Parashat Lech Lecha: Between Person and Place[*]

Reflections on

HCJ 7015/02, Ajuri v. Commander of IDF Forces in the West Bank[1]

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[Draft Translation]

1. Preface: Person, Place, Law

Antigone: For what of pain, affliction, outrage, shame,
Is lacking in our fortunes, thine and mine?
And now this proclamation of today
Made by our Captain-General to the State…[2]

Ajuri involves the "assigned residence" of three residents of the area of Judea and Samaria (hereafter: "the petitioners") to the Gaza Strip by the IDF military commander in Judea and Samaria. The military commander issued the order pursuant to Section 86 of the Order Regarding Defense Regulations (Amendment No. 84) (Judea and Samaria) (No. 510), 5762 – 2002, which empowers the military commander to direct, by order, that a person should be placed under special supervision and required to live in a certain area of Judea and Samaria or in the Gaza Strip (hereafter: "the amended order"). The petitions that are the subject of the judgment were filed against the orders assigning the residence of the petitioners.[3]

This article analyzes the court's decision. In Chapter 2, "The Matter," we provide a brief narrative, present the legal question raised, and then trace the normative response given to that question – all as set forth in the court's opinion. In Chapter 3, "Interpretation," we offer a legal analysis of the judgment, concentrating on three main points: first, the legal discussion, giving emphasis to the pivotal role played by international law in the decision; second, the

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[*] Parashat Lech Lecha ("Go Thee") is the name given to the weekly Biblical reading in which God demands Abraham to leave his home and go to live elsewhere.

[1] HCJ 7015/02, Ajuri v. Commander of IDF Forces in Judea and Samaria (not yet published).

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[2] Sophocles, Antigone*,* Prologue (all the quotations from *Antigone* are from the translation of F. Storr, 1908).

[3] *Ajuri, supra*, note 1, Par. 6. This order expanded the application of the original order, of 1970, which was limited to Judea and Samaria, to include the Gaza Strip.

proper approach for interpreting the Fourth Geneva Convention according to the court; and third, the application of this interpretation in the present case, both as regards categorizing the act involved – whether it is "assignment of residence," which is permitted, or deportation, which is prohibited – and as regards the degree of danger posed by the petitioners, who are the subjects of the orders assigning residence. In Chapter 4, "The Crossroads," we shall critique the narrative that sets the boundaries of the discussion, consider the light that it throws on the normative interpretation and its application. In our closing summary, we consider whether *Ajuri* establishes a new norm, and contemplate the role of law, between person and place.

2. The Matter: facts and description of the court's opinion

Antigone: Shall we not perish wretchedest of all,
If in defiance of the law we cross
A monarch's will?…
We must obey his orders, these or worse.
Therefore I plead compulsion and entreat
The dead to pardon. I perforce obey
The powers that be.[4]

2.1 The facts

The judgment sketches and at the same time classifies the political context that sets the stage for the events that led to the issuance of the orders assigning the residence of the petitioners.[5] The warfare raging in Judea and Samaria and in the Gaza Strip is not police activity, but an armed conflict in which many Israelis and Palestinians have been wounded and killed.[6] The forces fighting against the State of Israel are terrorists who do not belong to a regular army, do not wear uniforms, and hide among the Palestinian civilian population, which provides them with support and assistance. The favored tactic of these forces is the dispatch of suicide bombers, who sew death and destruction in Israeli towns and villages.[7] In acting pursuant to its right to self-defense, Israel has undertaken special military operations, in which IDF soldiers enter territories that were in the past under its control by virtue of belligerent occupation, and were transferred pursuant to agreements between Israel and the Palestine Liberation Organization to the complete or partial control of the Palestinian Authority. To

[4] *Antigone*, Prologue.
[5] The decision was unanimous. The court panel was comprised of President Aharon Barak, Vice-President Levin, and justices Or, Mazza, Cheshin, Strasberg-Cohen, Dorner, Türkel, and Beinisch. President Barak wrote the opinion.
[6] *Ajuri*, *supra,* note 1, Par. 1. It should be mentioned that the court states the number of the Israelis who have been killed, but not the number of Palestinians. At the time the judgment was written, more than 1500 Palestinians had been killed. The statistics on Palestinian, and Israeli, deaths are available on B'Tselem's Website: www.btselem.org.
[7] *Ajuri*, *supra,* note 1, Par. 2.

carry out these operations, many reserve forces were mobilized, and heavy weapons, including tanks, armored personnel carriers, assault helicopters and planes, were used.[8]

2.2 The legal question raised

The petitions and the judgment focus on the contention that the amended order was a nullity because it contravened international law.[9] In particular, the petitioners argued that the order constitutes a forced transfer, or deportation, of protected persons, in violation of Article 49 of the Fourth Geneva Convention.[10] President Barak divided the hearing on the question into three stages, from the general to the specific.

A) The norm – was the military commander competent under international law to make arrangements with regard to assigning a place of residence.

B) Analysis of the applicable law – if the said authority exists, what are the conditions and the scope of the commander's discretion according to international law in so far as assigning a place of residence is concerned.

C) Application of the law to the facts – in the petitioners' cases, do the requisite conditions exist for the military commander to exercise his authority to assign a place of residence.

Review of the court's opinion will follow this process in their proper order.

2.2.1 The norm

On the question of the source of the military commander's authority, the court reiterated the principle it set some time ago that the source of the authority of a military commander in belligerent occupation lies in the rules of international law relating to belligerent occupation, which are part of the laws of war.[11] These laws, which create the authority and the possibility to restrict it, are set forth in the regulations attached to the Hague Convention of 1907 and in the provisions of the Fourth Geneva Convention of 1949.[12] The applicability of these laws in the circumstances in *Ajuri was* consistent with the prior rules of law established by the court, i.e., the provisions of the Hague Regulations reflect customary law which, as such, bind Israel, and that the humanitarian provisions of the Geneva Convention apply pursuant to the

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[8] *Ajuri*, *supra,* note 1, Par. 3

[9] The High Court immediately rejected the petitioners' other arguments – that the proceedings before the Appeals Board, in which the petitioners contested the orders, were defective, that there was a sufficient factual basis for the respondent's decision, and that the respondent did not have the authority to issue orders regarding the Gaza Strip. *Ajuri*, *supra,* note 1, Par. 12.

[10] *Ajuri*, *supra,* note 1, Par. 13.

[11] HCJ 393/82, Jamma'yt Iskan Almua'lamun Altauniya Almahduda Almashulia v. Commander of IDF Forces in Judea and Samaria, Piskei Din 37 (4) 785, 793.

[12] Hague Convention IV Respecting the Laws and Customs of War on Land and the Annex Regulations Respecting the Laws and Customs of War on Land, 18 October 1907; IV Geneva Convention on the Protection of Civilians in Time of War, 12 August 1949 (hereafter: "Geneva Convention" or "the Convention").

undertaking that the government of Israel made to respect them.[13] However, President Barak noted, alongside the rules of international law, the fundamental principles of Israeli administrative law also apply: "Every Israel soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue."[14]

Thus, the provisions of the Hague Regulations and the Geneva Convention dictate the discussion in the matter before the court. These provisions, which create the authority of the military commander, also determine the proper balance to be given between the rights of the individual who is forcibly assigned to another place – the right to dignity, liberty, and property – and military needs in the territory under belligerent occupation.[15] The relevant provision, according to the court, is Article 78 of the Geneva Convention, which allows the occupying power, for reasons of security, to take safety measures concerning protected persons. These measures may, at the most, include assigning the person's residence or internment, provided that the decisions to take these measures are made according to a regular procedure and can be appealed before a competent body. This provision is *lex specialis*; thus, actions taken pursuant thereto are allowed, even though they are prohibited by a more general provision. Therefore, the provisions of Article 49, which prohibit forced transfer or deportation, do not apply in the case where the military commander is allowed to do so pursuant to Article 78. Indeed, the judgment states further that, "a study of the Amending Order itself and the individual orders made thereunder shows that the maker of the Order took account of the provisions of Article 78 of the Fourth Geneva Convention, and acted accordingly when he made the Amending Order and the individual orders." The matter herein does not deal with deportation, but with assigned residence in accordance with Article 78, the authority for which is given to the military commander.[16] When the place of residence of a person is assigned under the provisions of Article 78, the military commander's act is lawful and does not violate the rights given by international humanitarian law to protected persons. "Indeed, Article 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right."[17]

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[13] *Ajuri*, *supra,* note 1, Par. 13.
[14] *Ajuri*, *supra,* note 1, Par. 13. General Staff Order 333.0133 (1982) states that IDF soldiers must obey the humanitarian provisions of international law. On this point, see H. Sommer," *Eppur si applica*: The Geneva Convention (iv) and the Israeli Law", 11 *Iyuney Mishpat* (5746 – 1996) 263, 268-269.
[15] *Ajuri*, *supra,* note 1, Par. 16.
[16] *Ajuri*, *supra,* note 1, Par. 17.

2.2.2 Analysis of the applicable law

The first argument raised by the petitioners related to the area to which the residence of a person may be assigned pursuant to Article 78. According to the petitioners, Article 78 allows assigned residence only in the territory under belligerent occupation. In that Judea and Samaria should be viewed as a separate area from the Gaza Strip, transferring them to that area would not meet the conditions set forth in Article 78, and would constitute deportation that is prohibited by Article 49. The petitioners' distinction between Article 49 and Article 78, a distinction based on the area to which the individual is transferred, was accepted by the court.[18] Thus, the court discussed the question if the area of Judea and Samaria and the area of the Gaza Strip constitute one, or possibly separate, territory. On this point, the judgment states that the fact that the areas had been under the control of two different states and were administered by two different military commanders does not make them two separate areas.[19] Two reasons support the conclusion that one area is involved: first, an analysis of the purpose of Article 78 of the Geneva Convention leads to the conclusion that the purpose of restricting the validity of assigned residence to one territory lies in the societal, linguistic, and cultural unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, there is no difference between the area of Judea and Samaria and the area of the Gaza Strip. Second, both Israel and the Palestinian Authority relate to the two areas as one entity, as is apparent, *inter alia*, by the provision of Article 11 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. On this point, the court added: "In this territory, there are two military commanders who act on behalf of a single occupying power."[20] Therefore, the elements of Article 49 do not apply, and where residents of Judea and Samaria are assigned residence in the Gaza Strip, the provisions of Article 78 apply.

