At the Supreme Court in Jerusalem **HCJ 7015/02**
Sitting as the High Court of Justice

In the matter of:

1. **K. Ajuri**
2. **A.A.A**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger (Reg. Assoc.)**

all represented by attorneys Lea Tsemel, Labib Habib, Yossi Wolfson, Tarek Ibrahim *et al*., of HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
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The Petitioners

v.

1. **Commander of IDF Forces in the West Bank**
2. **Commander of IDF Forces in the Gaza Strip**

The Respondents

Petition for Order Nisi and Temporary Injunction

The Petitioners hereby file a petition for an Order Nisi directing the Respondents to show cause, as follows:

A. As regards Respondent 1, why he does not revoke Amendment 84 of the Order Regarding Defence Regulations, which grants him power to order the transfer of a resident of the West Bank to the Gaza Strip;

B. As regards Respondent 1, why he does not cancel the orders that he issued against Petitioners 1 and 2 (hereinafter: the Petitioners), titled "Order for the Assignment of Place of Residence," why he does not refrain from forcefully transferring the Petitioners to the Gaza Strip, and why he does not release the Petitioners from detention;

C. As regards Respondent 2, why he does not refrain from cooperating in the said forcible transfer, by receiving the Petitioners in the territory under his supervision if Respondents 1 transfers them to there.

Petition for Temporary Injunction

The Petitioners hereby file a petition for a temporary injunction ordering the Respondent not to transfer the Petitioners to the Gaza Strip until the hearing on the petition herein is completed.

Grounds for the petition for temporary injunction

The petition herein relates to the forcible transfer of the Petitioners from the West Bank to the territory of the Palestinian Authority in the Gaza Strip. According to press reports, the Palestinian Authority has already indicated that it refuses to cooperate with the Respondents and accept the Petitioners into its territory. Implementation of the orders for transfer before the court reviews it will create a harsh and traumatic situation for the Petitioners not only because they will be uprooted and taken to a foreign area, but also because it is completely unclear where and how they will live.

Furthermore, the passage of time will not harm the Respondents: the proposal to expel families of attackers has been floating around for months, the decision to implement it was made several weeks ago, the Petitioners were taken into detention more than three weeks ago, and the orders regarding them were issued only a few weeks after that, about a week and a half ago. Thus, the Respondents were not acting with urgency, and they can wait until this Honorable Court makes its decision herein.

Introduction

1. This petition involves the extraordinary and grave measure taken by Respondent 1: expulsion of relatives of persons who committed attacks, the objective of the expulsion being to deter potential attackers, who will fear that their relatives will be harmed. Respondent 1 seeks to rescue himself from the flagrant illegality of this measure by claiming consideration of the relatives' personal involvement was entailed in the act of deportation. As will be shown below, the claims regarding this motive are baseless, and not even the Appeals Committee took them into consideration. The harm caused to the Petitioners, even if beneficial as deterrence (which is not proven), is forbidden.

2. Deportation is prohibited by international customary law, is deemed a war crime, and, when committed in the context of a policy, also constitutes a crime against humanity. Not only the Petitioners and their relatives will be harmed by the deportation. IDF

soldiers and officers involved in the deportation are liable to find themselves being prosecuted before international criminal tribunals.

The parties

3. Petitioner 1 is a resident of the 'Askar refugee camp, which is situated near Nablus. He is twenty-eight years old, has been married for five years, and is the father of three children, one five years old, another four years old, and his third child was born while he was in detention. His past is absolutely clean. He is illiterate, and makes a living from painting and construction work. He supports his parents as well as his wife and children. He built his apartment (on the third floor) in his father's house. The night he was arrested, the IDF demolished the entire house.

   Petitioner 2 is a resident of Kafr Tel, Nablus District. He is thirty-four, married, and father of four daughters and a three-month-old son. Another son died in an accident at the age of three. For six years, he has been working pumping gas at a gas station in Nablus. The night that he was arrested, the IDF demolished his parents' house.

