HCJ 5319/97
HCJ 5706/97
HCJ 5707/97

HCJ 5319/97

1. Roman Kogen
2. Victor Raviv

v.

The Chief Military Prosecutor

HCJ 5706/97

1. Private Alexei Zamotovski
2. Private Yaacov Smailov
3. Alexei Kaisek

v.

1. The State of Israel
2. The Chief Military Prosecutor
3. The General Staff Prosecutor
4. Chief Military Police Officer
5. The Military Tribunal, Dep't of the General Staff

HCJ 5707/97

1. Sergei Kaufman
2. Golan Kzamal
3. Vitali Novikov
4. Alexei Kaisek

v.

1. Chief Military Prosecutor
2. General Staff Prosecutor
3. Deputy Commander of the Military Police
4. Commander of Prison Facility Number 396
5. Northern Command Prosecutor, Lieutenant Colonel Anat Ziso
6. Deputy Commander Shmuel Zoltek, Israeli Police
7. District Military Tribunal, Dep't of the General Staff

The Supreme Court Sitting as the High Court of Justice

[November 24, 2003]

Before Justices T. Or, D. Dorner, Y. Turkel

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: Petitioners, prisoners in a military prison, participated in a prison uprising allegedly motivated by deficient prison conditions. The military authorities negotiated with the inmates, who demanded improvements in prison conditions and a commitment from the authorities not to prosecute them. The military authorities agreed to this last condition. Despite this agreement, however, the inmates were prosecuted. Petitioners here contest this latter decision.

Held: The Court noted that precedents allow for the government to repudiate an agreement if such a step is dictated by the public interest. Such a decision must take all the relevant interests into account, including the fundamental principles of contracting, as well as the responsibilities and obligations of the government. The Court weighed the various interests, including the interest in maintaining the credibility of the government, the expectation and reliance interests of the petitioners, and the interest in prosecuting criminal offenses. The Court held, after weighing these interests, that the decision of the authorities to repudiate the agreement was reasonable, and that there was no room for intervention by the Court.

Petition Denied.

Israeli Supreme Court Cases Cited:

[1] HCJ 311/60 *Miller, Engineer (Import Co.) Ltd. v. Minister of Transportation*, IsrSC 15 1989.

[2] F.H. 20/82 *Adres Building Materials Ltd. v. Harlow & Jones G.M.B.E.*, IsrSC 42(1) 221.

[3] HCJ 1635/90 *Zarzevski v. The Prime Minister*, IsrSC 45(1) 749.

[4] HCJ 218/85 *Arbiv v. Tel-Aviv District Prosecutor*, IsrSC 40(2) 393.

[5] CA 64/80 *Eretz-Yisrael—Britania Bank v. The State of Israel—Ministry of Housing*, IsrSC 38(3) 589.

[6] Crim. App. 2910/94 *Yeffet v. The State of Israel*, IsrSC 50(2) 221.

[7] HCJ 428/86 *Barzilai v. The Government of Israel*, IsrSC 40(3) 505.

[8] Motion Crim. App. 537/95 *Ganimat v. The Government of Israel*, IsrSC 49(3) 355.

[9] HCJ 6781/96 *M.K. Olmert v. The Attorney General*, IsrSC 50(4) 793.

[10] HCJ 935/89 *Ganor v. The Attorney-General*, IsrSC 44(2) 485.

[11] HCJ 676/82 *The Histadrut General Workers' Union in Israel v. The Chief of Staff*, IsrSC 37(4) 105.

[12] CA 4463/94 *Golan v. Prisons Authority*, IsrSC 50(4) 136.

[13] HCJ 546/84 *Yosef v. Central Prison Warden in Judea and Samaria*, IsrSC 40(1) 567.

[14] Motion Crim. App.3734/92 *The State of Israel v. Azami*, IsrSC 46(5) 72.

[15] HCJ 5133/97 *Bitton v. The Chief Military Police Commander* (unreported case)

[16] HCJ 5018/91 *Gadot Petrochemical Industries Ltd. v. The Government of Israel*, IsrSC 47(2) 773.
[17] HCJ 636/86 *The Jabotinsky Estate, Workers' Cooperative* v. *The Minister of Agriculture*, IsrSC 41(2) 701.
[18] HCJ 4330/93 *Gans* v. *The District Committee of the Tel-Aviv Bar Association*, 50(4) 221.
[19] HCJ 3477/95 *Ben-Attiyah* v. *The Minister of Education, Culture, and Sport*, IsrSC 49(5) 1.
[20] HCJ 1563/96 *Katz* v. *The Attorney General*, IsrSC 55(1) 529

District Court Cases Cited:
[21] D.C. 3/57 *Military Prosecutor* v. *Melinki*, IsrDC 17 90.

English Cases Cited
[22] R. v. Latif, [1996] 1 All E.R. 353 (H.L.).
[23] R. v. Croydon Justice ex. p. Dean, [1993] 3 All E.R. 129 (Q.B.).
[24] Attorney-General of Trinidad and Tobago v. Phillip, [1995] 1 All E.R. 93 (P.C.).
[25] Bennet v. Horseferry Road Magistrate Court, [1993] 3 All E.R. 138 (H.L.).

Israeli Books Cited:
[26] G. Shalev, Government Contracts in Israel (1985).
[27] D. Barak-Erez, The Contractual Responsibility of Administrative Authorities (1991).
[28] 2 I Zamir, The Administrative Authority (1996).
[29] 1 D. Friedman & N. Cohen, Contracts (1991).
[30] A. Mudrik, Court Martial (1993).

Israeli Articles Cited:
[31] Y. Karp, *The Criminal Law – Forcing Human Rights: Constitutionalization in light of the Basic Law: Human Dignity and Liberty*, 42 *HaPraklit* 64 (1996).

Foreign Books Cited:
[32] Y. Dinstein, The Defense of "Obedience of Superior Orders" in

International Law (1965).