The petitioners' second argument focused on the military commander's exercise of discretion. According to the petitioners, in issuing the orders assigning residence, the military commander took only deterrence into account, and did not consider the need to prevent the danger presented by the petitioners themselves. In doing so, the petitioners contend, the military commander deviated from the authority given to him by Article 78, which allows assigned residence as a safety measure only for the purpose of preventing a danger posed by the persons whose place of residence is being assigned. The court emphasized, and repeated, that an essential condition for assigning the residence of a person is that the person himself constitutes a danger, "and that assigning his place of residence will aid in averting that

[17] *Ajuri*, *supra,* note 1, Par. 18.
[18] *Ajuri*, *supra,* note 1, Par. 20.
[19] *Ajuri*, *supra,* note 1, Par. 21.
[20] *Ajuri*, *supra,* note 1, Par. 22.

danger." It is forbidden to designate the residence of a person who is innocent or a person who did present a security danger, but no longer presents any danger, even if assigning his residence provides a deterrent benefit.[21] This result, the court held, is required by the outlook of the convention in general, and Article 78, in particular, that emphasizes the exceptional and extreme nature of this measure. It is also implied by construction of the Amending Order itself, and from "our Jewish and democratic values."[22]

The exceptional nature of assigning the residence of a person is also implied from the degree of the necessity for it. Assigning the residence of a protected person "may usually only be exercised if there exists administrative evidence that – even if inadmissible in a court of law – shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory."[23] This measure must meet the test of proportionality customary in administrative law; there must be an objective relationship between the forbidden act and the measure assigning residence; an appropriate relationship must exist between the purpose of preventing danger from the person and the danger he would present if this measure were not exercised against him; the measure adopted must be the one that causes less harm, and is proportionate to the benefit deriving from it.[24] In this context, the court mentioned that filing a criminal indictment would constitute a more proper and proportionate measure than assigning residence, and the suitability of each measure should be based on the facts of the case.[25]

However, the military commander may take into account considerations of deterrence. Deterrence is to be considered in the decision-making process when the measure of assigning the residence of a person meets the conditions mentioned above. On its own, deterrence is not a proper basis for issuing an order assigning the residence of a protected person. Thus, when the danger presented by a protected person justifies assigning the residence of a person, and the question is whether to choose this measure rather than another, he may take into account considerations of deterring others. This conclusion conforms, in the court's opinion, with the recognition of the Geneva Convention that assigning the residence of a person is a legitimate measure to safeguard the security of the region and is required by the harsh reality in which the State of Israel and the territory are situated, following the activity of suicide bombers.[26]

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[21] *Ajuri*, *supra,* note 1, Pars. 24, 27, 29.
[22] *Ajuri*, *supra,* note 1, Par. 24. This holding is consistent with the court's decision in Reh. CrimA 7048/97, *John Does v. Minister of Defense, Piskei Din* 54 (1) 721, 741, in which the court held that administrative detention is lawful only where the person constitutes a danger to state security, and not for any other reason, such as using the person for negotiation purposes to obtain the release of Israeli soldiers taken prisoner or missing in action.
[23] *Ajuri*, *supra,* note 1, Par. 25.
[24] Ibid.
[25] *Ajuri*, *supra,* note 1, Par. 26.
[26] *Ajuri*, *supra,* note 1, Par. 27.

The discretion of the military commander to assign the residence of a person is broad. The court does not replace the military commander's discretion with its own. The scope of judicial review that the court exercises regarding these decisions is limited, therefore, to an examination of the existence of the parameters mentioned above, which create "a zone of reasonableness." Thus, for example, the court will not consider the contention that assigned residence is ineffective, when there are examples of cases in which serious terrorist activity was prevented by taking account of considerations such as that of assigned residence.[27]

2.2.3 Application of the law to the facts – examination of the conditions necessary for the military commander to exercise his authority in the petitioners' cases

The order assigning the residence of the three petitioners was issued because of the aid that they gave to Ahmad Ali Ajuri, whom Israel believed was involved in dispatching suicide bombers carrying explosives. To determine whether the requirements of Article 78 were met, the court's opinion describes the petitioners and the deeds attributed to them.

Intissar Muhammad Ahmed Ajuri, 34, an unmarried woman, is the sister of Ahmad Ali Ajuri. The Appeals Board held that she knew about her brother's activity, that he was armed and had hidden an assault rifle in the family's apartment. The Appeals Board also held that the petitioner aided her brother by sewing a number of explosive belts. This activity laid a sufficient foundation for the court to conclude that the petitioner "creates a significant danger to the security of the area" well beyond the minimum level required by the provisions of Article 78. President Barak summarized the matter, stating: "Indeed, assigning the place of residence of the petitioner is a rational measure – within the framework of the required proportionality – to reduce the danger she presents in the future."[28]

Kifah Muhammad Ahmed Ajuri, 38, married and the father of three children, is the brother of Ahmad Ali Ajuri. The Appeals Board held that not only was he aware of his brother's activity, but that he also aided him. According to the findings, the petitioner provided a mattress to his brother's group, moved the mattress from the group's hideout apartment, and served as a look-out while his brother and the members of his group moved explosive charges from the apartment to their car. These deeds formed the basis for the court's conclusion that the petitioner "is deeply involved in the grave terrorist activity of that brother" and that "there is a reasonable possibility that he presents a real danger to the security of the area… The measure of assigned the place of residence of the first petitioner is indeed a proportionate measure to prevent the danger he presents, since the acts of this petitioner go far beyond the

[27] *Ajuri*, *supra,* note 1, Pars. 29-30.
[28] *Ajuri*, *supra,* note 1, Pars. 31-32.

minimum level required under the provisions of Article 78 of the Fourth Geneva Convention."[29]

Abed Alnasser Mustafa Ahmed Asida, 35, married and a father of five children, is the brother of Nasser Asida, who is wanted by Israel for a number of terrorist attacks. The findings of the Appeals Board indicate that the petitioner knew of his brother's involvement in terrorist deeds and also drove his brother and another person to the hospital after they were injured in the course of preparing an explosive charge. The petitioner supplied his brother and brother-in-law with food and clean clothes, and even let him use his car several times, even though he stopped giving his brother the car because he was afraid the Israelis would assassinate him while he was in the vehicle. The petitioner contended, and his contention was not refuted, that he did not know for what purpose his brother wanted the car, and that he did not know the purpose for which he drove his brother to Nablus. The court was of the opinion that these deeds did not provide a basis that justifies assigning the residence of the petitioner: "The active deeds that he carried out, in helping his brother, fall below the level of danger required under the provisions of Article 78 of the Fourth Geneva Convention and the provisions of the Amending Order. His behavior does not contain such a degree of involvement that creates a real danger to the security of the area…"[30]

2.3 Closing comments

At the end of the judgment, President Barak adds a few comments. First, he explains the need to take a dynamic interpretive approach to Article 78 of the Fourth Geneva Convention. This approach, according to the president, takes into account the collaboration between protected persons as well as the terrorist policy of suicide bombers, which the drafters of the Convention did not anticipate. This approach is necessary to give a meaning to the provisions of the Convention that will enable the State of Israel to contend with the reality of the security situation it faces.[31] Second, the terrorist attacks, which strike at residents of both the State of Israel and the territories, make it difficult for the State of Israel to protect its citizens and ensure the security of the region. Restrictions on its ability to fight against these attacks are not only military-operational. They are also normative. On the one hand, the State of Israel acts within the framework of the right to self-defense, which is recognized by the UN Charter. On the other hand, a liberty-seeking democracy acts within the framework of the possibilities available to it under international law and its internal law. "As a result, not every effective measure is also a lawful measure."[32]

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[29] *Ajuri*, *supra,* note 1, Par. 33-36.
[30] *Ajuri*, *supra,* note 1, Pars. 37-39.
[31] *Ajuri*, *supra,* note 1, Par. 40.
[32] *Ajuri, supra,* note 1, Par. 41.

3. Interpretation: analysis of the judgment

Creon: Well, let her know the stubbornest of wills
Are soonest bended, as the hardest iron,
O'er heated in the fire to brittleness,
Flies soonest into fragments, shivered through…
But this proud girl, in insolence well-schooled,
First overstepped the established law, and then-
A second and worse act of insolence –
She boasts and glories in her wickedness.
Now if she thus can flout authority
Unpunished, I am woman, she the man.

The court's opinion in *Ajuri* is the most recent in a line of judgments that review the measures used by the security forces in the context of the Israeli-Arab conflict. Decisions of particular note in recent years are Reh, CrimA 7048/97, *John Does v. Minister of Defense,* cited above, in which the High Court of Justice examined the legality of continuing the administrative detention of Lebanese prisoners who served as bargaining chips in Israel's negotiations for the return of Israeli soldiers taken prisoner or missing in action; HCJ 5100/97, *Public Committee Against Torture in Israel v. Government of Israel*, which involved the interrogation methods used by the General Security Service against detainees suspected of terrorist activity or of concealing information about such activity.[33] During Operation Defensive Shield, human rights organizations filed more than twenty petitions in the High Court against various combat actions carried out by the IDF in the Jenin area.[34] In most of the decisions, the High Court ruled, without detailed discussion on the norms involved, that the military forces acted properly, and that no factual foundation had been laid that the army's actions were not lawful; however, the court indicated that combat actions – at the time they are carried out – are subject to judicial review.[35]

Thus, as regards the Supreme Court's approach toward judicial review of state decisions on security matters, *Ajuri* does not break new ground.[36] However, the opinion in *Ajuri* is

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[33] HCJ 5100/97, Public Committee Against Torture in Israel v. Government of Israel, Piskei Din 53 (4) 817.

[34] For example, HCJ 2936/02, Physicians for Human Rights v. Commander of IDF Forces in the West Bank, Piskei Din 56 (3) 3; HCJ 3114/02, Barakeh v. Minister of Defense, Piskei Din 56 (3) 11; HCJ 3451/02, Almandi v. Minister of Defense, Piskei Din 56 (3) 30; HCJ 2117/02, Physicians for Human Rights v. Commander of IDF Forces in the West Bank, Piskei Din 56 (3) 26; HCJ 5872/02, Barakeh v. Minister of Defense, Piskei Din 56 (3) 1; HCJ 2901/02, HaMoked: Center for the Defence of the Individual v. Commander of IDF Forces in the West Bank, Piskei Din 56 (3) 19; HCJ 2977/02, Adalah v. Commander of IDF Forces in Judea and Samaria, Piskei Din 56 (3) 6.

[35] *Ibid.* (HCJ 2936/02, HCJ 3114/02, HCJ 3451/02, HCJ 2117/02).

[36] In HCJ 168/91, *Morkus v, Minister of Defense, Piskei Din* 44 (1) 467, in which the court ordered that gas masks must be distributed to Arab residents in Judea and Samaria; in Reh. Crim. 4110/92, *Hass v. Minister of Defense, Piskei Din* 48 (2) 811, the court held that a petition against IDF orders regarding the rules of engagement are subject to judicial review; in HCJ 5688/92, *Wekselbaum v. Minister of Defense, Piskei Din* 47 (2) 812, the court allowed the family of a fallen IDF soldier to deviate from the standard inscription on the gravestone; in HCJ 680/88, *Schnitzer v. Military*

innovative in the sense that, on its face, it seems to be talking in a different normative language than we were used to hearing from the court. This language, properly, sets the framework of the discourse chosen by the court to review the legality of assigning the residence of a person, and necessarily leads to the discussion of issues that were not previously discussed. In this chapter, we shall relate to the discourse on that framework and those issues.

3.1 The framework of the discourse – international law is determinative

As mentioned above, the judgment began with a description of the Israeli-Palestinian conflict: describing the armed conflict, characterizing the Palestinian forces not as combatants but as terrorists who do not belong to a regular army, defining Israel's response as self-defense permitted in accordance with the UN Charter, and describing the IDF's invasion into the territory of Judea and Samaria. There was reason why the court chose to use terms from the international laws of war to describe the conflict. In doing so, President Barak, at the beginning of the opinion, defined the normative framework of the judgment: the international laws of war and the laws of occupation. As will be shown below, the decision in *Ajuri* is the last stage in the evolution of the use of the rules of international law, in general, and the rules of the Fourth Geneva Convention, in particular, as the basis for the court's decision.