4. Petitioner 3 is a human rights organization that protects the human rights of Palestinians in the territories that Israel occupied in 1967.

5. Respondent 1, the Commander of IDF Forces in the West Bank, holds the West Bank by belligerent occupation, and, as regards the residents of the region, has the powers and duties that international law grants and imposes on him as commander.

6. Respondent 2, the Commander of IDF Forces in the Gaza Strip, holds the Gaza Strip by belligerent occupation, and, as regards the residents of the region, has the powers and duties that international law grants and imposes on him as commander.

Chronology

7. On the night between the 18th and 19th of July 2002, the Petitioners were arrested in their homes by Respondent 1. Nineteen other persons were arrested that night, some of them relatives of the Petitioners. The next day, the press reported that Israel intended to deport all twenty-one of the individuals to the Gaza Strip. A meeting was held that day in the office of the attorney general, who informed the media that nobody was going to be deported because of a blood relationship with a terrorist; rather, only those individuals who had a connection with terrorist attacks would be subject to deportation.

8. On 19 July 2002, in light of the above comments, a petition against the deportation was filed in the High Court of Justice: HCJ 6328/02. Petitioner 1 was Petitioner 2 in

that petition, while Petitioner 2 was Petitioner 16. Petitioner 3 was Petitioner 17. The petition was dismissed on 21 July 2002 after the General Security Service informed the court that, as of that time, no decision had been reached to transfer any of the Petitioners to the Gaza Strip, and that if such a decision is subsequently made, it would not be implemented less than twelve hours from the time of its delivery to Petitioners' counsel.

9. On 1 August 2002, Respondent 1 signed Amendment No. 84 to the Order Regarding Defence Regulations (Judea and Samaria), 5730 – 1970 (hereinafter, respectively: Amendment 84 and the Order Regarding Defence Regulations). Prior to the amendment, the commander was allowed to order a person to reside "within the confines of a specific place *in the region*." The amendment professes to allow the commander to order a person to reside also in a specific place in the Gaza Strip. The amendment further allows the detention of an individual for an unlimited period until he is transferred to the designated place of residence.

   Amendment No. 84 is attached hereto and marked P/1.

10. On that same day, Respondent 1 also signed orders relating to the Petitioners. The orders were titled Order of Assigned Residence. The orders direct the Petitioners to live for two years in areas in the Gaza Strip under the control of the Palestinian Authority.

    The orders are attached to the Petition and marked P/2 and P/3.

11. The following day, the Petitioners appealed against the orders before the Appeals Committee that was established (hereinafter: the Committee). The appeal was filed in accordance with the provisions of Section 86(e) of the Order Regarding Defence Regulations.

    The appeal is attached hereto and marked P/4.

12. The same afternoon, the Committee convened *in camera* in Ofer Camp. Following the Honorable Court's decision in HCJ 6693/02, most subsequent sessions were heard in open court. Part of the hearing was held *ex parte* and conducted in secret. Another part of the hearing, in which a General Security Service agent was questioned, was held *in camera.* The families of the Petitioners managed to attend the Committee's hearing only on the last day of the hearing. The hearing ended on 8 August 2002.

    The disclosed material that was provided to Petitioners 1 and to the Committee in the matter of Petitioner 1 is attached hereto and marked P/5a-g.

The disclosed material that was provided to Petitioners 2 and to the Committee in the matter of Petitioner 2 is attached hereto and marked P/6a-c.

The minutes of the hearings of the Committee and its decisions are attached hereto and marked P/7a-i.

13. Following completion of the hearings, on 12 August 2002, the parties submitted their legal briefs. The Petitioners attached an appendix, to which the court's attention is especially directed.

The Petitioners' brief is attached hereto as P/8.

14. A few hours after submission of the detailed briefs, the Committee gave its decision. The Committee recommended that the orders remain in effect, but that, as regards the period of applicability of the order, the light nature of the acts attributed to Petitioner 2 be taken into account.

A copy of the decision is attached hereto and marked P/9.