Miscellaneous:

[33] Findings of the Commission Examining the Exercise of Judicial Discretion in Sentencing (1998)

[34] Dr. Alkushi, A Wealth of Latin Terms and Expressions (1982)

Jewish Law Sources:

[35] Midrash Mechilta, Beshalach, 15

[36] Babylonian Talmud, Tractate Shabbat 31a

[37] Babylonian Talmud, Tractate Baba Metzia 44a, 48b

For petitioner 1 in HCJ 5319/97—Aryeh Licht
For petitioner 2 in HCJ 5319/97—Avigdor Feldman
For petitioners 1 & 2 in HCJ 5706/97—Avraham Nantal
For petitioner 3 in HCJ 5706/97—Yoav Tzach-Vaks, Beni Shaked
For petitioner 1 & 2 in HCJ 5707/97—Amirah Amiram
For petitioner 1 in HCJ 5707/97—Amit Mor
For respondents—Uzi Fogelman, Office of the State Attorney

JUDGMENT

Justice T. Or:

The Issue

1. A riot took place in a military prison facility, involving a number of the inmates. The inmates gained control of an area of the facility and blockaded themselves inside. They held several members of the prison staff. The riot involved the commission of various criminal offenses, which, *prima facie*, infringe the Penal Law-1977 and the Military Jurisdiction Law-1955. Following the takeover of the facility, negotiations ensued between the inmates and military authorities. These negotiations ended with an agreement between the rioting inmates and

the authorities, which provided for an end to the rioting in exchange for the authorities' promise not to prosecute the rioters for the offences allegedly committed during the riot.

Despite this agreement, the rioting inmates were arrested immediately after the uprising had ended and charged with various criminal offenses. Was the prosecution's decision to lay charges legal? This is the issue before the Court.

The Facts and Proceedings

2. The events leading up to this petition began on the morning of Saturday, August 9, 1997, in compound three of prison facility number 396 under the command of Military Company C. At the time, the compound in question housed approximately one hundred inmates. At approximately 10:30 am, a group of approximately twenty inmates took over the compound and detained nine members of the prison staff. It is alleged that the riot was violent, that a number of guards were beaten, locked in prison cells, with their arms and legs tied and mouths gagged.

3. The riot was motivated by several grievances of the inmates, including anger at their treatment. It is alleged that the prison staff subjected the inmates to degrading treatment, including physical abuse and beatings. It is claimed that the prison staff presented false disciplinary complaints against the inmates, resulting in a number of the inmates' sentences being lengthened. Additionally, it is alleged that the prison drills lasted for many hours, beyond that permitted by the regulations, past work hours, and even after the inmates had showered.

Moreover, petitioners claim that the guards would prevent the inmates from going to the bathroom, to the point of causing them serious discomfort. An inmate who violated these instructions would be denied various rights. Specific arguments were raised concerning the solitary confinement area of Military Company C. These inmates were confined to their cells 23 hours a day. Their cells are not equipped with toilets, and they relieve themselves in a bucket. Petitioners argued that this arrangement is improper, as it causes humiliation and severe discomfort.

The rioting inmates allegedly approached the Base Commander in writing two seeks prior to the riot, asking him to address their complaints. The petitioners claim that this request went unanswered.

4. After word of the rebellion at the prison spread, various military and police forces began arriving to the prison area. Among them were the Police Special Forces, a police negotiation team and senior army officers. General Gabi Ashkenazi, an assistant in the General Staff, was among these officers. He arrived Saturday evening and supervised the forces operating in the area.

Negotiations were conducted between the representatives of the rioting inmates and the negotiation team. During these negotiations, which lasted until Sunday morning, six of the prison staff members held were released, leaving three guards in the rioters' hands. The rioters raised the following list of demands during the negotiation process (emphasis added):

1. First and foremost, we demand that *nothing* be done to any of the participant. They are not to be investigated, beaten, no sections, no time served.
2. Soldiers sentenced to lengthy sentences shall not be transferred to civilian prisons (as we were soldiers when we committed the offences in question). This includes all future soldiers.
3. No days shall be added beyond *385*, only onto *630* and with a very justified reason.
4. Change the "Ascot" cigarettes to a different brand.
5. *Stop* beating the soldiers in the *division*.
6. Soldiers who have a lengthy sentence to serve should be transferred to rehabilitation or to officer's custody
7. We are requesting an in-depth examination of the files of the past two-three months, as it is impossible that a soldier who amassed ten complaints against him during a six month period should be denied parole.
8. Drills cannot be held after showers or meals.

9. We demand an on-duty *doctor*—not a medic—on Saturday.
10. The drills didn't stop until someone fainted—*why?*
11. Every inmate will have the right to a daily phone-call.
12. They do not allow us to drink when we need to—the same goes for bathroom access.
13. A soldier who is not fit for incarceration should not be incarcerated .

The rioting inmates requested that the riot not be investigated and that they not be harmed. They threatened to injure themselves if their demands were not met. Moreover, throughout the negotiation process, the rioting inmates threatened, if their demands went unanswered or if force was used against them, to harm the guards in their custody and the other inmates who did not take part in the riot.

The rioters presented the following document to the authorities during the night hours of Saturday August 9, 1997:

> We demand a contract by tomorrow afternoon signed by a person who can accept responsibility. If we receive this paper, we will immediately open all the doors, clean the compound and line up in an orderly fashion as required. If prior to this, someone tries to break into the compound we will commit collective suicide.

We also note that the evidence before us reveals that the prison commanders and army officials were given the impression that the rioting inmates were armed with weapons such as Japanese knives, clubs, hatchets, kitchen knives, fire extinguishers, tear gas, screwdrivers, handcuffs and firebombs.

5. Those conducting the negotiations with the rioting inmates estimated that there was a real danger to the lives of the detained guards, the lives of the other inmates, and the lives of the rioting inmates themselves, in the event of an attempt to take the compound by force. They further believed that the rioting inmates were prepared to take

extreme measures, in light of the fact that some of them had prior convictions for violent crimes. The negotiators also feared that, as the rioters grew tired, the likelihood that they would take extreme action would increase. As such, military personnel and police on site concluded that signing an agreement with the rioting inmates was the only way to end the incident without casualties.

6. The agreement which put an end to the riot was signed on Sunday, August 10, 1997, approximately 24 hours after the riot began. The agreement was signed by two inmate representatives, Victor Raviv and Gideon Martin. The agreement was also signed by the Deputy Chief of the Military Police, Colonel Yoram Tzahor, by the head of the Police Negotiation Unit, Deputy Commander Shmuel Zoltek, and by Northern Command Prosecutor, Lieutenant Colonel Anat Ziso. The prison warden also signed the agreement. The agreement provided:

> The guards shall be immediately released, unharmed.
>
> The weapons, including the hatchets, knives, and gas canisters shall be immediately turned over to the prison authorities/ security personnel.
>
> The inmates shall return to their cells at once.
>
> An inquiry into the demands raised by the inmates regarding prison conditions shall be conducted.
>
> No harm will come to the inmates and they will not stand trial for the incident.
>
> The inmates shall not be transferred to civilian prison facilities against their will, as punishment for the incident.
>
> This document's validity is contingent on the release of the guards and the immediate return to prison routine.