The status of international law in Israeli law is firmly established in Israeli common law. As a rule, the international conventions to which Israel is party do not have an independent status in Israeli law unless a statute is enacted to incorporate them into law.[37] The exception is declarative treaties and conventions, i.e., treaties and conventions that reflect rules of customary law.[38] These rules constitute part of the law applying in Israel and are binding as long as they do not contradict Israeli law.[39] International treaties and conventions, however, do not lack status in Israeli law. As part of international law, they form a compass that guides

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Censor, Piskei Din 42(4) 617, the court allowed the publication of an article criticizing the actions of the director of the Mossad [Institute for Intelligence and Special Operations]; in HCJ 4541/04, *Miller v. Minister of Defense, Piskei Din* 49(4) 94, the court ordered that women be accepted to flight courses run by the Air Force. Of particular relevance to the case before us are judgments relating to matters such as deportation of Palestinian residents and the subject of the settlements. See the discussion accompanying notes 53-68.

[37] CA 25/55, Guardian of Abandoned Property v. Samarah, Piskei Din 10, 1825, 1829; CA 439/67, Maccabi v. State of Israel, Piskei Din 31 (1) 770; HCJ 69/81, Abu Ita v. Commander of Forces in Judea and Samaria, Piskei Din 39 (2) 197; HCJ 785/87, Affo v. Commander of IDF Forces in the West Bank, Piskei Din 42 (2) 4, 36.

[38] HCJ 610/78, *Ayub v. Minister of Defense, Piskei Din* 33 (2) 113, 120, 129; *Iskan, supra,* note 11, at pp. 793-794; *Affo, supra*, note 37, at pp. 35, 76. For a comprehensive analysis of the ways international conventions are adopted into Israel law, see R. Lapidot, "The Place of International Public Law in Israeli Law," 19 *Mishpatim* (5750 – 1990) 807; B. Rubin, "Adoption of International Conventions into a Country's Law by the Courts," 13 *Mishpatim* (5744 – 1984) 210.

[39] CrimA 5/51, Steinberg v. The Attorney General, Piskei Din 5, 1061; CrimA 174/54, Stempefer v. The Attorney General, Piskei Din 10, 5; CrimA 336/61Eichmann v. The Attorney General, Piskei

the court in its decision-making, and a presumption exists that the purpose underlying every statute is to fulfill the provisions of international law.[40] The court must, therefore, construe Israeli law in a manner that is consistent with international law,[41] for "the State of Israel is a member of the family of nations. It should not breach its international obligations."[42]

The rules for the absorption of international law into Israeli law are clear, but their implementation by the court is irregular. The most glaring example is the additional hearing that the High Court held on its decision on the legality of Israel's continuing the prolonged detention of Lebanese prisoners as bargaining chips. In its original decision, the court held that the infringement of the rights of petitioners, who did not individually present a security danger, reflected the proper balance between the liberty of the individual and state security.[43] President Barak held that it was improper to consider the rules of international law on the prohibition of taking hostages, whether those rules were treaty-based or customary, in that the Emergency (Detentions) Law, 5739 – 1979, were controlling and prevailed over every provision of international law.[44] In the rehearing, President Barak, writing for the court, overruled the prior decision, holding that detaining a person who does not himself constitute a danger cannot constitute a proper balance between human rights and state security.[45] President Barak based this conclusion, *inter alia*, on the prohibition in international treaty-based law against taking hostages, which affects the proper interpretation of the Detentions Law.[46]

In contrast with the decision in the rehearing in *John Does,* in which, as mentioned, the court applied the presumption of conformity in interpreting the Israeli statute, the court refrained from applying the presumption in two other cases. In *Scheinbein v. the Attorney General,* the court discussed the question of the scope of Israel's obligation to extradite an Israeli citizen to a foreign state as set forth in the extradition treaty that it signed with the United States, in light of the prohibition stated in the Extradition Law, 5714 – 1954.[47] As a result of the international obligation of the State of Israel, the court chose not to construe the statute narrowly, and held that the prohibition applies also to an Israeli citizen who has no ties to the

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Din 16, 2033, 2040; CrimA 31/67, Kamiar v. State of Israel, Piskei Din 22 (2) 85, 97; Affo, supra, note 37, at p. 35; HCJ 253/88, Sajdiya v. Minister of Defense, Piskei Din 42 (3) 801, 815.

[40] HCJ 302/72, Hilu v. Government of Israel, Piskei Din 27 (2) 169, 177; HCJ 279/51, Amsterdam v. Minister of Finance, Piskei Din 6, 945, 966; Eichmann, supra, note 39, at p. 2040; John Does, supra, note 22, at pp. 7442-743; HCJ 256/01, Rabah v. Jerusalem Court for Local Matters, Piskei Din 56 (20 930, 935; HCJ 2599/00, YATED v. Minister of Education, Piskei Din 56 (5) 834, 846.

[41] For a comprehensive discussion on the question of absorption of international law into Israeli law, see Zilbershatz, "Absorption of International Law into Israeli Law – Reality versus the Desirable," 24 *Mishpatim* (5754 – 1984) 317.

[42] A. Barak, Judicial Interpretation, Vol. 2: Legislative Interpretation (5753 – 1993) 577.

[43] ADA 10/94, *John Does v. Minister of Defense*, *Piskei Din* 53 (1) 97, 107.

[44] *Ibid*., p. 109.

[45] See *John Does*, *supra*, note 22, at p. 743.

[46] *Ibid.,* at pp. 742-743.

[47] CrimA 6182/98, Scheinbein v. the Attorney General, Piskei Din 53 (1) 625.

state and is located in its territory for the sole purpose of fleeing from prosecution in his homeland.

In *Rabah,* the court discussed the question of the legality of applying Israeli law in East Jerusalem in light of the prohibition against the annexation of occupied territory in international customary law.[48] The court refused to deal with the validity of the building laws or to discuss the case substantively. It held that an Israeli court, which applied these laws to East Jerusalem, prevails over every international norm, and, therefore, there is no presumption of conformity that would benefit the petitioners.[49] In two other judgments, the court did take into account rules of international law in construing an Israeli law: in *Public Committee Against Torture in Israel*, the High Court nullified the interrogation methods used by General Security Service agents against security detainees, basing its opinion, *inter alia*, on the prohibition found in conventions to which Israel is party regarding torture and cruel and degrading treatment and punishment.[50] In YATED, the court used human rights conventions to derive the Ministry of Education's obligation to provide equal resources to various sectors of the population in the area of special education.[51]

However, it should be mentioned that the cases in which the court used rules of international law in sustaining a petition did not form the *sole* basis for the decision. The rules were used to "reinforce" the court's interpretation based on Israeli law.[52] The court deviated from this practice, as we shall see below, in its decisions regarding Operation Defensive Shield, and in *Ajuri*, the court made a change of direction that should not be disregarded. As will be shown below, the High Court's decision on the question before it relied almost completely on international law: the laws of war and the laws of occupation, in general, and the Geneva Convention, in particular.

Over the years since the occupation of the West Bank and the Gaza Strip began in 1967, the court has often confronted contentions that Israel had breached provisions of the Fourth Geneva Convention. The High Court's point of departure was and remains that the court will not consider contentions based on the Convention, because its provisions are treaty-based and not customary. In that the State of Israel has not enshrined them into its internal law, the state

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[48] Rabah, supra, note 40.
[49] *Ibid.,* at pp. 934-935.
[50] Public Committee Against Torture in Israel, supra, note 33.
[51] *YATED, supra,* note 40, at p. 846. It should be mentioned that, in a judgment made prior to *YATED* that involved a similar matter, the court rejected an argument that was supported by these conventions. See HCJ 1554/95, *Shoharey GILAT v. Minister of Education, Piskei Din* 50 (3) 2, 27-28.
[52] In *John Does, supra,* note 22, President Barak's decision to nullify the detention of the petitioners was grounded primarily on the fact that the right to dignity and liberty was a basic right, on which that the interpretive process was to be based (at pp. 79-740). The same reasoning was used in *Public*

remains bound to the Convention only on the international level. Thus, in most cases, the High Court refrained from discussing the provisions of the Fourth Geneva Convention and refused to apply them in cases involving deportation of residents of the territories to Jordan and Lebanon,[53] settlement policy,[54] and other matters.[55] At times, the High Court construed the various provisions of the Convention incidentally, commenting unambiguously that it does not aid the petitioners, because the provisions are not binding. A glaring example is *Affo,* in which the court discussed the question of whether transfer of the petitioners is a transfer prohibited by Article 49 of the Convention. In President Shamgar's opinion, the individual transfer of residents who constitute a security danger to the State of Israel does not come within the provisions of Article 49, whose drafters had in mind the large-scale transfers that the Nazis carried out during World War II.[56] Justice Bach disagreed with that conclusion, but supported the President, holding that, in any event, the prohibition on the transfer of protected persons to an area outside the region is not required in that the provision is treaty-based.[57] President Shamgar's approach was not innovative, an identical conclusion had been reached by the court ten years earlier, in *Abu Awad* and *Qawasmeh*.[58]

It is interesting that, in the framework of the proceedings in the High Court, the state did not refuse, as a rule, to discuss the provisions of international law. While maintaining that the Geneva Convention did not bind the state at the internal level, it emphasized its commitment to act in accordance with the Convention's humanitarian provisions.[59] This position led Justice Bach in *Affo* and Justice Barak in *Iskan* to raise the possibility that the provisions of the Geneva Convention be viewed as binding the state in light of the internal directive that it imposed on itself.[60] This approach was the complete opposite of the opinions written by

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Committee Against Torture in Israel, at pp. 834-836. In *YATED*, at p. 846, Justice Dorner based her decision on the right to equality and education, which are fundamental values.

[53] HCJ 320/80, Qawasmeh v. Minister of Defense, Piskei Din 35 (3) 114; HCJ 874/88, Nasrallah v. Commander of IDF Forces in the West Bank, Piskei Din 43 (2) 265, 268-269; HCJ 5973/92, The Association for Civil Rights in Israel v. Minister of Defense, Piskei Din 47 (1) 267.

[54] *Ayub, supra,* note 38, at pp. 119-122, 129-137; HCJ 390/79, *Dweikat v. Government of Israel*, *Piskei Din* 34 (1) 1.

[55] See, for example, HCJ 591/88, *Taha v. Minister of Defense*, *Piskei Din* 45 (2) 45, which involved an order, issued by the commander of IDF forces in Judea and Samaria, to supervise the behavior of minors.

[56] *Affo, supra,* note 37, at pp. 24-28.

[57] *Ibid.,* at pp. 76-77.