15. Respondent 1 decided not to alter the orders, and even disregarded the Committee's recommendation regarding the length of the period of the order regarding Petitioner 2.

A copy of the letter of Captain Hirsch regarding the decision of Respondent 1 is attached hereto and marked P/10.

16. Finally, we should mention that, simultaneous with the proceedings before the Committee, the Committee heard the matter of _____ Ajuri, the sister of Petitioner 1.

The decision of the Committee in the matter of _____ Ajuri is attached hereto and marked P/11.

Legal Argument

Arguments regarding the proceeding

Proceeding before the commander

17. The military prosecutor told the Committee that the material presented to it was not provided to the commander of the region because the Committee – and not the commander – is supposed to examine the material and make its recommendations to the commander. This statement was made explicitly by counsel for the Respondents, though it was not recorded in the hearing's protocol (of 5 August 2002, p. 12), where it is "only" stated that it was unnecessary to question the commander of the region

"because the Committee's purpose is to advise the commander of the region as to the relevant material." The Committee itself decided – in accordance therewith – that "we are the ones who must bring before him (the commander of the region) our recommendations; he is not the one who must present the evidence or evaluations to us."

18. Thus, at the time that he signed the first orders, the commander did not have all the relevant material. Nor did the commander study the relevant material at the time that the orders were ratified following the appeal. Rather, he only studied the Committee's recommendations. The holder of the authority did not exercise his discretion in regard to the orders, and the review proceeding regarding the orders did not remove this grave flaw.

19. Respondent 1 also disregarding the Committee's recommendation to distinguish between the appellants regarding the period of the orders. No grounds were given for failing to take this recommendation into account. It appears that Respondent 1 did not study the Committee's recommendations at all, and if he did, he did not study them with an open mind.

Breach of principles of natural justice: bias

20. From the beginning of its deliberations, the Appeals Committee has been subject to heavy pressure. Anybody who reads the newspapers knows that the prime minister himself favors implementation of the deportation, and as fast as possible. Counsel for the Respondents are aware that the prime minister also personally met with officials in the legal establishment, both civilian and military, who were handling the matter.

21. In these circumstances, the Committee should have taken special care not to be swept along and to succumb to these pressures. But such was not to be the case.

22. On the afternoon of 6 August 2002, members of the Committee were seen sitting together with the military prosecutor and his associates, and did not allow counsel for the Petitioners to enter the room where they were meeting. That same afternoon, the Committee convened without summoning Petitioners' counsel to the hearing. In the absence of Petitioners' counsel, the Committee heard the representative of Respondent 1, the legal advisor for the West Bank. The protocol of the Committee's sessions that day does not indicate the statements made between the Committee and the legal advisor. In its decision reached at the end of the session, the Committee asked for instructions from Respondent 1 as to what the Committee was "supposed" to do. At the end of the session, the Committee decided to grant the Respondent's request and annul its decision of that morning regarding adjournment of the hearing

for forty-eight hours. This decision was made because the brother of Petitioner _____ Ajuri was killed by the IDF that night, and the Petitioner was informed about it on the morning of the hearing.

Details on this issue were set forth in the Petitioners' application to annul the said decision and is attached hereto and marked P/12.

23. The Committee's actions provided several grounds for objection, each of which was sufficient to disqualify the Committee. Substantively, the actions showed that the Committee did not maintain its independence; it succumbed to the pressure that Respondent 1 placed on it, and failed to maintain any separation between it – as a quasi-judicial committee – and Respondent 1 and his representatives – as one of the litigants appearing before it. The Committee preferred the Respondent's claim of urgency over the right of Petitioner Ajuri and his sister to be given even two days of mourning over the death of their brother. When the Committee submits to the Respondent's pressures in such an instance, how can one expect that it would give consideration of greater than featherweight proportion to the human dignity of the Petitioners in its hearing on the principal matter?