7. The signing of the agreement put an end to the riot. The inmates

returned to their cells, turned over their weapons to the prison authorities, and all the staff members were released. The investigation of the military police [hereinafter IMP] began a day after the incident. On the same day, the inmates who participated in the riot, including the petitioners, were arrested. The petitioners were detained until September 8, 1997, at which point charges were filed with the District Military Tribunal, Dep't of the General Staff.

Eighteen inmates were indicted on charges related to the riot. All the accused are charged with the offence of rioting, as per section 46 of the Military Jurisdiction Law, in conjunction with article 29 (b) of the Penal Law. They are also charged with blackmail and uttering threats, as per article 428 of the Penal Law, in conjunction with article 29 (b) of the Penal Law. The indictment also charges several inmates with the commission of various crimes against on-duty officers, under article 60 of the Military Jurisdiction Law, and the offence of uttering threats against on-duty officers, under article 63 of the Military Jurisdiction. With the filing of the indictment, the military prosecution requested that the military tribunal instruct that the accused inmates be detained until the end of the proceedings.

8. The three petitions before us (HCJ 5319/97, HCJ 5706/97 and 5307/97), attack the decision to prosecute the accused inmates despite section five of the agreement, which provided that the inmates would not stand trial for the incident. These petitions were filed with the High Court of Justice following the indictment. In each of the three petitions, *orders nisi* were issued against the military tribunal, instructing it to refrain from conducting any hearings on the merits of the charges against the petitioners. It was held, however, that the *orders nisi* would not prevent hearings on the issue of the petitioner's detention.

9. In its decision of October 1, 1997, the military tribunal granted the prosecution’s request to detain the petitioners until the end of the proceedings. In his decision, the Honourable Judge D. Piles of the tribunal noted that there exists *prima facie* evidence against the petitioners. The tribunal emphasized that there are grounds for detaining the rioting inmates, in light of the fact that there were serious breaches of

military discipline. In its decision, the tribunal explicitly stated that it did not address the agreement concluded between the military authorities and the petitioners, in light of the petitions filed with this Court.

10. We now turn to the petitions here. In their response briefs, the respondents requested that we uphold the decision to prosecute the petitioners. They argued that it is doubtful whether the parties' agreement can be deemed binding under the circumstances, absent the authorities' intention to create a legally binding instrument. According to this contention, the agreement was merely "an instrument aimed at putting an end to the incident without casualties….An act to save lives" in a situation where no other alternative to end the incident without casualties existed. Respondents also contend that the agreement should be voided, as it is the product of coercion and force. In this context, respondents note that the agreement was concluded following the threats made by the rioters to harm themselves and the prison staff members if their demands were not met.

The state invokes section 17 of the Contracts Law (General Part)-1973 in support of its submission. That section provides that a contract formed by coercion may be voided. Respondents further argue that the agreement is against public policy and is therefore void under section 30 of the Contracts Law.

These arguments raise complex issues, including the issue of whether, and to what extent, the provisions of the Contracts Law (General Part) apply to the type of agreement at issue here. I see no need to address these issues, however, as I have concluded that, even if the provisions found in section five of the agreement are valid, there is no room for judicial intervention in the decision of the prosecuting authority to repudiate the agreement.

Contracts of Public Authorities

11. The agreement here was reached between government authorities and a group of individuals. The agreement touches on the exercise of powers—powers in the hands of government authorities—to press

criminal charges against those subject to the Military Jurisdiction Law. Under the agreement, the authorities undertook to refrain from exercising these powers. The rule is that agreements of this nature are deemed valid and binding. *See* HCJ 311/60 *Miller, Engineer (Import Agency) Ltd*. v. *Minister of Transportation* [1]. Indeed, it is incumbent upon government authorities to respect the agreements that they enter into. It has already been held that "our lives as a society and as a nation are premised on keeping promises." FH 20/82 *Adres Building Materials.* v. *Harlow and Jones* [2], at 278 (Barak, J.) The authorities' duty to abide by its obligations is supported by public policy. *See* G. Shalev, Government Contracts in Israel 101 (1985) [26]. This duty is also derived from the authorities' general obligation to act fairly and reasonably. "A government authority which denies its obligation is deemed not to have acted fairly and reasonably." HCJ 1635/90 *Zarzevski* v. *The Prime Minister* [3], at 841 (Barak, J.)

Our case law has recognized the validity of agreements dealing with the exercise of the power to initiate legal proceedings. *See* HCJ 218/85 *Arbiv* v. *Tel-Aviv District Prosecutor* [4], at 401-02. This having been said, the issue of what normative arrangement is applicable to such agreements has not yet been decided. This in light of the problems inherent in contractual relations where one of the parties is a government authority and where the agreement touches on the manner in which that authority is to exercise its powers. *See* Shalev, *supra.* [26], at 39; D. Barak-Erez, *The Contractual Responsibility of Administrative Authorities* [27], at 56-57; *see also Arbiv* [4], at 399-400. Whether the ordinary rules set out in the Contracts Law (General Part)-1973 apply to the agreement here is subject to doubt. Do these ordinary rules apply? Do they apply in conjunction with provisions of administrative law? Perhaps a contract of this nature is subject to a special scheme drawn from administrative law. These issues have not yet been resolved.

12. There is no need for us to rule on these issues, as all agree that an authority may free itself of the obligations it undertook under certain circumstances. The rule is that, in making that decision, it is incumbent on the authority to pay proper attention to all the considerations touching on the matter, including the basic principle of respect for contractual

obligations, on the one hand, and the government authority's duty to fulfill its mandate and realize the interests and values for which it is legally responsible. *See* CA 64/80 *Bank Eretz Yisrael—Britania* v. *The State of Israel* [5], at 599-600. Indeed, the authorities may deviate from a promise "if the public interest so demands. This interest shall be ascertained by balancing between the various interests struggling for primacy." *See Arbiv supra* [4], at 401.