[58] HCJ 97/79, *Abu Awad v. Commander of Judea and Samaria*, *Piskei Din* 333 (3) 309, 316; HCJ 698/80, *Qawasmeh v. Minister of Defense*, *Piskei Din* 35 (1) 617, 626-629. In *Qawasmeh*, Justice H. Cohen disagreed with the opinion of President Landau, holding that transfer of residents of the region, unlike transfer of aliens, is part of customary law. *Ibid.* at pp. 637-647.

[59] M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial State," 1 *Military Government in the Territories Administered by Israel 1967-1980,* M. Shamgar ed. (Jerusalem, 1982) 13, 33-34.

[60] *Affo, supra,* note 37, at pp. 77-78; *Iskan, supra,* note 11, at pp. 793-794.

Justice Vitkin in *Hilu* and President Landau in the second *Qawasmeh* case.[61] Indeed, in *Sajadiya,* Justice Bach held, in a minority opinion, that the government should respect its humanitarian provisions and supply security detainees in the detention camps with the minimal requisite living space and movement.[62]

The court's position that the Fourth Geneva Convention binds the executive branch at the international level only was widely criticized for a variety of reasons that are not appropriate for extensive discussion here.[63] Despite this criticism, the principle of law regarding application of the Fourth Geneva Convention remained as it was for many years, and only recently has there been a change in its application, which becomes absolute in *Ajuri.* The reason, both for the original principle and for the current change, are extra-judicial: the original principle was, apparently, the only way that the court could act to refrain from entering into political disputes over the Israeli occupation of the West Bank and Gaza Strip, while maintaining the principle that they are justiciable. In this way, the court refrained from deciding on the applicability of the Convention in the Israeli-occupied territories and on

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[61] In *Hilu*, supra, note 40, at p. 181, Justice Vitkin wrote: "I can only relate with doubt to the conduct that has taken root, apparently, by representatives of the state to agree to investigate the military government's actions also from the view of internal treaty-based law. But this consent , which is given from time to time regarding limited subjects and without a commitment that it will be made in all the petitions, turns our hearing into a kind of arbitration dependent on the consent of the defendant. In my modest opinion, this court was not created for that purpose." In *Qawasmeh, supra,* note 53, at pp. 627-628, President Landau stated: "The decision of the government of Israel to fulfill in practice the humanitarian provisions of the Fourth Geneva Convention… is a political decision, which does not relate to the legal level, in which court must deal."

[62] *Sajadiya, supra,* note 39, at p. 832.

[63] One approach emphasizes that the authority of the military commander in the Occupied Territories lies in international law, from the internal law in the area, or from its military legislation, and not from the Knesset. Thus, the main rationale underlying the failure to grant independent status to the Convention in Israeli law, the separation of powers, does not apply under the circumstances. See Kretzmer, "Enforcement and Interpretation of the Fourth Geneva Convention by the Supreme Court," 26 *Mishpatim* (5755 – 1995) 49, 62-63. Prof. A. Rubinstein makes a similar argument, contending that the Fourth Geneva Convention does not need to be incorporated into Israeli law by statute because, by its nature, it applies to territory that lies outside the sovereign area of the Knesset, and the Knesset is not empowered to enact legislation regarding that territory. A. Rubinstein, "The Changing Status of the Territories: From Trust to Legal Hybrid," 11 *Iyuney Mishpat* (5746 – 1986) 439. Another approach states that, under English law, from which the distinction is made between absorption of a convention into internal law and absorption of custom, differs from the Israeli practice, making the distinction in Israeli law irrelevant. Rubin, *supra*, note 38. Sommer's approach states that the Israeli military administration must respect the provisions of the Geneva Convention because these provisions constitute part of the military commands. Sommer, *supra,* note 14. One last approach contends that the provisions of the Geneva Convention, having been accepted by the vast majority of states, have become part of customary law over the years. E. Benvenisti, "Implications of Security Considerations and Foreign Relations on Application of Treaties in Local Law," 21 *Mishpatim (*5792 – 1992) 221; L. Shelef, "The Border of Activism is the Green Line: On the Margins and Paths of the High Court of Justice to Justice in the Territories," 17 *Iyuney Mishpat* (5753 – 1993) 757. For a comprehensive discussion on High Court decisions relating to the actions of the military authorities in the Occupied Territories from 1967 to the outbreak of the Al-Aqsa Intifada, in general, and on the question of the application, enforcement and interpretation of the Fourth Geneva Convention in Israel, in particular, see D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany, NY: 2002) especially 19-56.

Israel's breach of fundamental rules of international law, a breach that entails grave political significance in the international area. It should be noted that the political and legal developments in recent years have led to a situation in which the refusal to relate to these matters was perceived, properly, by the court to be more harmful than beneficial to the State of Israel.[64]

The decade of the 1990s were witness to an enormous increase in international awareness of human rights violations in international and internal conflicts, as well as in the desire of states to act more strenuously to prevent, or at least minimize, human rights violations. A major way for giving this desire a normative expression was by establishing and operating an international judicial system.[65] Another way was by the exercise of universal judicial jurisdiction.[66] The international war-crimes tribunals set up following the wars in Rwanda and Yugoslavia provided an opening for the development of international criminal law, both internationally and internally. These tribunals, as well as a number of key decisions made by state courts that exercised universal jurisdiction,[67] paved the way for the establishment of an international criminal court having a permanent statute and broad jurisdiction.[68]

Clearly, the court is aware of these developments. In this context, we believe, it is necessary to understand its decisions in the petitions filed against the IDF and the government of Israel

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[64] President Barak is aware of these developments, as appears from his comments at the annual conference of the Israel Bar Association in 2002. A. Barak, "How Do We Combat Terrorism and Preserve Human Rights, 30 *Orech HaDin* (2002). See, also, M. Gorali, "The Honorable Justice Barak Offers a Warning," *Ha'aretz,* 7 May 2002.

[65] Statute of the International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. R27, 25 May 1993, U.N. Doc. S/RES/827 (1993), 32 I.L.M. (1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, 8 November 1993, U.N. Doc. S/RES/955 (2994), 33 I.L.M. (1994) 1598.

[66] The first warning light came in the form of many criminal indictments filed in Belgium against numerous leaders, among them Israel's prime minister, Ariel Sharon, pursuant to an amendment to the Belgian law regarding the punishment for grave breaches of humanitarian law, of 1993, which expanded the jurisdiction of Belgian courts. See, Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 1993 (as amended in 1999) (Belgium), 38 I.L.M. (1999) 918.

[67] On this matter, see the proceedings that took place in Belgium based on the statute empowering its court to hear criminal charges relating to deeds committed in the civil war in Rwanda: Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, Chapter 4A (1 September 2000) [URL:www.web.amnesty.org/802568F7005C4453/0/D6F700D99340954580256AF4005000AF?Open] (last visited 3 February 2003).

[68] Rome Statute of the International Criminal Court, 17 July 1998, Art. 12-13, U.N. Doc. A/CONE 183/9, 37 I.L.M. 999 (1998). See, also, the judgment of the House of Lords in the Pinochet matter; although it did not relate to the question of universal jurisdiction, it chose to mention that such jurisdiction exists in cases of torture. *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarre* (No. 3), [1999], 2 All. E.R. 97, 109, 188 (H.L.).

during Operation Defensive Shield.[69] In the petition filed by Physicians for Human Rights against IDF forces firing at ambulance crews of the Red Cross and the Red Crescent, Justice Dorner stated that, "We should emphasize that our forces involved in the fighting are required to act in accordance with the relevant humanitarian rules for the treatment of wounded, the sick, and the bodies of the persons killed" and that their improper use "does not permit a sweeping breach of the humanitarian rules."[70]

In another petition on the evacuation of the bodies of Palestinians who were killed, President Barak points out that, "during hostilities, too, there must be compliance with the laws of warfare. In hostilities, too, every action must be taken to protect the civilian population."[71] In a petition that was filed regarding IDF gunfire at medical teams, [72] Justice Dorner examined whether IDF actions complied with the provisions of Article 19 and 21 of the First Geneva Convention.[73] In a petition opposing the refusal of IDF forces to supply water and drinks to the armed Palestinians who entrenched themselves in the Church of the Nativity, the court examined whether the refusal met the requirements of Articles 17 and 23 of the Fourth Geneva Convention.[74] The court denied all these petitions, either by consent or by holding that the IDF acted in accordance with international law, or following a declaration that the IDF has the duty to act in accordance with the rules of international law. The results of these judgments are interesting: on a normative level, they refer to the relevant rules of international law and the necessity to apply them, though they do not necessarily offer firmly established support, yet they approve the Israeli army's actions. It is possible that this was the reason why counsel for the state did not raise arguments regarding the application of humanitarian law, but reiterated the state's commitment to act pursuant thereto.

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[69] Assuming that transferring the petitioners to the Gaza Strip does in fact constitute a transfer that is prohibited by Article 49, pursuant to Article 147 of that convention, the perpetrators are criminally responsible for their act. They are also subject to criminal responsibility pursuant to Article 8(2)(a)(vii) of the Rome Statute, which deals with war crimes, and to Article 7(1)(d), which deals with crimes against humanity. The refusal of the Israeli court to hear the question will give an incentive to the courts of other states to use universal jurisdiction to do so in its stead See A. Reichman, "When We Sit to Judge We are Being Judged: The Israeli GSS Case, Ex Parte Pinochet and Domestic Global Deliberation," 9 *Cardozo J. Int'l & Comp. L.* (2001) 41. As with universal jurisdiction, the jurisdiction of the international criminal court also depends on the relevant state not being able or not intending to investigate an offense or prosecute persons pursuant thereto. See M.A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court," 167 *Mil. L. Rev.* (20010 20, 27. A state having most of the ties with the act has, as a rule, first right to prosecute suspects for international offenses, and the rationale for the intervention of state or international forums is based and justified on the failure of the relevant state to act as required.

[70] HCJ 2936, *supra,* note 34, at pp. 4-5.

[71] HCJ 3114/02, *supra,* note 34, p. 16.

[72] HCJ 2117/02, *supra,* note 34, pp. 27-28.

[73] The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949.

[74] *Almandi, supra,* note 34, pp. 35-36.

The judgments in these cases related to IDF actions that took place during hostilities and required rapid decisions – which explains, apparently, the absence of legal analysis – whereas the petition in *Ajuri* involved the question of security policy, of the kind that the court considered in *John Does* and in *Public Committee Against Torture in Israel*, and the court therefore provided a more comprehensive legal analysis. As described above, the court based its decision on Article 78 of the Fourth Geneva Convention.[75] Regarding *Ajuri*, however, it should be mentioned that it was the first decision in which the court based its decision on a *deep* analysis of the rules of international law, while not relating to the treaty-based aspect and while deviating from the interpretation given by the court in *John Does* and *Public Committee Against Torture in Israel*. Another important point: by setting the permissible limits of the policy that is under review, contrary to judgments that it issued during Operation Defensive Shield and which were also based, in principle, on humanitarian law, the court paved the way for prohibiting additional measures, or the manner in which they are carried out, by the security agencies if they fail to conform to the rules of humanitarian law.

