceedings. As in *Association for Civil Rights in Israel v. Minister of Defence*, the only choices available to the military powers, according to the Court, are detention or immediate deportation.²²² If an immediate deportation without a prior hearing is not ap-

Atmallah v. Commander of the Northern Command, H.C. 672/87, 42(4) Piskei Din 708 (1988), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 85 (1991).

See Levadi v. Commander of the I.D.F. in the West Bank, H.C. 672/88, 43(2) Piskei Din 227 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 86 n.228 (1991) (using the proportionality test to overturn a deportation order where less severe measures were available against the deportee).

216. See Bracha, *Judicial Review*, *supra* note 15, at 85 (noting that an authority should not use a severe measure if the state objective can be met through a less restrictive alternative).

217. See *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1297 (1972) (discussing the use of the less restrictive alternative test in the context of American judicial review).

218. *Tamimi v. Minister of Defence*, H.C. 507/85, 41(4) Piskei Din 57 (1986), summarized in 18 ISR. Y.B. HUM. RTS. 248 (1988).

219. *Id.* at 249. Order No. 1164 allowed the Military Commander to appoint officers to the Bar Council (rather than permit elections), set membership dues, manage the finances, and set the schedule and agenda for meetings. *Id.*

220. *Id.* at 251.

221. *Id.* The Court, however, did not indicate what alternatives existed for the Military Commander, or what analysis should be implemented to determine the most appropriate security measure. *Id.*

222. See TEMPORARY EXCLUSION ORDERS--LEGAL ASPECTS, *supra* note 13 (noting that the Israeli Supreme Court has held that where imprisonment does not satisfy the security needs of the state, deportation is a lawful alternative). In addition, as in *As-*

propriate, then by default, detention²²³ is required until a deportation hearing and appeal is provided, which could take as long as one year.²²⁴ Thus, the Court must consider the cost, effectiveness, and restrictiveness of detention as compared to immediate deportation.²²⁵

Although concern exists about the judicial branch's ability to evaluate the cost, effectiveness, and restrictiveness of alternative security measures during a state emergency,²²⁶ the less restrictive alternative test is within the court's capabilities.²²⁷ For example, the circumstances in *As-*

sociation for Civil Rights in Israel v. Minister of Defence, prison camps are often used as bases for terrorist activity and do not preserve the security necessary for public order. *Id.*

See Zeer Segal, *Justices Speak Loudly on Right to be Heard*, THE JERUSALEM POST, Jan. 29, 1993, at 4 (noting that proportionality has traditionally served as an important factor in determining whether deportations are appropriate measures against suspected terrorists where detentions have been ineffective). See generally Rodan, *supra* note 130, at 4 (discussing whether Israeli authorities can deport Palestinians without their appeals being heard by the Court). In considering the appropriate proportionality of security measures, the Israeli government stated that capital punishment is not an option it is willing to consider, even in the fight against terrorism. TEMPORARY EXCLUSION ORDERS—LEGAL ASPECTS, *supra* note 13, sec. 2.

Justus Weiner, the former director of the Human Rights Division of the Israeli Justice Department, noted that "[w]hen weighed against Israel's legal options in attempting to obstruct the designs of hardened terrorists, namely, the activation of the death penalty or very long terms of solitary confinement in prison, deportation is arguably the most humane measure available." Justus Reid Weiner, *Human Rights in the Israeli Administered Areas During the Intifada: 1987-1990*, 10 WISC. INT'L L.J. 185, 211 (1992).

223. U.N. Chief Meets on Exiles, N.Y. TIMES, Dec. 31, 1992, at A3 (stating that U.N. Secretary General Boutros-Ghali insists that Israel should place the deportees in internment camps and prosecute them for violations of Israeli law rather than deport them). See also Ehud Yaari, *A Safe Haven for Hamas in America*, N.Y. TIMES, Jan. 27, 1993, at A23 (stating that the Hamas terrorists should have been kept in detention centers rather than deported because now the Israeli government faces the politically-more difficult task of returning them).

224. See Rodan, *supra* note 130, at 4 (noting that such a long period of time can eliminate the effectiveness of the deportation order).