The principle concerning the government's ability to repudiate obligations it undertook is anchored in these same considerations. In this spirit, it was decided that "the principles of fairness and reasonableness, which lie at the basis of the rule that promises must be kept, also underlie the limits of this rule and the exceptions to it." *Zarzevski supra.* [3], at 841 (Barak, J.). Similarly, the government's status as the public trustee gives rise not only to its duty to act fairly and to keep its promises, but to act effectively in order to promote the public good and realize the social values that it is responsible for. *See* D. Barak-Erez *supra.* [27], at 170; 2 I. Zamir, The Administrative Authority [28], at 674-75. These principles give rise to the government's right—and, indeed, its duty—to repudiate an agreement if the public interest so requires. *See* 1 D. Friedman & N. Cohen, Contracts 357 (1991) [29].

In the general context of the public interest, what are the interests in the case here? In *Arbiv supra.* [4], the Court enumerated three interests in determining the legality of the authorities' decision to repudiate a plea bargain: the integrity of the government authorities, enforcement of the criminal law, and the reliance and expectations of the accused. These interests are also relevant to the case before us, which, like a plea bargain, involves an agreement dealing with the exercise of the government's power to enforce the criminal law. We shall, therefore, address the respective weight of these interests.

13. *The Public Interest in The Integrity of the Government*

As noted in *Arbiv supra.* [4], at 402-03:

> A government that keeps its promises is a credible one.

> Repudiating its promises is liable to harm the government's integrity in the public's eyes, thereby tarnishing the fabric of the state's public life…. A government that fails to keep its promises in the realm of the criminal law harms the integrity of the system of criminal law. Preserving this integrity constitutes an important public interest … indeed, a government that fails to keep the promises may find it difficult to make promises in the future, as members of the public shall refuse to believe these promises.

See also Crim. App. 2910/94 *Yeffet* v. *The State of Israel* [6], at 336.

Aside from this utilitarian perspective, there is additional facet to the public interest in its government's integrity—the government's fairness. We are not referring here to the individual's interest that the government treat him fairly and respect its obligations towards him. That interest shall be addressed below. Here we are dealing with the interest in the legality of the government's actions. This interest demands that the government's actions in imposing the law and enforcing it correspond to the principle of the rule of law. *See* HCJ 428/86 *Barzilai* v. *The Government of Israel* [7], at 622 (Barak, J.). There is a public interest in not conveying the impression that there are no limits to the government's power. To this end, in *R v. Latif* [1996] 1 All. E.R. 353, 361[22], Lord Steyn noted the "public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

The application of these statements to this case is obvious. The government seeks to be released from an agreement which led to the release of the hostages unharmed and put an end to the riot in the military prison—a riot which may have otherwise deteriorated into a violent confrontation. We cannot ignore the fear that if a similar event was to occur, the authorities would find it most difficult to resolve the incident without casualties, as any promises they would offer not to press criminal charges would be met with distrust. This is liable to deprive the authorities of any practical option, save for the use of force, to put an end to such incidents. Such an option is liable to result in casualties, both injuries and fatalities, as was feared in this instance. As such, there is

clearly a weighty public interest in the state keeping its promise under section 5 of its agreement.

14. A. Additionally, the interest of the individual that contracted with the authorities must be taken into account. This interest concerns the fulfillment of the reasonable expectation interest of the individual that his agreement be respected. At times, the individual has changed his position for the worse, in reasonable reliance on the agreement. Thus, releasing the state from its obligations under the agreement is liable to violate the individual's expectation and reliance interests. This being the case, it is incumbent upon the authority to consider these interests. This interest was described in *Arbiv supra.* [4], at 403:

> The expectation interest refers to the miscarriage of justice caused an accused who expected that the promises made to him be kept, and the authorities not deny him that promise.
>
> The reliance interest refers to an accused who relied on the authorities' promise, provided information, admitted to the charges, or otherwise changed his position. This requires that the accused be treated fairly—that his interests be protected. Allowing the authorities to be released from their obligations under the plea bargain agreement is liable to infringe these.

Today, following the enactment of the Basic Law: Human Dignity and Liberty, the degree of protection offered these interests has been heightened. The right to liberty is now constitutional. This directly affects the criminal justice system, which "is so intimately related to an individual's personal freedom, so that it is only natural that the new balance struck between individual and society—reflected in the constitutional status granted human rights—influence criminal procedure." Crim. Motion 537/95 *Ganimat* v. *The State of Israel* [8], at 421 (Barak, J.). As such, the Court recently recognized its authority to delay proceedings in criminal trials, when the matter contravenes our sense of justice and fairness. *See Yeffet supra* [6], at 370. The Court recognized its authority in this matter, having concluded that the Basic Law: Human Dignity and Liberty "redraws the boundaries of what is

deemed due process, within the system … the human rights enshrined in the Basic Law also serve to influence the provisions of criminal procedure." *Id.* at 368-69; *see also* HCJ 6781/96 *M.K. Olmert* v. *The Attorney General* [9], at 811.

Indeed, a decision to press criminal charges against an individual, despite an agreement not to prosecute that person, is liable to constitute a severe infringement of the right to due process, and this Court will exercise its authority to delay proceedings. Such authority has been exercised where a confession was provided in exchange for a promise, even when the promise was made by an agent who lacked the proper authority. *R. v. Croydon Justices, ex parte Dean* (1993) 3 All. E.R. 129 (Q.B.) [23]. Another case held that breaking a promise or a pardon proposal, made in exchange for the release of hostages held by a religious cult that sought to carry out a *coup d'etat*, may result in the exercise of this authority, if the promise in question was broken without justification. *Attorney-General of Trinidad and Tobago v. Phillip* (1995) 1 All. E.R. 93, 108 (P.C.) [24].

Were the interests of the petitioners infringed and, if so, to what extent?

B. All agree that the petitioners' expectation interest was violated. The petitioners reasonably expected that the agreement would be respected. Releasing the prosecution from its obligations violates this expectation. This having been said, it should be noted that the petitioners were arrested one day after the agreement was reached. During the investigation, a number of the petitioners chose to avail themselves of the right against self-incrimination. This being the case, the circumstances suggest that, in practice, their expectation that the authorities would respect their obligation under section five lasted only briefly.

C. Let us proceed to the reliance interest. Petitioner number three in HCJ 5707/97, Vitali Novikov, argues that the investigation was conducted subsequent to the signing of the agreement but prior to the decision to prosecute. During this period, the authorities "extracted various statements from the inmates and some of them incriminated

themselves and others." The decision to prosecute was allegedly made after securing these confessions. This suggests that some of the inmates relied on the authority's promise to their detriment. In response, respondents maintain that all interrogations were conducted under a warning, and that most of the suspects invoked their right to silence.