On its face, inclusion of international law in Israeli legal discourse is a welcome and necessary development. However, it is important to understand that international law, like law in general, is a means to an end. Some of these ends will be proper, and some not. A proper purpose is one that views the law as a means to establishment and existence of a normative regime that sets limits on those who carry out its activities, among them state authorities, and subordinates them to its instructions. A less proper purpose is that which perceives the law as a tool box available to the skilled jurist and those which justify the existing power structure.[76] Therefore, not the fact that international law is included in Israeli legal discourse, but the objective of this inclusion, and the manner of the use of its provisions, determine the nature of this development. We shall now examine this subject as expressed in *Ajuri*.

3.2 The proper approach for interpreting the Geneva Convention – dynamic interpretation and purpose-based interpretation

Just prior to his concluding comments in *Ajuri*, President Barak stated that, "We doubt whether the drafters of the provisions of Article 78 of the Fourth Geneva Convention

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[75] See Section 2.2.2.

[76] For a critical analysis of the structure of legal argument in international law, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989). For a critical analysis of High Court decisions relating to the acts of the state authorities in the Occupied Territories, see R. Shamir , "'Landmark Case' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice," 24 *Law and Society Rev.* (1990) 781. Shamir' s article, based on an examination of decisions given by the High Court between 1967-1986, which comprise 0.89 percent of its decisions on the subject, and are, therefore, perceived as important milestones, as landmarks, contends that their significance is primarily symbolic: these decisions signify the independence of the judicial branch, a status that gives it greater legitimacy, and at the same time enables it to

anticipated protected persons who collaborated with terrorists and 'living bombs.' This new reality requires a dynamic interpretive approach to the provisions of Article 78 of the Fourth Geneva Convention, so that it can deal with the new reality."[77]

The first problem created by this comment involves the contention that the drafters of the Convention did not anticipate that protected persons would collaborate in hostilities against the occupier. The problematic nature of this comment results from the explicit presence of provisions in the Convention that permit measures that the occupier can take against protected persons taking part in the hostilities, whether as perpetrator or abettor, as long as the person constitutes a danger to the security of the occupier.[78] Furthermore, Article 78 itself, which permits the occupier to assign the residence of a protected person or order his internment, is proof of the anticipation of the hostile and dangerous conduct of protected persons. In this same context, we can also mention Article 68, which regulates the punishment that can be imposed for such hostile acts, after the protected person has been tried and found guilty of committing hostile terrorist acts.[79] This problematic point of departure sheds light on the interpretive approach taken by President Barak throughout the opinion.

The court's approach that the Geneva Convention should be interpreted in a dynamic manner, in a way that conforms its provisions to the nature of warfare in the present era, is most desirable. Indeed, it was also the position held by the international tribunal on war crimes during the war in the former Yugoslavia. However, the court's point of departure differs from that of the international tribunal. While the latter considered a dynamic interpretation in order to expand the protection given to the civilian population, which is the purpose underlying the Geneva Convention and pursuant to which it is to be construed, the court's interpretation was intended to reduce the protection that the Convention provides to civilians.[80] In relating to the

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sanction most of the state's action, and automatically grant the latter greater legitimacy. See *Ajuri*, *supra,* note 1, Par. 40.

[77] *Ajuri*, *supra,* note 1, Par. 40.

[78] Only in circumstances in which military necessity requires. See J.S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, 1958) 57.

[79] The wording of Article 68 is as follows: "Protected persons who commit an offense which is solely intended to harm the *Occupying Power,* but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offense committed…. The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected persons only in cases where the person is guilty of espionage, *of serous acts of sabotage against the military installations of the Occupying power or of intentional offenses which have caused the death of one or more persons*, provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began." (emphases added)

[80] The tribunal imposes a condition to application of the Convention that is stated in Article 4, whereby the nationality of the protected person must be different from the nationality of the party or occupier into whose hands the person fell. The tribunal held that the drafters did not anticipate a situation like that which occurred in the former Yugoslavia, so it was necessary to conform it to meet conflicts of

need to take this interpretive approach regarding the methods of warfare used by the Palestinian side, the court limits the application and justification of the Convention in a one-sided manner, granting an advantage to Israeli security forces and not to the Palestinian population. In other words, this interpretive approach expands the maneuverability of the security branches in coping with the hostile acts perpetrated by the Palestinian side. At the same time, the court does not consider the other side of the coin: the Convention's drafters also did not anticipate a situation of such a prolonged occupation.[81] One of the declared purposes of the Geneva Convention was to maintain the situation that had existed in the occupied territory for the period of warfare, and the arrangements and rights set forth in the Convention come to reflect the relations between the occupier and the occupied party for a limited time.[82] Had the drafters anticipated such a prolonged occupation, they might have altered the balance of forces, and also the rights and obligations of the parties. A limited time for occupation justifies restrictions on the residents of the occupied territory to rebel, and recognizes the security measures that the occupying state can take, with a prolonged occupation altering this balance in favor of the population under occupation.[83] The court ignores this point, and thus applies this interpretation in regard to the legitimate issue of considerations relating to deterrence in the decision to assign the residence of a person.[84] Its conclusion that these considerations are legitimate is, in our opinion, totally inconsistent with

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this kind, in which ethnic background, rather than nationality, is the source of the conflict and the difference between the parties. *Prosecutor v. Tadic,* Case No. IT-94-1-A, ICTY, App. Ch. (15 July 1999) Par. 168; *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-T, ICTY App. Ch. (24 March 2000) Pars. 151-152; *Prosecutor v. Delalic,* Case No. IT-96-21T, ICTY App. Ch. (20 February 2001) Pars. 82-84. It should be mentioned that interpretation relying on the purpose of the Convention is customary in international law, but is not subject to the interpretation of the Convention's language where the wording of the article is clear. See, *Vienna Convention on the Law of Treaties, opened for signature 23 May 1969*, Article 31, 1155 U.N.T.S. 331.

[81] A. Roberts, "Prolonged Military Occupation: The Israeli Occupied Territories Since 1967," 84 A.J.I.L. (1990) 44, 71.

[82] The only expression of concern of the Convention's drafters regarding prolonged occupation is found in Article 6, which states that most of the provisions of the Convention will cease to apply one year after the close of military operation. On this point, Pictet mentions that the drafters believed that in this time, most of the powers in the occupied territory would be handed over to the authorities of the territory. Pictet, *supra,* note 86, at pp. 35-36.

[83] It should be mentioned that Article 78 of the Geneva Convention is not included among the Convention's provisions that continue to apply after the year that follows the close of military operations. Although this fact does not necessarily mean that Article 78 should not be applied, Pictet points out that, in a situation in which the occupation continues more than one year after the close of military operations, the measures that the occupier is permitted to use against the protected population are no longer justifiable, and this concept underlies the section. *Ibid*.

[84] *Ajuri*, *supra,* note 1, Par. 27. It is interesting to note that in *Iskan, supra,* note 11, Justice (as his title was at the time) Barak centered the discussion on the repercussions of a prolonged occupation on the proper interpretation that should be given to Article 43 of the Hague Regulations, which deals with the obligations of the occupier to ensure public safety and life in the occupied territory. *Iskan,* pp. 800-805. In the framework of that discussion, Barak accepted the assumption that just as the situation in which their presence endangers military operations or affects the security needs of the population itself, so too was the situation in which their presence in areas that are subject to military attacks endangers their safety. See Pictet, *supra,* note 78, at p. 280.

an interpretation based on the purpose of the Convention, which emphasized the rights of the protected population.

Furthermore, the court's comment does not give full expression to the interpretive approach that the court took throughout its opinion. In discussing the question of whether the transfer of West Bank residents to the Gaza Strip transfers them outside the region, President Barak turned to the purpose-based interpretation of the Geneva Convention, stating that, "Indeed, the purpose underlying the provisions of Article 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, social and political unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place."[85] In this case, this interpretation serves the respondents' argument and not that of the petitioners, but the emphasis on the needs of the protected persons forming the basis for the President's holding is desirable and is consistent with the approach that the purpose underlying the Geneva Convention is to provide the broadest protection possible to protected persons, and thus its provisions should be interpreted in light of this purpose.[86] This approach led the President to conclude that the measure of assigned residence may be used only if the person whose residence is assigned is himself a danger, meaning that a the measure is preventive only, and not punitive: "This conclusion is required by the outlook of the Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents. Therefore, these measures may be adopted only in extreme and exceptional cases. [87] It goes without saying that this interpretive approach deviates from the approach that President Shamgar took in *Affo,* which placed the emphasis on the intention of the Convention's drafters and its legislative history, at the expense of an interpretation that is more beneficial for the protected population.[88] Therefore, at the normative principle level, the purpose-based interpretation, unlike dynamic interpretation,

[85] *Ajuri*, note 1, Par. 22.
[86] See *supra*, note 80.
[87] *Ajuri*, note 1, Par. 24. It is interesting to compare this approach, which considers internment and assigned residence as the most severe measures that the occupying power can take against protected persons, with the court's permissive approach to the measure of demolishing the houses of residents suspected of hostile activity and of the houses of their families. On this matter, see HCJ 8084/02, *Abassi v. Commander of the Home Guard* (not yet published); HCJ 7473/02, *Bachar v. Commander of IDF Forces in the West Bank* (not yet published); D. Simon, "The Demolition of Homes in the Israeli Territories," 19 *Yale J. Int'l L.* (1994) 1. House demolitions have not been reviewed by the court in the context of the Geneva Convention, but in the context of Section 119 of the Emergency Defense Regulations. Assuming that demolition of the family home is a more severe measure than assigned residence or internment raises the question how these two contradictory approaches can be reconciled.
[88] *Affo, supra,* note 37, at pp. 15-29. This approach is supported by previous rulings. See *supra,* note 58. This approach was criticized by Justice Bach, see *supra,* note 57, and by the literature. See Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Deportations," 23 *Isr. Yb. Hum. Rts.* (1993) 1; Kretzmer, *supra,* note 63, at pp. 78-86.

which the court used in construing Article 78, is, in our opinion, the proper interpretation. But this is not enough: application of this principle in the circumstances of the case, as we shall see below, unfortunately sheds little light on the principle. Its application can be perceived in two ways: one regarding place, defining the area of the occupation, and another relating to the persons involved, to the petitioners whose residence the authorities seek to assign because of the danger they present.

3.3 The place: assigned residence is allowed whereas deportation is prohibited – legality of the orders

The authority of the military commander in Judea and Samaria to assign the residence of the petitioners to the Gaza Strip relies on the court categorizing them as orders to assign residence within occupied territory, which is a lawful security measure pursuant to Article 78 of the Fourth Geneva Convention. If the court categorized them as deportation orders, they would be prohibited by Article 49 of the Convention. In that Article 49 defines deportation as the transfer of protected persons to an area outside the occupied territory, the court considered the following question: if a resident of Judea and Samaria is transferred to the Gaza Strip, does that action constitute a transfer to outside the occupied territory, or perhaps Judea and Samaria and the Gaza Strip constitute one area of occupied territory, in which case the transfer is from one part of the area to another part of the same area.[89]

An extremely significant point in resolving this question is the fact that, under the circumstances, the court was unable to refrain from discussing the substantive question of whether the Gaza Strip and Judea and Samaria are *indeed occupied territory.* It should be recalled that the authority to deliberate on the humanitarian provisions of the Fourth Geneva Convention has been based, until the present time, including the petition under discussion, on the state's declaration that it is committed to complying with these provisions, and the court has refrained from discussing the preconditions to their application, i.e., whether these provisions bind Israel and whether the areas under discussion are occupied territories. This is a significant point, at least as regards the areas designated as Area A in the Oslo Agreements (which included most of the Gaza Strip and parts of the West Bank), because the State of Israel categorically rejected this contention on the grounds that the Palestinian Authority had been given autonomy over the area.[90] According to this argument, Israel does not effectively

[89] *Ajuri*, *supra,* note 1, Par. 24.