225. See *The National Security Interest and Civil Liberties*, *supra* note 217, at 1298 (describing the three factors courts must consider in evaluating the national security-personal liberty balance as including the relative costs, effectiveness, and restrictiveness of the security measures).

226. *Id.* at 1299. The judicial branch is often not capable of evaluating security measures because it lacks the expertise for determining the appropriateness of actions under such emergency situations. *Id.*

227. See *id.* (providing, as an example, the courts' ability to evaluate the warrant requirement of the Fourth Amendment of the United States Constitution during both

sociation for Civil Rights in Israel v. Minister of Defence clearly demonstrate that keeping the deportees in detention centers created the potential for widespread unrest within the centers, prisons, and in the streets of the occupied territories.²²⁸ Thus, detention would jeopardize the goal of maintaining security and preserving order and would therefore be less effective than immediate deportation. Yet, since the burden of persuasion is on the petitioner attacking the government's action,²²⁹ an alternative measure requires substantially similar effectiveness in restoring order for the Court to strike down the military authority's measure.²³⁰

As a result, adoption of the less restrictive alternative test provides the Court with a means for evaluating exceptions to the right to prior hearings in deportation proceedings and maintaining its interventionist trend in examining military discretion. At the same time, the Court preserves the ability of the military to effectively contain hostile activity in the occupied territories because the burden to offer a more effective alternative lies with the petitioner, not with the government.²³¹

3. Military Necessity for Security Measures

The Court has struggled to establish the appropriate standard of judicial review in evaluating military necessity for security measures imposed by the Military Commander. Expertise in evaluating the emergency circumstances in the occupied territories, and the need for remedial action, rests with the military and not the Court. The military necessity approach has resulted only in examinations of the military authority's

normal and emergency times).

228. See TEMPORARY EXCLUSION ORDERS--LEGAL ASPECTS, *supra* note 13, sec. 4 (stating that detainees often use their prisons as bases for organizing violent acts).

229. *The National Security Interest and Civil Liberties*, *supra* note 217, at 1300.

230. *Id.* The Court however would not be required to make "subtle comparative evaluations" in determining whether alternative measures are more appropriate. *Id.* Rather, by a preponderance of the evidence, the Court needs to decide whether the alternative "would be substantially as effective." *Id.*

231. See *contra* Ahmard H. Tabari, *Humanitarian Law: Deportation of Palestinians From the West Bank and Gaza*, 29 HARV. INT'L L.J. 552, 557 (1988) (disputing the presumption that deportations will necessarily provide more security in the occupied territories than detentions). Instead, the deportations will only increase rioting in the territories, in which case the Israeli military will have to resort to mass deportations (which violate Article 49 of the Fourth Geneva Convention) in order to establish calm. *Id.*

motives in creating security measures, an approach the Court has yet to adopt consistently.²³²

Commentators note that the Court's interventionist trend began in the late 1970's with its decision in *Dweikat v. Government of Israel* (known as the *Elon Moreh* case).²³³ In that decision, the Court, for the first time, examined military necessity for an order to expropriate land by the Military Commander in the West Bank.²³⁴ The Court concluded that the Military Commander acted out of political motives rather than military necessity,²³⁵ and overturned the security order.²³⁶ The *Elon Moreh* decision represented a landmark for the Court,²³⁷ leading the Court to consider more than jurisdictional or procedural disputes, but substantive rights.²³⁸

Whether the Military Commanders in *Association for Civil Rights in Israel v. Minister of Defence* were faced with a military necessity that required immediate expulsion without a prior hearing, requires an evaluation of the decision-making process that led to the deportation.²³⁹ Although dispute exists about whether military necessity within an area under military administration is ever valid,²⁴⁰ necessity pursuant to "su-

232. See *supra* notes 98-100 and accompanying text (discussing the Court's decision in *Alyubi* and its refusal to examine military necessity).

233. *Dweikat v. Gov't of Israel*, H.C. 390/79, 34(1) Piskei Din 1 (1979), summarized in 9 ISR. Y.B. HUM. RTS. 345 (1980).