This answer is insufficient in light of the fact that the interrogations were conducted under circumstances where the petitioners assumed that the agreement would be respected. This suggests a real possibility that the subjects of the investigation who cooperated were denied the right against self-incrimination, seeing as how the commitment not to prosecute caused them to believe that they had nothing to fear from the investigation. In this situation, it is doubtful that a standard warning—as distinguished from a clear warning that their agreement may not be respected—was sufficient to alert petitioners to the danger that their statements would be used as evidence against them. There is a real danger that these individuals' right against self-incrimination was violated.

Under the circumstances, it appears that it would have been appropriate for the investigation to have been conducted after a clear decision to repudiate the agreement was made. At the very least, the subjects of the interrogation should have been made aware of the risk of prosecution despite the authorities' commitment to the contrary. In this manner, it would have been possible to ensure the effectiveness of the right against self-incrimination. It should be noted that the Court handed down a similar ruling in *Yeffet supra* [6]. There, a police investigation took place after a Commission of Inquiry, under the Commission of Inquiry Law-1968, had investigated the same matter. Section 14 of that statute provides immunity for witnesses testifying before Commissions of Inquiry, so that testimony given before such commissions cannot be used in legal proceedings. In *Yeffet* [6], the Court held that the subjects of the police investigation should have been informed of their immunity under section 14. The reason was due to doubt whether "a subject who did not invoke his immunity and answered the police's questions renounced the immunity of his own free will and in good faith." *Id.* at 309. Likewise, unawareness of the risk of incrimination is liable to produce a situation where one inadvertently renounces to the right against self-incrimination.

The state's response does not suggest that those interrogated were informed of the risk of prosecution despite the agreement. Even so, in and of itself, this is insufficient to allow us to conclude that there was a severe infringement on the reliance interest of those who cooperated with the investigation. No facts were supplied to indicate the extent of the damage caused by the absence of warning, and to which charges and petitioners such a claim would relate. Under these circumstances, we lack a basis for a finding of detrimental reliance, which would have required us to conclude that the state's repudiation of its agreement was illegal.

15 A. These interests are confronted with the interest of pursuing criminal charges. "The public interest in having the accused stand trial is a central one and ordered modern life depends on its realization." *Arbiv* [4], at 403; *see also Yeffet supra.* [6], at 369. As Y. Karp notes in her article *The Criminal Law—Janus of Human Rights: Constitutionalization in Light of the Basic Law: Human Dignity and Liberty*, 42 HaPraklit 64, 67-68 (1996) [31]:

> Criminal law is an essential component of a properly functioning civilized society and its struggle to preserve its values. Criminal law reflects the degree to which a given society is committed and determined to protect its values. These values include the rule of law, public welfare, public order, security and social justice and morality, in addition to the individual's peaceful existence and his ability to realize his human rights through peaceful means, as these constitute a basic value in a democratic state.

In light of the criminal law's function in protecting social values and interests, it has been established that, when criminal behavior is involved, there is a presumption in favor of the public interest in prosecution. *See* HCJ 935, 940, 935/89 *Ganor* v. *Attorney-General* [10] at 509 (Barak, J.). Moreover, "the graver the charge, the greater the public interest in the accused standing trial." *Id.* at 510. The severity of the crime may be reflected in its elements and in the punishment that the law provides. *See Findings of the Commission Examining the Exercise of Judicial*

Discretion in Sentencing 12 (1998) [33]. At times, the very fact that a particular act or behavior is criminal indicates that its commission involves a severe breach of important social values, whose protection demands a social response in the form of criminal prosecution. The severity of the offence may be expressed in the concrete circumstances of its commission, such as premeditation, the substance of the offence, the intent to obstruct justice and the use of weapons. *Id* at 22-24. The crime's severity may also be assessed by "how widespread the criminal behavior is. In addition, the destructive influence of a given act on a society and orderly government also points to the offence's severity." *Ganor* [10], at 510 (Barak, J.)

In light of this, we now discuss the severity of the offences attributed to the petitioners.

B. First, we turn to the normative aspect of the alleged offenses. The indictment attributes serious crimes to the petitioners, involving the breach of army discipline and rioting, the uttering of threats, and the use of violence against superiors. While we do not take the other crimes that the petitioners are charged with lightly, particular importance attaches to the offense of rioting. Few are the offences in the Military Jurisdiction Law that are deemed graver than this offence. The gravity of the offence is reflected in the harsh maximum sentence set out for this offence—fifteen years in prison. Under certain circumstances, when this offence is committed with arms or while uttering threats, the maximum punishment provided is a life sentence. Military Jurisdiction Law, § 46(A).

The elements of the offence also attest to its severity. "Rebellion" is defined under article 46(B)(1) of the Military Jurisdiction Law as a situation in which at least three soldiers armed with weapons, or using force against their superiors, disobey orders. We are dealing with a combination of several elements—the use of force, including potentially deadly force, against a commanding officer, in the context of the commission of an act, which must be coordinated collectively, by a number of individuals. Each of the enumerated elements constitutes an aggravating element, involving a severe breach of military discipline. The combination of these aggravating elements suggests the severity of the

crime.

C. The severity of the offences attributed to the petitioners is further amplified by the particularly significant weight attached to the criminal prohibition against the violation of military discipline.

In relation to military service, the term "discipline" is defined as "deep-seated awareness of the authority of the commanding authority and the readiness to obey orders unconditionally—even under difficult and dangerous circumstances." A. Mudrik, Court Martial 62 (1993) [30]. True, this value is not absolute. Indeed, under particular circumstances—when an order is blatantly illegal—the law sets out a duty *not* to obey. *See* Penal Law, § 34(13)(2); *see also* Military Jurisdiction Law, § 125. Nevertheless, no one disputes the fact that the observance of discipline is crucial to the military, which is judged by its ability to deal with extreme situations, where individuals risk their lives. Y. Dinstein stated the crucial nature of this interest in his book entitled The Defense of "Obedience to Superior Orders" in International Law 5 (1965) [32]:

> An army by its very nature is founded on the basis of discipline. Discipline means that every subordinate must obey the orders of his superiors. And, when we deal with army, ordinary discipline is not enough. Military discipline is designed, ultimately, to conduct men to battle, to lead them under fire to victory, and, if and when necessary, to impel them to sacrifice their lives for their country…The success of the military objective, to wit, victory in battle, as well as the lives of many soldiers, and, above all, the security of the nation, seem, therefore, to compel "total and unqualified obedience without any hesitation or doubt" to orders in time of war and emergency, and complementary training and instruction in time of peace.