[90] The agreement on the Gaza Strip and Jericho between the government of Israel and the Palestinian Liberation Organization (hereafter: "PLO"), the representative of the Palestinian people, of 28 September 1995, divides the Palestinian territory into three kinds: Area A, in which administrative and security powers were transferred to the Palestinian Authority; Area B, in which only administrative powers were transferred to the Palestinian Authority, with Israel retaining security powers; and Area C, which remained under the complete control of Israel. Most of the Gaza Strip was classified as Area A.

control these areas, which means that, according to international law, it cannot be considered the occupying power there.[91] In their response to the petition, the respondents stated: "Furthermore, as was explained, the two regions are viewed – according to the provisions of the Interim Agreement, quoted above – by the Palestinian side and the Israeli side, *as one territorial unit.* The world community also views these areas as such."[92] The respondents also emphasized that, "The legislation enacted in the two areas is generally identical, the judicial actions in the two areas comes under one roof, and the administration, even if separate, is coordinated in the two areas – both as regards civil matters and security matters."[93] As will be explained below, the state's position is largely inconsistent with its argument that it cannot be considered the occupying power and that a distinction should be made between the areas based on the powers that remain in its hands in each area.

The main test that international law sets in deciding the status of a certain piece of territory is whether the occupying power has effective control over the territory.[94] That is, is the state able to perform the duties imposed on the occupier by the laws of occupation set forth in international law?[95] The basic assumption is that no other power [entity] is capable of exercising the authority.[96] Also, if another power holds the authority in a particular area, that fact is irrelevant to establishing the status of the territory if the particular area is surrounded by the occupying power and cut off from the rest of the territory.[97]

At the beginning of its opinion, the court describes the entry of IDF forces into the West Bank after Operation Defensive Shield and Operation Determined Path, as follows: "In these operations, IDF forces entered many areas that were in the past under its control by virtue of belligerent occupation and were transferred pursuant to agreements to the (full or partial) control of the Palestinian Authority. The army imposed curfews and closures on various areas. Weapons and explosives were rounded up. Suspects were arrested. "[98] Since these operations, the IDF has not withdrawn its forces from the area, and it imposes closures and arrests suspects from time to time. It also carries out actions in the Gaza Strip. Although the

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[91] G.R. Watson, *The Oslo Accords* (Oxford, 2000) 176. This was, for example, the argument that Israel made to the UN Human Rights Committee as a reason for the Covenant on Civil and Political Rights not being applicable to Israel in these areas. See the report submitted by Israel to the committee in accordance with Article 40 of the UN Covenant on Economic, Social and Cultural Rights; *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Israel*, 20 November 2001, U.N. Doc CCPR/C/ISR/2001/2 (4 December 2001) Par. 8.

[92] Section 120 of the response. See, also, Section 50 of the said response.

[93] Ibid., Section 50.

[94] Article 42 of the Hague Regulations; *Tadic, supra,* note. 80, at Pars. 579-581.

[95] Primarily, does the state have the ability to enforce directives and orders that the occupying power issues regarding residents of the territory. See D. Fleck (ed.), *The Handbook on Humanitarian Law in Armed Conflicts* (Oxford, 1995) 243.

[96] L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester, 1993) 247-248.

[97] *Tadic, supra*, note 80, at Par. 250.

IDF does not maintain a permanent presence in Area A in the Strip, the army has cut the area into three parts, between which lie Israeli settlements that are surrounded by Israeli forces.

Clearly, then, the West Bank must be viewed as occupied territory. As regards the Gaza Strip, on the other hand, the status of the territory is not obvious. Most of the area there is under the authority of the Palestinian Authority. Ostensibly, therefore, a relevant authority other than the IDF exists in that region.[99] However, the IDF has severed the area into three parts and continues military operations in the region.[100] Thus, according to the rules of international law, the Gaza Strip region is considered occupied territory.[101]

In adopting the state's argument, and its rationale, that the two areas are to be viewed as one territory for all intents and purpose, President Barak resolved the question of the occupation in one sentence: "In this territory there are two military commanders who act on behalf of *a single occupying power*."[102] This conclusion was a natural result of the arguments that the respondents' themselves made, which emphasized the identical legislative, organizational, and administrative powers given to the military commanders in the two areas. Indeed, the President mentions that, "one military commander is competent to assign the place of residence of a protected person outside his area, and the other military commander is competent to agree to received that protected person into the area *under his jurisdiction*."[103] To support the argument that the two areas should be deemed as constituting one territory, the respondents and the court both emphasized the powers given to the military commanders in the West Bank and in the Gaza Strip, which are powers that establish Israel as the occupying power in these areas.[104] The fact that the military commander in the Gaza Strip has the *authority to receive* the person into the assigned area is proof itself that he is able to exercise governing powers in the territory. For this reason, Israel is considered the occupier for all intents and purpose. Presumably, this position formed the basis of the court's consideration of the question of the occupation as automatic. *Ajuri*, then, sanctions the contention that the Gaza Strip and the West Bank hold the status of occupied territory, and thus undermines the state's argument that we are dealing with autonomous territory.

However, the court did not settle for the identical legislative, organizational, and administrative mechanisms in the two areas to support its conclusion that they constitute one territory. As mentioned above, if the court had found that they were separate areas, the

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[98] *Ajuri, supra*, note 1, Par. 3.
[99] See *supra,* note 90.
[100] See, for example, Y. Limor, "IDF Returned to Ramallah," *Ma'ariv,* 11 June 2002; M. Rahat *et al*., "Sharon: Arafat is Finished," *Ma'ariv,* 22 September 2002.
[101] However, in light of Article 6 of the Geneva Convention, the obligations of Israel relating to this area should be restricted to the *de facto* powers remaining in its hands.
[102] *Ajuri*, *supra*, note 1, Par. 22 (emphasis added).
[103] *Ibid.* (emphasis added).

transfer of the petitioners from Judea and Samaria to the Gaza Strip would be subject to the provisions of Article 49, which prohibits *any* deportation or forced transfer of protected person to areas outside the territory.[105] Indeed, the official commentary of the Geneva Convention mentions that transfer of the residence of a person pursuant to Article 78 is subject to the prohibition set forth in Article 49. Thus, it is permitted to arrest a protected person or assign his residence, but it must be done within the borders of the territory itself.[106]

The court looked to the purpose of Article 78 in construing the provision, as follows: "Indeed, the purpose underlying the provisions of Article 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, social and political unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, the area of Judea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory."[107] This approach is questionable: while interpreting the Geneva Convention based on its purpose is consistent, as noted, with the relevant case law established by the tribunal on war crimes in the former Yugoslavia Convention – which held that the purpose underlying the Fourth Geneva Convention is the desire to grant protection as wide as possible to the protected population, and that its provisions should be construed consistent with that purpose.[108] Therefore, this purpose should lead to a restrictive interpretation of the territory set forth in Article 78, in a way that reduces as far as possible the harm to a person who is assigned to live away from his home, his family, and from his source of livelihood.[109] Territorial contiguity between the West Bank and the Gaza Strip is lacking, and movement between the two areas entails border crossings controlled by Israel. Despite the identical nationality and language between the two areas, it is also necessary to consider both their history, which clearly reflected different cultural and societal development, and the reality over the years: prior to the Oslo Agreements and since Operation Defensive Shield, these areas have been separated from each other, thus raising a real concern that the sense of alienation that the petitioners will experience in their new place of residence

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[104] See note 93, *supra.*

[105] The article allows the evacuation of the population from a particular territory to meet the exceptional security needs of the occupier, such as situations in which their presence endangers military operations, or to meet the security needs of the population itself, such as in situations where their presence in an area that is subject to military assault endangers their safety. See Pictet, *supra,* note 78, at p. 280.

[106] *Ibid.,* at p. 368. See *Ajuri*, *supra,* note 1, Par. 20.

[107] *Ajuri*, *supra,* note 1, Par. 22.

[108] See note 80, *supra.*

[109] This interpretation is warranted also by application of international human rights laws regarding territory under occupation. See E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and the Occupied Territories," 26 *Isr. L. R.* (1992) 24, 30; Roberts, *supra,* note 81, at p. 71.

will be similar to the sense of alienation they would likely experience if they moved to a foreign country.[110]

This point is further strengthened in light of the question that was not asked by the court in its opinion: what is the original purpose of Article 78? The clear and present purpose of assigning residence is to transfer the person to a more isolated area, where it would be easier for the occupying power to supervise more effectively the activity of the individual, who is deemed a danger to security.[111] Why, then, did Israel consider it proper to transfer the petitioners from the area of Judea and Samaria, over which it has broad control, to the area of the Gaza Strip, where its effective control, and thus its ability to supervise and monitor the acts of the petitioners, is significantly less? The court ignored this question.[112] If the argument is made that the military commander's objective was to isolate them from persons who would influence them to carry out acts against the State of Israel, this argument strengthens the petitioners' position that the Gaza Strip should be considered an area separate from the area of Judea and Samaria, making transfer from one to the other prohibited.

3.4 The person: members of the Ajuri family as a danger to state security

In denying the petitions of Intissar Muhammad Ahmed Ajuri and Kifah Muhammad Ahmed Ajuri, the brother and sister of Ahmad Ali Ajuri, who allegedly dispatched suicide bombers, the court found that they knowingly assisted their brother in his hostile activity and therefore constituted a substantial and significant danger to the security of the area.[113] Specifically, the brother because he served as look-out when Ahmad Ajuri transferred explosive charges, and the sister because she sewed one or more explosive belts for her brother.[114]

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[110] On the geopolitical situation in the territory of the Palestinian Authority and on the significant changes in the reciprocal relations between a person and his place of residence from the dynamics of the occupation, see A. Efrat, *Geography of Occupation* (2002). On the relations between the physical severance of the territory preceding the Oslo Agreements and the pragmatic nature of the legal discourse regarding those relations, see A. Shalakany, "Violent Jurisdictions: On Law, Space, and the Fragmentation of Discourse Under Oslo," 3 *Adalah Review* (2002) 35.

[111] Pictet, *supra,* note 78, at p. 256.

[112] The court, on the other hand, considered it proper to consider, for example, why the petitioners are not prosecuted. See *Ajuri*, *supra,* note 1, Pars. 32, 36. This silence is especially glaring in light of petitioner Intissar Ajuri's contention that she preferred administrative detention – which would provide Israel with an extremely high level of supervision – over being transferred to Gaza. This position, which may be surprising when seen from Western eyes, is not surprising in Palestinian culture, as is apparent from the preference of several Palestinians to remain in prolonged administrative detention than be "willingly deported." See the Petition for Order Nisi, Par. 76.