234. *Id.*

235. *Id.*

236. *Id.*

237. See Shimon Shetreet, *Developments in Constitutional Law: Selected Topics*, 24 ISR. L. REV. 368, 417-18 (1991) (stating that the *Elon Moreh* decision was the "salient turning point" for the Court in establishing an interventionist approach to its cases).

238. *Id.* at 417.

239. G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 226-27 (1957), discussed in Esther Rosalind Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 504 n.120 (1986).

240. *Id.* at 504. von Glahn states:

It must be remembered that practically all measures of real importance undertaken by an occupant in hostile territory fall in a period of time when the military phase of active hostilities has passed from the occupied territory and when the occupant attempts to establish an orderly administration. Hence, there is an absence of nationally vital necessity and a lack of real necessity which would enable a successful employment of the defence in question.

Id.

Justice Witkin, in his opinion in the *Beit El* case, disagreed with von Glahn's analysis and stated that no distinction between military necessity and security necessity

pervised regulation or administration would normally be upheld . . .²⁴¹ Thus, in *Association for Civil Rights in Israel v. Minister of Defence*, the examination of military necessity by the Israeli cabinet, the Ministerial Committee for National Security Matters, and the Military Commanders in the occupied territories²⁴² demonstrates the close analysis and consideration of the security needs under the circumstances in that case. As a result, the military necessity examination of security measures provides the Court with reasonable assurance that the government carefully considered and weighed the relevant factors in reaching a decision.

V. RECOMMENDATIONS

Following the Court's decision in *Association for Civil Rights in Israel v. Minister of Defence*, the Israeli government and the Palestine Liberation Organization (PLO) began secret talks to negotiate a mutual recognition agreement²⁴³ that eventually led to the signing of the Declaration of Principles in Washington, D.C.²⁴⁴ Whether such talks were

exists. *But see* Sulkman Tufik Ayub v. Minister of Defence, H.C. 606/78, 33(2) Piskei Din 113 (1978), summarized in 9 ISR. Y.B. HUM. RTS. 337 (1979), where Justice Witkin concluded:

In our opinion, this distinction is irrelevant. As I have just mentioned, the existing situation [in the occupied territories] is one of belligerency, and the occupying power has the responsibility [to] maintain order and security in the occupied territory. It must meet those dangers arising within the occupied area threatening the occupied area and the occupying state itself. Combat presently takes the form of sabotage, and even those who would regard such actions (which harm innocent civilians) as guerrilla warfare, would admit that the occupying power is authorized and is obliged to take any measures to prevent them. The military and the security aspect are one in the same.

Id.

241. *Id.* at 504 n.120.

242. *See supra* note 129 (explaining the decision-making process which led to the implementation of the deportations of the Hamas terrorists).

243. *See* Letter from Yasir Arafat to Prime Minister Yitzhak Rabin (Sept. 9, 1993) (available at the Embassy of Israel, Washington, D.C.) (stating that the PLO recognizes the right of the State of Israel to exist); Letter from Prime Minister Yitzhak Rabin to Yasir Arafat (Sept. 9, 1993) (available at the Embassy of Israel, Washington, D.C.) (stating that the State of Israel recognizes the PLO as the representative of the Palestinian people).

244. *See supra* note 1 (discussing the signing of the Declaration of Principles between Israel and the Palestine Liberation Organization on September 13, 1993 in Washington, D.C., creating a Palestinian interim self-government arrangement in the occupied territories).

prompted by the Court's decision remains unknown. The decision, however, underscored the Court's unwillingness to jeopardize Israel's negotiating position in the peace process or Israeli national security when it denied the Hamas activists the protection of the Court.

To the contrary, the Court reassured the Israeli military of its broad powers through the Defence (Emergency) Regulations designed to counter terrorist activity.²⁴⁵ Thus, the Court encouraged the Palestinians to utilize the peace process, rather than terrorism, as a means of achieving self-rule and potential independence in the occupied territories.²⁴⁶

Until the Court applies limits to the military's powers in deportation proceedings neither the military nor the Palestinians will know the criteria which permit immediate deportations without the right to prior hearings. The Declaration of Principles and the self-rule accord are not the end of the Arab-Israeli conflict, but are merely the beginning of serious and substantial peace talks.²⁴⁷ Neither the Declaration of Principles nor

245. See *supra* note 164 and accompanying text (emphasizing the undisputed authority of the Defence (Emergency) Regulations).