For similar statements, see the words of Justice B. HaLevy in HCJ 3/57 *Military Prosecutor* v. *Milinky* [21], at 213; *see also* HCJ 676/82 *The Histadrut* v. *The Chief of Staff* [11], at 112).

This interest finds expression in the laws governing soldiers serving in the Israel Defense Forces ("IDF"). Thus, article 3 of the Israel Defense Forces Ordinance-1948, provides that it is incumbent on every soldier serving in the IDF to take an oath of allegiance to the State of Israel, to its laws and authorized government. The oath states the following: "I take upon myself, without conditions or qualification, to accept all instructions and directives given by the authorized superiors."

Alongside the oath, the Military Jurisdiction Law sets out prohibitions, which include sanctions against those breaching army discipline. These include the prohibition against behavior disruptive to military operations, Military Jurisdiction Law, § 45, the prohibition against mutiny, *Id.*, §§ 48-50, and prohibitions against refusing to obey orders and disobeying orders, *Id.*, §§ 122-124. Some of these offences are severe, and are accompanied by long prison terms—in certain circumstances even life imprisonment. It should be noted that the petitioners are subject to these statutory norms since the Military Jurisdiction Law also governs those in military custody, *Id.*, § 8(1), and those deemed to be "soldiers" for the purpose of the law, *Id.*, § 16.

These prohibitions, whose purpose it is to protect army discipline, encompass a broad spectrum of offences, from relatively light offences to those that are grave and severe. The offence of rioting is found at the most severe end of this spectrum. A situation involving a number of soldiers using force against their superior, while collectively disobeying binding orders, is, for the military, intolerable. It reflects the breakdown of all discipline a complete repudiation of the basic values of the military. There is a clear public interest in using the criminal law to punish such an offence—particularly when it is accompanied by violent offences and threats against superiors.

D. One may question whether these values of army discipline apply in full force to military prison facilities, as they do to army units on active duty. One may argue that considerations underlying the duty of discipline, such as a soldier's ability to deal with life-threatening situations, do not apply to inmates in military prison facilities, some of whom will not continue to serve in the military after serving their

sentence. Indeed, the petitions reveal that at least some of the petitioners were discharged from army service and will not return to duty upon completion of their sentence.

This argument may be answered in two ways. First, military prisons are an integral part of the army. It would be artificial and dangerous to try to separate these facilities from the army in general. Sending the message that there are "islands" in the army that are not subject to the basic values of military service is liable to weaken these values. This may lead to repeated attempts to test the boundaries of various military frameworks, including combat units. We cannot draw distinctions between various army units, linking a unit's "combat capabilities" to the value of discipline in it. The risks of such an approach are difficult to dismiss. As such, no distinctions should be made between military prison facilities and any other army unit for the purpose of imposing discipline.

Second, the value of discipline is important, not only because the petitioners are subject to the Military Jurisdiction Law, but also because we are discussing a prison riot. "Order and discipline are at the foundation of the prison system. In the absence of order and discipline—in the broad sense of these terms—no longer shall prisons be able to exist and the entire system will fall apart." CA 4463/94 *Golan* v. *Prisons Authority* [12], at 173 (Cheshin, J.). In comparing prisons to other organizations in which discipline is a basic value, Justice Cheshin noted:

> Prisons are similar to the army or the police, and the demands of order and discipline in a prison are necessarily more restrictive, if only due to of the nature of its population. Prisons house those who have broken the law, including dangerous and hardened criminals, many of whom are embittered and convinced that society has mistreated and wronged them, quarrelsome individuals, with a low threshold for incitement to violence, easily fired-up and lacking any motivation to help and be helped.

Id. See also Id., at 154-61 (Mazza, J.)

This interest finds expression in the special provisions set out in the army disciplinary code, alongside the penal guidelines found in the Military Jurisdiction Law. We are referring to the arrangement set out in the Military Jurisdiction Law (Military Prison Facilities)-1997, by which various punishments may be meted out by prison authorities in the event of a breach of prison discipline. *Id,* at §§ 59, 60. The regulations set out disciplinary punishments, such as the denial of rights to visits, letters, and cigarettes, solitary confinement, and even restricting parole eligibility by as much as twenty-eight days. It shall be noted that an inmate may also be tried for an offence under article 133 of the Military Jurisdiction Law (Failure to abide by Military Instructions) for certain disciplinary offences, including insulting a staff member or visitor, hitting a fellow inmate, or breaching a prison order or any other breach of instructions given by a superior or other prison staff member.

It therefore follows that the value of preserving discipline also applies in full force to prisons—particularly military prisons.

E. The gravity of the offence in question is further aggravated by the circumstances of the matter. The petitioners are charged with participating in a riot, committed by violent means against superiors. The rioting involved the taking of hostages, some of whom were tied and gagged. The riot was premeditated and coordinated by a large group of participants, using various weapons. All this in a military prison facility.

These serious circumstances serve to heighten the severity of the offence. Moreover, the use of violence and threats against prison staff and military superiors in itself constitutes a severe breach of prison discipline—even aside from the offense of rioting. Consequently, it is difficult to dismiss the severity of the deeds attributed to the petitioners and the public interest in their standing trial.

F. In their petition, the petitioners dwell on the motivating circumstances for their takeover of Company C. Do these offer any justification for their actions, which may serve to weaken or overcome the public interest in bringing the petitioners to trial?

First, I will note that the framework of the hearing before the High Court of Justice makes it rather difficult to make factual findings regarding issues such as this, particularly when the parties do not agree on the facts. Without deciding the matter, it is my opinion that, to the extent that the motivating circumstances of the uprising can provide a defense for the petitioners—and to the extent that they may serve to lighten the punishment—they should be raised and the necessary facts should be presented to the military tribunal hearing the case.

To begin with, it is plain to see that the prison, and particularly Company C, was far more crowded than permitted. On several occasions it housed twice the number of inmates allowed in such a facility. It also appears that such a situation posed a threat to the inmates' health. All agree that the physical conditions in the prison—an old structure, built during the British mandate—are difficult. On the face of it, this state of affairs is irreconcilable with the inmates' right to dignity, enshrined in the Basic Law: Human Dignity and Liberty. *See* HCJ 540-546/84 *Yosef* v. *Central Prison Warden of Judea and Samaria* [13], at 573; Motion Crim. App 3734/92 *The State of Israel* v. *Azami* [14], at 84-85.