[113] See Section 2.3.3 above.

[114] The Appeals Board held in its decision of 12 August 2002 that the appellant (Intissar Ajuri) sewed a body belt; the respondent on the appeal contended that she sewed body belts. See *Ajuri*, *supra,* note 1, Par. 31.

As a rule, the laws of war grant civilians immunity from military actions and attacks,[115] as long as the civilians do not take direct part in the hostilities.[116] However, it should be mentioned that hostilities in recent decades, during which we have been witness to a large number of gory non-international conflicts – which is how the Israeli-Palestinian conflict is characterized – have generated a closer look into the kinds of activity that remove the protection granted to the individual as a civilian.[117] This inquiry has become relevant because these conflicts are characterized in large part by involvement of the civilian population and by civilians providing widespread aid to the warring forces.[118] This aid includes, at least, the regular provision of food, hiding places, and refuge.[119]

The desire to prevent the denial of protection to whole civilian populations affected the restricted interpretation given to the concept "taking a direct part in hostilities": currently, it is necessary to distinguish between taking part in the overall war effort, which does not affect the protection given to persons who are taking part, and activity that by its nature and purpose is intended to cause great loss of life and equipment of the enemy's forces,[120] and which constitute, therefore, a substantial threat.[121] Acts such as killing, taking prisoners, destroying enemy equipment, collecting intelligence in the area in which hostilities are taking place, and operating weapons systems constitute "taking direct part in hostilities."[122] On the other hand, supplying food to combatants, which is done by most of the population as a matter of course,

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[115] I. Detter, *The Law of War* (Cambridge 2nd ed., 2000) 135; H.B. Robertson Jr., "The Principle of the Military Objective in the Law of Armed Conflicts," 8 *USAFA J. Leg. Stud*. (1997) 35,36.

[116] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts (Protocol I), 8 July 1977, Article 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 July 1977, Article 13(3); M. Bothe *et al., New Rules for Victims of Armed Conflicts* (The Hague, 1982) 301.

[117] I. Detter, *supra,* note 115, at p. 18. International conflicts are those between two sovereign states. The laws of war and humanitarian laws of international law applied originally only in cases of international conflicts. Thus, every armed conflict that is not international is considered a non-international conflict. A significant portion of the laws of war and humanitarian laws of international law also apply to this latter kind of conflict when it is prolonged and severe and involves two parties that have a high degree of military organization. See *Prosecutor v. Tadic,* Case No. IT-94-1-A, ICTY, App. C (2 October 1995) Par. 70. For a discussion of this case and for a less stringent definition, see O. Ben-Naftali & K. Michaeli, "We Must Not Make a Scarecrow of the Law: A Legal Analysis of Israel's Policy of Targeted Killings," 36(2) *Cornell Int'l L.J.* (Spring 2003), Sec 2.1. An attempt to equate the status of these conflicts and international conflicts led to the signing of the First Additional Protocol to the Geneva Conventions. See Protocol 1, *supra,* note *116.* However, Israel is not party to the First Protocol precisely for this reason. See T. Meron, "The Time has Come for the United State to Ratify Geneva Protocol I," 88 *A.J.I.L.* (1994) 678, 683.

[118] L.L. Turner & L.G. Norton, "Civilians at the Tip of the Spear, 51 *A.F.L. Rev* . (2001) 1; S.R. Sarnoski, "The Status under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the field," 9 *Army Lawyer* (1994) 29; M.N. Schmitt, "The Principle of Discrimination in the 21st Century Warfare," 2 *Yale Hum Rts. & Dev. L.J.* (1999) 143, 158-159.

[119] L. Moir, *The Law of Internal Armed Conflict* (Cambridge, 2002) 58-59.

[120] Y. Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 July 1977 to the Geneva Conventions of 12 August 1949 (Geneva, 1987).

[121] Bothe, *supra,* note 116, at p. 303.

does not come within that rubric. According to this criterion, it appears that the court's differentiation between aid that the petitioner Abed Alnasser Mustafa Ahmed Asida, whose petition was sustained, and aid that the Ajuri's gave to their brother, is essentially proper.[123] By permitting harm to a "protected person," who is the subject of the Geneva Convention, Article 78 is an expression of this differentiation in humanitarian law.[124] This provision permits the occupying power to assign the residence of a protected person if that individual endangers its security. According to the official commentary on this article, to justify the use of such a severe measure against a protected person, "the State must have good reason to think that the person concerned, by his activities, knowledge, or qualifications, represents a real threat to its present or future security."[125]

The court's opinion clearly states that the acts of aid themselves – and not special knowledge or qualifications required to provide the aid – are that which justify a reasonable fear of harm to state security: indeed, the aid provided by the brother and sister in the Ajuri family are not only not special, and do not result from special skills, but they come within the category of completely traditional tasks: observer and seamstress. These roles are derived from the most basic functions of the petitioners, as a brother and sister. This role – at the level of the family institution – requires that they assist their brother, at times, even at the price of breaking the law. Clearly, the above comments should not be construed to negate their responsibility for their unlawful acts, but the unlawful act should be placed in the family context in which and for which it was carried out.[126] This context is strengthened in that nobody contends that the petitioners were involved in activity that was not related to assisting the brother. It is not contended that either of them held a special status in the society in which they lived, or had special qualifications, or were particularly involved in politics.[127] The brother and sister aided their brother Ahmad because of their blood ties, and not because of land ties.[128]

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[122] Fleck, *supra,* note 95, at p. 232; R.K. Goldman, "America's Watch Experience in Monitoring Internal Armed Conflicts," 9 *Am. U. J. Int'l & Pol'y* (1993) 49, 70-72.

[123] See *supra,* Section 2.2.3.

[124] A protected person is defined in Article 4 of the Geneva Convention as a person who is in the hands of the occupying power, provided that he is not protected by one of the other three Geneva Conventions and is not a national of the occupying power or a state with which it has normal diplomatic relations.

[125] Pictet, *supra,* note 78, at p. 258.

[126] In this context, it should also be mentioned that Intissar Ajuri is an unmarried, 34-year-old woman, and that it is reasonable to assume she had extremely close family relations with her parents and brothers.

[127] Section 72 of the petition of Intissar. The petition also states, in Section 67, that "Yuri," the GSS agent who gave testimony, admitted in all fairness that today, following the death of the brother, Ali, he would not recommend administratively detaining the sister.

[128] These ties is what creates the associative relationship to Antigone, who breaches the positive law to pursue a more fundamental norm, Antigone justifies her action to the sovereign. Creon, as follows:
Yea, for these laws were not ordained of Zeus,
And she who sits enthroned with gods below,
Justice, enacted not these human laws.

With this as a backdrop, the following question arises: is it reasonable to believe that the aid the two petitioners provided to their brother makes them a danger to the security of the region? The answer seems obvious, for common sense tells us that a person who knowingly abets the commission of a prohibited action will do so in the future, unless the possibility of providing such assistance is removed. It is often the case that the obvious, rather than reflecting the present reality, shows the blindness of the observer: Indeed, in the judgment, the presence of this blind point is expressed in what is hidden from view. Regardless of the position taken, the fact is that the wanted brother to whom the aid was given, was killed – or assassinated – by the IDF, on 6 August 2002, that is, about one month before the judgment was given.[129] Therefore, is it not more reasonable that, with blood ties no longer being a consideration, the reason no longer exists for which, perhaps, there is a reasonable basis for assuming that the acts of assistance of the brother and sister endanger the future security of the State of Israel? And, in any event, must not one wonder if assigned residence is a "rational measure – within the framework of the required proportionality – to reduce the danger she presents in the future?"[130] And why was the fact of his death not mentioned in the judgment?

The proportionality of the order assigning residence and the rationality of the measure are even more problematic when the story of the Ajuri family is taken into account. The Ajuri family lies at the center of the petition: the family home, in the Iskar al Jadid refugee camp, near Nablus, was demolished; the elderly parents were left homeless; most of the family were arrested; the brother Ahmad, whose acts led to these bad consequences, is dead. Is the transfer of the sister and brother to Gaza – a transfer that they perceive as a more severe punishment than losing their liberty, and to the extent that a person builds an identity from belonging to place and home in a way that does not necessarily reflect an objective and external perception of place, the transfer also injures their identity – indeed proportional, or is it disproportionate, and therefore, a case of assigning their residence in contravention of law?[131]

Nor did I deem that thou, a mortal man,
Could'st by a breath annul and override
The immutable unwritten laws of Heaven.

[129] The court knew this fact, both from the petition and from the state's response: according to Section 80 of the petition, he was assassinated. Amnesty International made the same contention in a statement condemning the judgment. See Amnesty International, "Forcible Transfers of Palestinians to Gaza constitutes a War Crime" (3 September 2002). According to the state's response, he was killed. On the position of international law on the question of targeted assassinations, see Ben-Naftali & Michaeli, *supra,* note 117.

[130] *Ajuri*, *supra,* note 1, Par. 32. See, also, Par. 36 regarding Kifah Muhammad Ahmed Ajuri.

[131] On the disparity between cartographic maps and cognitive maps, see J. Portugali, *Implicate Relations: Society and Space in the Israeli-Palestinian Conflict* (1996). See, also, Shalakany, *supra,* note 110.

4. Crossroads: adjudicate and weep

Creon: Whither to turn I know now; every way
Leads but astray,
And on my head I feel the heavy weight
Of crushing fate.

The Supreme Court's judgment in *Ajuri* is complex and requires examination not only on the normative level, but also on the narrative level, while relating to the reciprocal connection between the two levels. At the normative level, the judgment is extremely innovative, at lease in certain aspects, and contains potentially far-reaching normative consequences. This innovation, as we have seen, revolves primarily around three focal points:

A) For the first time, High Court of Justice used the rules of international treaty-based law solely and profoundly to decide a question regarding state security. In doing so, the court paves a proper normative path for the examination – in accordance with humanitarian law – of the measures taken by the defense establishment.

Indeed, as we mentioned, the development of international criminal law explains to a great extent the court's perceived need to conform the law applying in Israel to international law, in general, and to humanitarian law, in particular.[132] However, the condition that enables such conformity to succeed is recognition of the applicability of the Fourth Geneva Convention to the acts of the occupying power in the Occupied Territories, whereby its applicability is not contingent on the state's consent to apply it in a specific instance. In *Ajuri*, the court did not recognize such non-contingent applicability.[133]

B) The court's holding that the Gaza Strip and the West Bank is territory in which Israel is the occupying power – which contradicts the position normally taken by the state, although not as regards the right of the occupying power to assign the residence of a person – is consistent with the criteria of international law, and is significant. It sets a norm whereby Israel also bears the obligations that international humanitarian law imposes on the occupying power.

This normative consequence is not as obvious as one might think. The reason for the lack of clarity results not only from the decision in *Ajuri,* a decision that sustained the authority of the

[132] See *supra,* the discussion relating to notes 63-68.