Breach of the right to be heard

24. The brief submitted by Respondent 1's counsel to the Appeals Committee regarding the candidate for deportation, the sister of one of the Petitioners in our case, bears the name "judicial review" and sets forth the following quotation:

> **The degree of sensitivity of a society to the protection of the liberty of the individual is reflected in the scope of judicial review of a decision of a governing authority that infringes a liberty that it recognizes. Indeed, protection of liberty of the individual is too precious to us to let it stay in the hands of governing officials. I know that judicial supervision does not always ensure effective protection of human rights. But I am convinced that the lack of judicial supervision leads ultimately to infringement of human liberty. Without judges, there can be no law.** (LCrimA 2060/97, *Wilenchik v. Psychiatrist for the Tel-Aviv District*, at p. 713)

However, the name "judicial review" must not be used in vain. Judicial review must enable the Petitioners to fulfill the functions given judicial review, and that did not occur in this case.

25. The right to be heard was severely breached during the hearing before the Committee. Some of these breaches, and the breaches in their entirety, denied the Petitioners their right to be heard.

26. Throughout the hearings, representatives of Respondent 1 put constant pressure, directly and indirectly, on members of ht Committee to make an immediate recommendation, shorten the proceedings, and prevent an extensive and comprehensive hearing. The Respondent's representatives made sure that they mentioned to the Committee time and again that their principals demanded rapid and immediate action.

27. Undoubtedly, many Committee decisions were reached under pressure, and the Committee failed to exercise its independent discretion.

Disregarding factual and legal contentions

28. The chairman of the Appeals Committee sent the Committee's recommendation to the military commander some 3.5 hours, and not much more than that, after the Committee received the brief of Petitioners' counsel.

29. The Committee was not under a time limit in giving its recommendation; however, it acted as if it was subject to Respondent 1's pressure, and wrote its recommendation *without relating to a substantial part of the Petitioners' arguments.*

<u>Giving of Respondent's testimonies before the Committee</u>

30. The Committee heard the testimony of two General Security Service agents and allowed the Petitioners to interrogate only one of them. "Yuri," the GSS agent who was cross-examined by Petitioners, limited his information to factual material against the Petitioners' relatives. It is undisputed that the factual material alleged against the Petitioners' relatives does not bear significant weight among the total considerations involved.

31. GSS agent "Gidon" also appeared before the Committee. His testimony, the Petitioners were informed, related to *the fact of the decision* to deport the Petitioners, the background to the decision, the rationale behind it, the quasi-scientific proofs that led to taking this action, and the benefit that the Respondent expected to reap from it.

32. It is undisputed that "Gidon's" testimony is **decisive** because it is the basis for the change in policy. It is the background to the decision to take the extreme and innovative sanction, and it, in effect, is the framework in which the Respondent exercises his discretion.

33. Notwithstanding this, **it was the testimony of "Gidon," in its entirety, that was kept secret and confidential from the Petitioners and their counsel**. The Petitioners were unsuccessful in their requests to obtain a summary of his testimony, or to question "Gidon."

The interrogatories

34. In accordance with the decision of the Committee, the Petitioners drafted a list of relevant questions intended to check and understand the effectiveness of the sanction, the expected period it would remain in effect, and the manner of its implementation. **The Committee did not forward the interrogatories to "Gidon" and did not direct that he respond to them.**

35. **Prior to the time of drafting their brief for submission to the Committee, or even before their petition was drafted, the Petitioners did not receive answers to their questions, *nor were such answers provided to the Committee itself*.**

36. The written interrogatories contained fifty-one questions. They were intended to shed light on the deportation from various perspectives, for example: expertise on the subject of the ineffectiveness of deportation, the harm it is expected to generate, and the level of fear of the sanction.

The interrogatories are attached hereto and marked P/13.

37. **The interrogatories were provided following a delay of some thirteen hours, in light of a malfunction that occurred following the assassination of the brother of the appellant Ajuri, which led, in any event, to a two-day adjournment in the Committee's hearings.**

38. The appellants' counsel apologized for this failure, and later in the evening telephoned the Respondent's representative to facilitate matters for him and enable him to provide the interrogatories to "Gidon" that same night, so that the Respondent would have time to respond.