I find it highly doubtful that the minimum standards of prison conditions were indeed met in this instance. The possibility that these conditions contributed to the incidents at issue here should not be denied. At the same time, however, it should not be forgotten that the demands of the petitioners after taking over the facility did not even raise the issue of overcrowding. The rioter's demands touched on other aspects of their lives in prison. Regarding those claims, the IMP found some truth in the claim regarding the drills. It did not, however, find any basis in the other claims.

Furthermore, the evidence before this Court fails to indicate that the petitioners took advantage of the opportunities that the law afforded them to legally raise their grievances, prior to taking extreme measures. The petitioners assert that they sent a written request to the warden two months before the incident. However, even if such a request was in fact made—we note that a copy of the request was not attached to the petition—and even if this request did go unanswered—as the petitioners

contend—this does not serve to justify the petitioners' choice to resort to extreme measures. The petitioners could have turned to the courts, including the High Court of Justice, with their grievances regarding prison conditions. *See* HCJ 5133/97 *Bitton* v. *The Chief Military Police Commander* [15] (dealing with prison conditions in Compound 6, submitted on August 25, 1997, after the rioting). Indeed, all agree that, at the time of the incident, the inmates had access to the free services of the Military Public Defender, free of charge, had they chosen to bring their grievances to the courts.

The petitioners, however, did not pursue this course of action. Instead, they chose to try to advance their cause by breaking all the rules, and through the use of violence. Bearing in mind the circumstances behind the riot—as far as this is possible through the evidence before us—I believe that the magnitude of the public interest in trying the petitioners stands firm.

G. Another factor in deciding whether the authorities can repudiate the agreement would be a change in circumstances after the time of the signing of the agreement. *See Arbiv* [4], at 403-05. Clearly, such a change may cause an agreement previously seen as serving the public interest to no longer be considered as such. Consequently, such a change may serve as an additional consideration in justifying the authorities' release from their obligations. This having been said, it is important to emphasize that a change in circumstances does not constitute a decisive ground for releasing the authorities from their obligations. In the final analysis, the issue is the public interest that the authorities are charged with. Even absent a change in circumstance, the decision to repudiate an agreement may be deemed reasonable, when the agreement severely harms a significant public interest. HCJ 5018/91 *Gadot Petrochemical Industries.* v. *The Government of Israel* [16], at 784 (Netanyahu, J.). Similarly, it is said that the authorities may repudiate an agreement even if "the contracting was preceded by administrative negligence," provided that a weighty public interest is at stake. Barak-Erez, *supra.* [27], at 183; *see also* HCJ 636/86 *Jabotinsky Estate Workers Cooperative* v. *Minister of Agriculture* [17], at 710. Therefore, even in the absence of a change in circumstances, the authorities may still retain the prerogative to repudiate

section 5 of the agreement.

To this we should add that, in this instance, a change in circumstances did occur between the time that the agreement was signed and the decision to repudiate it. The evidence before us reveals that at the time that the authorities decided to enter the agreement in question, those conducting the negotiations truly feared for the lives and safety of those besieged in Company C. This fear was based on the fact that the siege was a violent one, accompanied by the use of force and threats, the fact that the rioters were armed with various weapons, the determination they showed, and the fear that their judgment would be affected the longer the incident was drawn out. These circumstances, alongside the desire to prevent injuries and the loss of life, to a significant extent, compelled the army authorities to sign the agreement. These circumstances were no longer in force when they decided to repudiate it.

Given this, I am convinced that the analogy that petitioners sought to draw between this agreement, and between plea bargains and immunity agreements, is inappropriate. We are not dealing with an agreement concluded under circumstances allowing for reflection and consideration of the circumstances. Instead, the negotiation team was forced to make their decisions under severe pressure and concrete threats to human lives and safety. This did not allow for sufficient consideration of the options available to the negotiations team —whether to commit to refrain from pressing charges against the rioters and, if so, whether to qualify this commitment. The position was justifiably premised on the desire to protect the lives and physical integrity of those in the besieged compound.

A substantive change took place after the riot ended. At that stage, it became possible to examine the significance of the provision that provided that the rioting inmates would not be made to stand trial. The evidence before us suggests that such consideration and deliberation did indeed take place. It is therefore my opinion that, under exceptional circumstances the likes of those before us—in which an agreement was signed for fear of the loss of lives—it should be said that, after the moment of truth has passed, the circumstances have changed so as to

justify a careful reassessment of the public interest.

H. These statements also answer another contention of the petitioners. Petitioners argue that an agreement with the rioters could have been reached even without a commitment to refrain from pressing charges. From this, petitioners ask the Court to conclude that the authorities committed to this obligation out of their own free will and not under the pressure of the circumstances at the time.

I do not agree. As noted, the circumstances of the incident gave rise to a concrete fear for the lives and safety of both the hostages and the rioters themselves. This is the only way to understand the circumstances and this is the way the military negotiation team understood them. Plainly put, the army authorities had no interest in promising not to prosecute the rioters unless making such a commitment was crucial to prevent the loss of life. As such, this claim of the petitioners does not reflect the concerns and considerations at the time, and should be rejected.

I. To summarize, the offences attributed to the petitioners involve a breach of the basic principles of the military and of prison discipline. Pressing criminal charges in response to such deeds is essential to prevent the dissemination of a dangerous message regarding the weakness of army discipline. The failure to press criminal charges in response to the riot—particularly when these acts involved the use of violence—is liable to encourage similar behavior in other prison facilities.

It shall be noted that there is evidence pointing to the fact that this fear is not negligible. The petitioners' responses indicate that several serious breaches of discipline, which may be deemed riots, occurred in military prisons this past year. These incidents, organized by groups of inmates, involved violence and the destruction of property. Indeed, respondents make a point of stating that a riot attempt in another military prison occurred shortly after the riot in Compound 6 and was inspired by it. As such, we are dealing with a pattern of criminal behavior, liable to cause severe harm to ordered social life and good government. There is therefore a significant public interest in criminally prosecuting such behavior.

The Ruling

16. We have addressed aspects of the public interest which may justify allowing the authorities to repudiate section 5 of the agreement. We have also addressed the petitioners' reliance and expectation interests. The issue that must now be decided is whether the authorities' decision is reasonable. To this end, we are guided by the rule that the Court will not substitute its judgment for that of the authorities. Hence, the issue is not whether, under the circumstances of the incident, the Court would have opted for a different course of action, but rather whether the course of action chosen by the authorities is legal—this is to say whether it is within the parameters of reasonable options available to the authority in question.