246. See Lisa Beyer, *Victims or Victors?*, TIME, Jan. 11, 1993, at 23 (stating that Israeli officials believe the key to a successful and peaceful resolution with the Palestinians "lies in defusing Hamas' power"). A struggle exists between the PLO and Hamas for control over the Palestinian agenda in the peace process. *Id.* at 22. While the PLO is committed to the peace process with Israel in hopes of reaching a compromise on self-rule and independence, Hamas seeks the complete destruction of the Jewish state through terrorism and violence and the liberation of all of pre-1948 Palestine. *Id.*

Thus, Israel's goal is to reward the PLO for negotiating for peace and to punish Hamas for utilizing terrorism. *Id.* Israel must provide the PLO with the tangential evidence of its success in negotiating with Israel in the peace process for fear that otherwise the Palestinians will turn to Hamas and terrorism as a means for achieving their goals. See Joseph Nevo, *The Hamas-PLO Battle for Palestinian Support*, NEAR E. REP., Feb. 15, 1993, at 4 (discussing the PLO's efforts to become the "sole representative of the Palestinian people"). The deportation of the Hamas activists provided the following benefits to the PLO: "(1) the weakening of Hamas would reduce its threat to PLO hegemony in the territories; (2) this would provide the PLO with the opportunity to make itself spokesman for all Palestinians, regardless of their religious or political convictions." *Id.*

The Hamas threat to the peace process and the PLO is a central concern to Yasir Arafat who allegedly asked "[w]hen will Israel do something about these Hamas fundamentalists?" Richard Z. Chesnoff, *Fundamentalist Fears*, U.S. NEWS & WORLD REP., Jan. 11, 1993, at 29. Other Palestinians note the trouble with Hamas' terrorist approach: "They want us to boycott the peace process, but they are not offering any realistic alternative." *Id.*

247. See President Bill Clinton, Address at the Signing of the Declaration of Principles (Sept. 13, 1993) (stating that the Declaration "charts a course toward reconcilia-

the self-rule accord between Israel and the PLO alters the jurisdiction of the Court in the Gaza Strip or the West Bank,²⁴⁸ the continued presence of the Israeli military in the territories,²⁴⁹ nor the acts of violence by Palestinian extremists that might warrant emergency measures by Military Commanders.²⁵⁰ In order to prevent further controversies similar to the deportation of the Hamas terrorists the Court must provide appropriate guidance to the military in its approach to future confrontations with the Palestinian population.

This Note offers two recommendations to the Israeli Supreme Court for addressing Israeli deportation proceedings, and other emergency measures employed by the Israeli military, during the continuing military presence in the Gaza Strip and the West Bank.

tion" and that "difficult work . . . lies ahead"); Goshko and Murphy, *supra* note 2, at A1 (quoting Prime Minister Rabin as saying that "[w]e have witnessed, you have witnessed, the world has witnessed, the tip of the iceberg of problems we shall have to overcome in the implementation" of the self-rule accord).

248. See *supra* note 4 (discussing the unclear jurisdiction of the Israeli Supreme Court in light of the combined effects of the Declaration of Principles and the Gaza-Jericho self-rule accord). As a result of the self-rule accord, the Palestinians are charged with providing internal security to the territories while the Israelis are responsible for protecting the territories against external threats. *Id.*

249. See Declaration of Principles, *supra* note 1, arts. V, VIII, XIII, XIV (discussing the continued presence of the Israeli military for overall security in the occupied territories); see also Goshko and Murphy, *supra* note 2, at A40 (outlining the jurisdiction of the Israeli security forces in the occupied territories).