[133] As stated, the state agreed with the decision: *Ajuri,* note 1, Par. 13. The state's recognition that Israel agrees to respect the humanitarian provisions of the Geneva Convention is problematic: where is the line drawn between humanitarian provisions and its other provisions. For example, it is possible to argue that Article 78 itself, which deals with a security measure that the occupying power is permitted to take against a protected person, is not a humanitarian provision. However, the court did not make that distinction, and in practice, subjected all the provisions of the Geneva Convention to its review.

military commander to assign the residence of the petitioners, and not a decision that imposed liability on the state toward residents of the Occupied Territories, but in particular from the broader context of the High Court's decisions in petitions filed by residents of the Occupied Territories. In most of these petitions, the discourse on the rights that characterized High Court decisions in other contexts was replaced by a national-security discourse and viewed Palestinian rights in a regressive manner.[134] The manner in which the court interpreted the Geneva Convention enables this process to take place, and the case law it has generated teaches that, in choosing between a text-based interpretation and a purpose-based interpretation – ostensibly conflicting approaches – application of the interpretation based on its factual background leads to approval of the contention that the state essentially desired.[135] The court's interpretation in *Ajuri* is, therefore, central to an analysis and evaluation of the judgment.

C) The interpretive approach of the Geneva Convention that the court adopted – a purpose-based and dynamic interpretation – is a proper approach that is consistent with current trends in international law. The same can be said about the purpose of the Convention as perceived by the court, i.e., giving as broad protection as possible to protected persons.

The court's understanding of "dynamic interpretation" is inconsistent with its purpose-based interpretation. As we have seen, its interpretation restricts the protections that the Convention provides to civilians. The court's rationalization for this restriction: the need to conform the Convention's provisions to the nature of the current hostilities, which the drafters did not anticipate. This is a proper reason, but not necessarily one that results in a restrictive dynamic interpretation, but one that supports an expansive dynamic interpretation that is consistent with the purpose of the Convention, in that the drafters also did not anticipate a situation of such a prolonged occupation. Had they done so, they might have altered the balance of forces, along with the parities' rights and obligations, in a way that favors the population under occupation. Dynamic interpretation, therefore, does not confine the normative boundaries to an exercise of authority by the occupying power, but on the contrary, is appropriate for a narrative norm. This narrative overlooks not only the "dynamic interpretation," but the very dynamic of the conflict, as perceived by the court. This point leads us, therefore, from the normative level of the judgment to its narrative level.

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[134] See Kretzmer's conclusion, *supra,* note 63, at p. 188: "The rights-minded approach is generally conspicuous by its absence in decisions relating to the Occupied Territories. The jurisprudence of these decisions is blatantly government-minded." Shamir, *supra,* note 76, whose findings support this conclusion, contends, as stated, that in the rare cases in which a petition has been sustained, the exception proved the rule, and even gave it, and consequently the state and the court, a justification and a reaffirmation. *Ibid.,* at pp. 795-799.

[135] Kretzmer, *supra*, note 63, at p. 55.

Israel, the court states at the beginning and end of its opinion, is acting pursuant to its right to self-defense.[136] Is, indeed, Israel acting in accordance with this right, or perhaps its status as the occupying power in the Occupied Territories makes it unnecessary to use force based on this right?[137] But this significant question has nothing to do with the question that was discussed in the hearing on the petition: whether the state using force in the framework of its right to self-defense is, from a normative perspective, totally unrelated to the question of whether the force used – if used pursuant to this right, or not – is consistent with humanitarian law.[138] The question facing the court is whether a particular measure taken by the state is consistent with humanitarian law, and the court indeed deals with this question. In any event, it is clear that a statement on the use of force pursuant to self-defense has no normative effect for the purposes of the judgment. The only effect is narrative: it marks the manner in which the court understands the situation of one side to the conflict, the side that it is identified with and with whom it identifies, and the manner in which it desires that others will understand the conflict.

The statement that "the forces fighting against Israel are terrorists" can be understood in the same way.[139] This characterization of the Palestinian forces has narrative effect in the rhetorical violent struggle, which marks a particular person as a despicable terrorist on the one side and a revered combatant on the other side, but has no normative significance in the framework of the relevant legal discourse. In the framework of a non-international armed conflict, which is the normative characterization of the conflict under discussion, the measures used by the parties to the conflict, among them illegal measures according to the laws of war, do not determine their legal status.[140] This status is set primarily according to the organization of the fighting forces, and for good reason: the very existence of "armed conflict" in the context of a non-international conflict indicates the intensity of the violence that characterizes it, distinguishing it from disorganized violent insurrection and acts of terror.[141] Therefore, from the moment that it was held that a non-international conflict is involved, the laws of war and humanitarian law apply, and these recognize the status of a

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[136] *Ajuri*, *supra,* note 1, Pars. 3, 41.

[137] General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1979, Principle A. GAOR.25th Sess. Supp., No. 28, at 121, U.N. Doc. A/8028 (1971) provides that states are forbidden to use force against a people fighting for self-determination. For a discussion on this question, see A. Cassese, *Self Determination of Peoples: A Legal Reappraisal* (Cambridge, 1995) 193-2000.

[138] This is the difference between the right to use force, *jus ad bellum,* and the manner in which the permitted use of force is exercised, *jus in bellum.* See M. Walzer, *Just and Unjust War,* 2nd ed. (New York, 1992), Chaps. 1, II.

[139] *Ajuri*, *supra,* note 1, Par. 2.

[140] See *supra*, note 116.

[141] Ibid.

person as a combatant or civilian, regardless of the measures that he uses.[142] In other words, although the war against terrorism itself is proper, that fact tells us nothing about the propriety of the measures used in fighting that war, whose validity is based on humanitarian law. The court, of course, knows this, and even said so explicitly in its opinion.[143] The reference to "terrorist forces" against who Israel is fighting is, therefore, a rhetorical touch, which, in the present context places these forces on the side of the "axis of evil" and Israel on the other side.

The narrative laid out in the court's opinion continues and characterizes "the harsh reality in which the State of Israel and the territory are situated, *in that* they are exposed to an inhuman phenomenon of 'human bombs' that is engulfing the area" (emphasis added).[144] This perception of reality indeed reflects the dominant Israeli position, and is the principal reason, according to that position, for the failure of the Oslo process. The Palestinians, on the other hand, perceive the harsh reality as a result of the occupation, the continuation of which, they believe, is the primary reason for the failure of the Oslo process.[145]

The court's adoption of Israel's narrative determined the interpretation that the court made in giving the provisions of humanitarian law a "dynamic interpretation" and its application in the framework of Article 78, such that, as we have seen, the term "area" is given an expanded interpretation while a purpose-based interpretation proper in the case in which there is no territorial contiguity between the West Bank and the Gaza Strip is in fact the restrictive interpretation.[146]

This understanding is clear not only from what the court says, but also from what it leaves out of its opinion. We have seen that, despite its use of the term "interpretation based on purpose," it did not seek to determine the actual purpose of Article 78. Had it done so, the court would have found that the clear and immediate purpose of assigning the residence of a

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[142] These methods of warfare affect the determination of the status of a person as a combatant according to the First Additional Protocol of the Geneva Conventions only. See Protocol I, *supra,* note 116, at Pars. 43, 44. They are not relevant in determining the status of a combatant in international conflicts, in which a combatant is defined as a person who is part of the combat forces of the state. The only relevance to the combat measure in this context is that a combatant may be prosecuted for using unlawful combat tactics, while his status as a prisoner of war protects him against prosecution for carrying out acceptable combat actions. Because the laws of warfare applying to non-international conflicts do not recognize prisoners of war, the persons may be prosecuted even for committing acceptable combat actions. Thus, the combat measures lose all legal relevance in a non-international conflict. For a discussion on this issue, see Ben Naftali and Michaeli, *supra,* note 117, Section 3.1.

[143] "The State is doing all that it can in order to protect its citizens and ensure the security of the region. These measures are limited. The restrictions are, first and foremost, military-operational ones. … These restrictions are normative… The State seeks to act within the framework of the legal possibilities available to it under the international law to which it is subject… As a result, not every effective measure is also a lawful measure. *Ajuri*, *supra,* note 1, Par. 41.

[144] *Ibid.,* Par. 27.

[145] See The Sharm el-Sheikh Fact-Finding Report (The Mitchell Report, 2001).

person is to enable the occupying power to more effectively supervise and monitor the individual's actions, and that this objective is not met when the person is transferred to an area in which it has relatively less effective control. Had it reached this conclusion, the court would not have been able to approve the order assigning residence; the act would have to be characterized as forbidden deportation, which constitutes a grave breach of the Fourth Geneva Convention, i.e., a war crime.[147] Similarly, the court's silence regarding the death of the wanted brother, to whom the petitioners gave aid, enabled it to find that the petitioners constituted a danger to state security. Had the court not made that finding, assigning their residence would have been unlawful as a purely deterrent action.[148]

In its final part, titled "Conclusion," the court describes the state's situation and its legal system, in the framework of the conflict, as follows:

> Indeed, the position of the State of Israel is a difficult one. Also, our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle. Our work, as judges, is hard. But we cannot escape this difficulty, nor do we wish to do so."[149]

This paragraph, which shows great empathy for the state and its judges, such that not only is there identification between the two, but a joint identity as well, the identity of a state operating under the rule of law, closes the judgment with a call to the imagined community for which the court is writing.[150] This imagined community is domestic and external.[151] In this way, the court brings the narrative that characterizes the judgment throughout to it rhetorical peak. At the same time, it exposes, in our opinion, the ongoing subordination of the international norm to the national narrative. This subordination is consistent with our legal analysis of the court's opinion. This subordination is consistent with prior decisions of the High Court regarding the state's actions in the Occupied Territories, and rather than provide

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[146] See *supra,* Section 3.2.
[147] See *supra,* Section 3.3, and note 69.
[148] See *supra,* Section 3.4.
[149] *Ajuri*, *supra,* note 1, Par. 41. It should be mentioned that this is not the first time that President Barak emphasizes the democratic nature of the State of Israel and the limits that democracy places on it regarding the rule of law. See, for example, *Public Committee Against Torture in Israel*, *supra,* note 33, at pp. 845-846; HCJ 3451/02, *supra,* note 35, at pp. 34-35; HCJ 168/91, *supra,* note 36, at pp. 470-471.
[150] B. Anderson, *Imagined Communities,* 2nd ed. (5759-1999), 75-79, 238-240 [in Hebrew].
[151] "Part of the public will be happy with our decision; another part will oppose it. It is possible that neither the former nor the latter will read the reasoning. But we shall do our work." *Ajuri*, *supra,* note 1, Par. 41, which quotes the President's comments in HCJ 2161/96, *Sharif v. Home Guard Commander, Piskei Din* 50 (4) 485, 491. The opinion was published in Hebrew and English and placed on the Supreme Court's Website, as was the case in *Public Committee Against Torture*, *supra,* note 33.

some measure of innovation, it provides a great deal more of *deja vu*. This subordination exposes the contradiction offered by the rhetoric between human rights and considerations of state security as an imaginary contradiction, and directs that the law, rather than operating to restrain power, sanctions the power, becomes its tool, and, in doing so, duplicates the overall system of power between the State of Israel and the "terrorist forces fighting against it."[152] This subordination rejects the justification that the law gives to power in the web of relations between person and place.

[152] *Ajuri*, *supra,* note 1, Par. 2