To my mind the authorities' course of action should not be deemed unreasonable—a finding that would require judicial remedy—notwithstanding the fact that a different solution may have been reached to end the riot. On the one hand, the case here involves a significant public interest in the authorities' credibility, in addition to the interest that the promise made to the petitioners, that they would not be made to stand trial, be kept. On the other hand, there is a significant public interest in releasing the authorities from this commitment, given the severity of the offences attributed to the petitioners and in light of the circumstances surrounding their commission. Attaching the proper relative weight to each of the relevant factors is by no means an easy task. We are dealing with a multi-faceted case, involving complex facts. There are considerations and arguments pointing in opposite directions. The prosecution's difficult deliberations in deciding whether to repudiate the agreement are, as such, quite understandable. We must, however, reiterate and reemphasize that the power to make this decision—and the responsibility of shouldering its consequences—rests with the authorities, and only a decision that lies out of the parameters of reasonableness can justify the Court's intervention in this matter.

I have considered the totality of the circumstances and concluded that the Court should not interfere with the decision not to respect the fifth

provision of the agreement. In so deciding, it is not my intention to deny that the authorities could have very well reached a different decision, which the Court would presumably also not have interfered with. However, the mere existence of another reasonable option does not, in and of itself, constitute cause for interfering with the decision of the authorities which, as noted, also stands the test of reasonableness.

17. I note that my decision stands regardless of the argument raised in HCJ 5319/97, according to which the authorities' decision fails to meet the tests of proportionality set out in our case law. *See* HCJ 4330/93 *Gans* v. *The District Committee of the Tel-Aviv Bar Association* [18]; HCJ 3477/95 *Ben-Attiyah* v. *Minister of Education, Culture, and Sport* [19]. According to this argument, the authorities are allowed to repudiate obligations that touch on violent offences attributed to the petitioners. They cannot, however, be released from their obligations relating to the offence of the takeover itself and the offences of extortion and the making of threats.

In my opinion, such a distinction lacks any basis. I noted above that there is a clear public interest in pressing charges for the offense of rioting, in light of its severity under the circumstances. Indeed, the distinction presented in HCJ 5319/97 is based on the understanding that the riot contained an element of a legitimate "outcry," given the prison conditions. I dealt with this argument above, noting that the petitioners failed to factually back up this contention.

Fairness

18. Petitioner number 1 in HCJ 5319/97 argues that the failure to keep the promise of section five of the agreement supplies him with the fairness defense under the circumstances. This refers to the Court's inherent power not to hear particular charges, when it cannot, as per Justice D. Levin in *Yeffet supra.* [6], at 370:

> give the accused a fair trial or when hearing the case would offend our sense of justice and fairness, as the Court understands it. The determining test is the whether the

> authorities behaved intolerably. This refers to arbitrary behavior, involving persecution, oppression and abuse of the accused.

First, I point out that the place of this argument is in the trial court and not before the High Court of Justice. It has been held that for the High Court of Justice to grant such a petition

> requires a clear and unequivocal factual basis revealing an extreme degree of arbitrariness in the exercise of the said power….In general, the "fairness defense" argument shall be considered as a "defense" during the criminal hearing before the court of first instance.

HCJ 1563/96 *Katz* v. *The Attorney General* [20], at para. 8. This standard has not been met here.

To this I would add that, according to the evidence before us, the said defense is not available to the petitioners. Indeed, it has been held that this defense applied in a similar matter, in which the authorities breached a promise to give immunity to rioters who took over the Parliament of Trinidad and Tobago. *See Phillip supra.* [24], at 108. Nevertheless, the case here does not appear to involve the sort of behavior by the army authorities that would make this defense available to the petitioners, under the standard of *Yeffet supra.* [6]. Indeed, the evidence does not justify a holding that the authorities' chosen course of action, including the prosecution, was, under the circumstances, illegitimate, so as to taint the criminal proceedings taken against the petitioners and have them deemed a wrongful use of legal proceedings. *See Bennet v. Horseferry Road Magistrates' Court* (1993) 3 All. E.R. 138, 151 (H.L.) [25]. Moreover, no evidence points to the fact the petitioners can not receive a fair trial. *See Letif supra.* [22], at 361.

19. The petitions are rejected. The *orders nisi* and interim orders issued in connection with these petitions are cancelled. Under the circumstances, an award for costs shall not be made. In order to remove any trace of doubt, we emphasize that this ruling in no way serves to weaken the parties' arguments made in the criminal proceedings on the

matter, before the military tribunal.

Justice D. Dorner

I agree.

Justice Y. Turkel

It is with a heavy heart that I join the opinion of my esteemed colleague, Justice Or.

The requirements set out by our Rabbis regarding conducting negotiations in good faith and concerning ’s the keeping of one's word, *see* Midrash Mechilta, Beshalach, 15 [35]; Babylonian Talmud, Tractate Shabbat 31a [36]; Babylonian Talmud, Tractate Baba Metzia 44a; 48b [37], were imposed on the individual more as a matter of morals and ethics, rather than as legal obligations. To my mind, these requirements are just as valid today as they were in the past, and apply not only to relationships between individuals but to the authorities and to government officials conducting negotiations with the public. Their foundation is to be found in the province of morals and ethics, in addition to considerations of efficiency. I shall refrain from making a pronouncement on the legal basis of such duties at this juncture, for such a discussion is unnecessary for our purposes.

I will not deny that given the significant weight, which, in my view, attaches to these considerations, I initially leaned towards a different decision. Likewise, I considered whether the authorities’ decision in this instance truly satisfied the test of proportionality. The petitioners’ cries may have reached the heavens, but they nonetheless failed to reach the prison wardens. Such cries should have been heard and should perhaps have been taken into account in deciding whether to press charges.

One way or another, I can only push away my doubts and accept my colleague’s conclusion that there is no room for the Court’s interference in the authorities’ decision not to respect the provisions of section 5 of the agreement. Indeed, while the authorities may have very well reached

a different decision in this matter, this, in and of itself, does not justify our intervention here.

Roman law recognized a type of decision known as "*Non liquet*". This referred to a judge's announcing his inability to rule one way or another. *See* Dr. Alkushi *A Wealth of Latin Terms and Expressions* [34], at 320 and legal dictionaries. In my view, this term also characterizes our decision to reject this petition. It is best left to stand as such, somewhat nebulous and equivocal, ending in both an exclamation and a question mark.

Decided as per the opinion of Justice Or.
24 November 1997