250. See, e.g., *Rampage Over West Bank Death*, N.Y. TIMES, Oct. 31, 1993, at I17 (reporting disturbances in the West Bank following a Hamas attack that killed a Jewish settler); Clyde Haberman, *PLO Moderate Short Dead, Raising Fears on Pact*, N.Y. TIMES, Oct. 22, 1993, at A3 (discussing the killing of the third senior Palestinian leader in less than a month as part of an apparent power struggle for control of the PLO after the occupied territories are transferred from Israel to the Palestinians); Joel Greenberg, *Palestinians Slay 2 Israeli Hikers; Israelis Kill Suspected Guerrilla*, N.Y. TIMES, at I11, Oct. 10, 1993 (describing the brutal attack on the civilian hikers); Clyde Haberman, *30 Israelis Hurt by Suicide Bomber*, N.Y. TIMES, Oct. 5, 1993, at A7 (describing the fourth suicide attack since the signing of the Declaration of Principles by Hamas in order to disrupt the peace process); *Israeli Fatally Stabbed; Arab Group Suspected*, N.Y. TIMES, Sept. 25, 1993, at I3 (reporting on one of a series of Hamas attacks in opposition of the peace process); *Arafat Ally Slain After Gaza Rally*, N.Y. TIMES, Sept. 22, 1993, at A16 (describing the mounting tensions within the Fatah faction of the PLO on the issue of self-rule).

A. APPLY THE LESS RESTRICTIVE ALTERNATIVE TEST

First, the Court should apply a single, uniform standard of judicial review in examining emergency decisions by the military. The less restrictive alternative test²⁵¹ discussed by the Court in *Tamimi v. Minister of Defence*,²⁵² should replace the current standard of review. This approach allows the Court to consider whether the actions of the Military Commander produced the least restrictions on the personal liberties of the accused in reaching the security goal.²⁵³ Thus, the Court must determine the most effective method of achieving the security goal by examining both the options of the Military Commander on the one hand, and the relative threat of the accused to national security on the other hand.²⁵⁴ This combination of factors permits the Court to weigh the needs of the military in preserving national security while assuring minimal injury to the rights of the accused under international law.

Two other methods of judicial review discussed above, the near certainty test²⁵⁵ and the military necessity test,²⁵⁶ focus exclusively on either the acts of the accused or the acts of the military leaders in determining whether to uphold the Military Commander's security order.²⁵⁷

251. See *supra* notes 216-31 and accompanying text (discussing the less restrictive alternative test).

252. See *supra* notes 218-21 and accompanying text (discussing *Tamimi v. Minister of Defence*, H.C. 507/85, 41(4) Piskei Din 57 (1986), summarized in 18 ISR. Y.B. HUM. RTS. 248 (1988)).

253. See *supra* note 217 (defining the application of the less restrictive alternative test).

254. See *supra* notes 218-21 and accompanying text (discussing the *Tamimi* Court's examination of both the security measure employed by the Military Commander and the relative hostile threat created by the bar council in determining to strike down the security measure under the less restrictive alternative test).

255. See *supra* notes 202-14 and accompanying text (discussing the near certainty test).

256. See *supra* notes 232-42 and accompanying text (discussing the military necessity review by the Court).

257. See *supra* notes 204-09 and accompanying text (discussing the *Schnitzer* Court's examination of the importance of free speech and a free press in a democratic society without any review of the security measure employed by the Military Censor); see also *supra* notes 233-37, 241-42 (discussing the *Elon Moreh* Court's examination of political motives of the Military Commander in striking down the security order under the military necessity test, and von Glahn's requirement of supervised regulation under that test, both which ignore any consideration of the acts of the accused).

Unlike the less restrictive alternative test, neither of these tests balances²⁵⁸ the military and human rights interests nor consider the appropriateness of the security order, and thus does not allow the Court to consider whether other means existed for the military to limit the impact on the rights of the accused. As a result, the less restrictive alternative test is an important tool for securing human rights protection for the Palestinians, the original purpose behind granting jurisdiction to the Court over the territories in 1967,²⁵⁹ while maintaining necessary consideration for security goals for the military and the government.

The exception to the right to prior hearings discussed in *Association for Civil Rights in Israel v. Commander of the Central Front*²⁶⁰ also serves as an important method for creating bounds to an immediate deportation order.²⁶¹ Given the specific language used by then-Justice Shamgar in that exception, however,²⁶² its general applicability to the different security measures under the Defence (Emergency) Regulations is not clear. In addition, the exception only applies to immediate actions by the Military Commander where the right to prior hearings requires suspension. Thus the goal of a uniform approach by the Court is lost under this exception. Uniformity is important as a means of assuring the Court's consistency in addressing human rights concerns under international law. This consistency may prevent the appearance of arbitrariness

258. But see Bracha, *Judicial Review*, *supra* note 15, at 101 (stating that interventionism by the Court is most effective by escaping the use of balance tests which provide too weak a protection for human rights interests). Bracha asserts that the most effective test for an interventionist Court is the near certainty formula, which he identifies as particularly appropriate in the cases of detention and restraining orders. *Id.*

259. See *supra* note 96 and accompanying text (discussing Attorney General Shamgar's rationale for creating Israeli Supreme Court jurisdiction over military orders in the occupied territories). Shamgar was greatly concerned that without the Supreme Court's review of military decisions in the occupied territories, such security orders would appear arbitrary and only exasperate the tension and bitterness felt by the Palestinians. Cohen, *High Court of Justice*, *supra* note 4, at 473.

260. See *supra* notes 174-96 and accompanying text (discussing the Shamgar exception to the right to prior hearings addressed in *Association for Civil Rights in Israel v. Commander of the Central Front*, H.C. 358/88, 43(2) Piskei Din 529 (1989), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 75-81 (1991)).

261. See Bracha, *Judicial Review*, *supra* note 15, at 101 (stating that the courts should strictly adhere to the exception laid down in *Association for Civil Rights in Israel v. Commander of the Central Front* and only allow the military to escape their requirement of prior hearings when "urgent and immediate military necessity" exists).

262. *Supra* note 179 and accompanying text.

in the Court's decisions,²⁶³ and maintain the Court's record as an independent, non-political body in a thriving democratic state.²⁶⁴

B. ELIMINATE THE REMEDY OF *RESTITUTIO IN INTEGRUM*

The Note's second recommendation is that the Court eliminate the remedy of *restitutio in integrum*²⁶⁵ in cases involving immediate deportations without the right to prior hearings. The remedy, discussed in *Kawasme v. Minister of Defence*²⁶⁶ and applied by the Court in *Association for Civil Rights in Israel v. Minister of Defence*,²⁶⁷ is designed to assure that deportees maintain the right to appeal their deportation orders if they are not provided with that option in the first instance by the Military Commander.²⁶⁸ Rather than serve as a remedy to deportees, however, *restitutio in integrum* is an escape hatch for the Court, allowing the Justices to find that the military violated the deportee's rights by not providing a prior hearing, but not holding the deportation order null and void.²⁶⁹ Instead, the Court upholds the deportation order and permits the deportee to appeal the deportation order from exile or from a place determined by the advisory committee.²⁷⁰ The advantage of this remedy to the Court is that the deportee remains expelled from the occupied territories to the benefit of the government, while securing the right to appeal the deportation order for the deportee.

Ultimately, this remedy allows the Court to avoid the issue of the legality of immediate deportations without prior hearings under interna-

263. See Paula E. Marcus, *The Treatment of Terrorists in the Israeli Occupied Territories*, 3 AM. U. J. INT'L L. & POL'Y 451, 471-77 (1988) (discussing the appearance of arbitrariness and disproportionality in the Court's treatment of Palestinians).

264. See Shetreet, *supra* note 237, at 405-10 (discussing the status and role of the Israeli judicial system in light of the failures of the political branches).

265. See *supra* notes 110, 149 (discussing the application of the *restitutio in integrum* remedy for deportees in *Kawasme v. Minister of Defence* and *Association for Civil Rights in Israel v. Minister of Defence*, respectively).

266. *Supra* note 110.

267. *Supra* note 149.

268. See *supra* note 110 (discussing the use of the *restitutio in integrum* remedy).

269. See *supra* note 110 and accompanying text (discussing the *Kawasme* Court's decision to provide the remedy of *restitutio in integrum* without nullifying the deportation orders).

270. See *supra* note 165 and accompanying text (explaining that the deportees were granted the right to appeal their deportation orders at a time and place determined by the advisory committee).

tional law because the deportee is always assured of the right to appeal the order at some later point in time. The fundamental problem with this remedy is that no incentive exists for the Military Commander to make a careful determination of the national security interests and the relative threats of the accused. Under the Court's approach, the Military Commander always knows that the deportation order, whether it provides for the right to prior hearings or not, will survive judicial scrutiny. One way or another, the Military Commander will successfully expel the deportee, and the deportee will successfully receive a right to appeal, although the appeal may occur after the deportation is implemented.

Such a remedy is contrary to the goals of an interventionist Court, one that actively seeks to protect human rights while balancing the needs of the military and the government. By eliminating the remedy of *restitutio in integrum*, the Court will create the necessary incentives for the Military Commander to avoid arbitrary and capricious decisions. If the Military Commander fails to provide a prior hearing, and is not justified in depriving the deportee of that right under an immediate review of that right by the High Court of Justice, the deportee would then be returned to the territories and the deportation order nullified. The deportee therefore would not need to appeal the deportation order itself. In addition, the Court will properly determine the limits of the military's actions and the extent of the deportee's rights under international law during immediate deportations without the right to prior hearings.

CONCLUSION

The Court's decision in *Association for Civil Rights in Israel v. Minister of Defence* represents a major break from the interventionist approach that the Court had adopted in the late 1970's. Whether this decision is merely a temporary reversal or a new trend is difficult to determine.²⁷¹ The circumstances surrounding the deportation of the Hamas

271. See Shetreet, *supra* note 237, at 424 (discussing the decline in importance of security factors by the Court). The trend of the Court will likely be determined by the outcome of the peace process. If Shetreet is correct in asserting that the significance of security considerations is diminishing (which would likely continue to occur as peace develops in the Middle East), then the Court will eventually provide less weight to such security factors in its decisions. This would indicate that the decision in *Association for Civil Rights in Israel v. Minister of Defence* was merely a temporary reversal of its interventionist trend.

terrorists were unusual and, given the signing of the Declaration of Principles and the self-rule accord, possibly the last such decision the Court will ever face.²⁷² The Court's decision, however, demonstrates the difficult and frustrating task the judicial branch has in balancing national security interests with humanitarian rights in a democracy surrounded by hostile elements.²⁷³ With such obstacles, however, the Israeli Supreme Court has served its role honorably in preserving the important security powers of the military during national crises, while also providing necessary judicial review to protect personal liberties that inappropriately suffer during such emergencies.

To support the theory that the decision in *Association for Civil Rights in Israel v. Minister of Defence* was an anomaly in the Court's interventionist trend, note that, only two weeks after that decision, the High Court of Justice ruled that the army could not conduct the demolition of homes of convicted Palestinian terrorists if such action would affect others. *Turkemaan v. Minister of Defence*, H.C. 5510/92, reported in Asher Felix Landau, *When A Home May Not Be Demolished*, THE JERUSALEM POST, Feb. 22, 1993, available in Lexis, Nexis Library, Jerusalem Post file.

272. But see *supra* note 4 (stating that the jurisdiction of the Court is not clear after the signing of the Declaration of Principles). Although, politically, large-scale deportations will not occur again due to the self-rule accord, Israel has managed to deport four PLO terrorists from the Gaza strip since the self-rule accord was executed. *PLO Expulsion*, *id.*, at 44A.

273. See, e.g., *Schnitzer v. Chief Military Censor*, H.C. 680/88, 42(4) Piskei Din 617, 645 (1988), discussed in Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 99 (1991) (stating that any democracy's security exists in its moral character, as well as its military defense). Justice Barak stated:

Of course, democracy is entitled, and obliged, to protect itself. Without security a democratic state would not exist. However, it must not be forgotten that security is more than a matter of armed forces. Democracy too is security. Our strength consists in our moral power and in our adherence to the principles of democracy, especially when we are encompassed by such dangers. Indeed, security is not an end in itself, but a means. The end is democratic government, i.e., a government of the people, which guarantees individual freedoms.

Id.