39. The committee that convened simultaneously to hear the matter of appellant Ajuri's sister decided to allow her attorney to submit interrogatories and obtain answers to them. Notice of the decision was sent a few times to the Committee's chairman, but the Petitioners received no reply.

40. The interrogatories seek to obtain facts that have not been revealed, and apparently have not been discussed at any level, and are significant regarding the deportation and its consequences: what will be the effect on the economic wellbeing of the deportees and their families; what will happen to other family members (although it is contended

that they are being deported to the same "country," the relatives do not have access to the deportees); what is the economic cost of this means for an individual and for many persons.

41. The interrogatories relate to all the possible components of discretion, the manner in which it is exercised, and the proportionality inherent in it. They relate also to a possible grading of various sanctions and alternative sanctions.

42. They do not ignore the contention that was halfheartedly made that the decision on the deportation is from a "scientific" source and seeks to examine the "scientific nature" of the source, and to dispute its reliability.

- They seek to examine the conclusions and possible consequences of deportation that are actually negative.
- How was classification made regarding the kinds of offenses or kinds of victims or kinds of relatives subject to the sanction? How much is implementation dependent on a populist-political connection than on a security connection?
- They seek information on the decision of the attorney general, it not being clear that his decision was forwarded in its entirety to the Committee, and on the reservations of the attorney general regarding the sanction.
- They seek to examine this sanction, and its consequences, in comparison with other sanctions, and whether alternative sanctions had been formulated in the event of the current failure.
- They seek information on how prepared the Respondent is to adopt such a policy also within Israel itself.
- They seek to examine whether the Respondent was given an accurate survey of international law on this subject, and on the subject of war crimes inherent in such a measure.
- They seek to know the role that the Palestinian Authority will play in implementing the order, with all the ramifications thereof.
- They seek to know what information the Respondent himself received, and how he was affected by it in making his decision to order the deportation.
- They seek to know the background that was given to the Respondent regarding Palestinian organizations and their response.

43. **The Petitioners will argue that the lack of response to the interrogatories and of details on their contents impairs the Respondent's ability to exercise his judgment, as well as the ability of the judicial branch or quasi-judicial branch to examine and rule thereon correctly.**

Disregarding the testimony of GSS director for Samaria, referred to as "Haim"

44. It was only from study of the decision of another advisory committee, which heard the matter of _____ Ajuri, that we learned that a witness named "Haim" appeared before this other committee. "Haim" was referred to as "the GSS director for Samaria." He was cross-examined by counsel for _____ Ajuri. The Petitioners assume that "Haim's" testimony, which was given to a parallel committee and was not revealed to the committee that dealt with their matter, was relevant. The number of references that the chairman of the parallel committee makes to the testimony of "Haim" also indicates its importance.

45. On page 14 of its recommendation, the other committee states:

> **We listened intently *to the evaluation* of the GSS director for Samaria, referred to as "Haim," pursuant to which, in the circumstances of this case, his statement has additional significance. It is also found that new, updated information that was recently obtained also is liable to shed light on the degree to which the appellant is a danger, even after the death of her brother.**
>
> **….**
>
> **We also heard the evaluation of "Haim," who testified in this matter (deterrence) in the presence of the parties and even responded to questions of appellant's counsel. In his opinion, persons involved in suicide attacks are not bothered by the damage that they will cause by the acts, not even to their closest friends, but fear potential injury to their relatives. He contends that, while this sanction against relatives has not yet been used, the mood in Arab society, since the decision was reached to implement this means, indicated the actual fear from its use.**

46. "Haim's" testimony is extremely important. In his testimony before the other committee, he clearly relates to points and questions that were raised by the

Petitioners in its interrogatories, which remained unanswered in the committee before which they appeared. "Haim's" testimony was of much greater importance also in light of the intention to compare the three candidates for deportation, their past acts, and the effect on their future acts.

47. The desire to hasten the proceedings, and not security reasons, prevented the appearance of "Haim." The result: limitation and infringement of the right of the Petitioners to be heard.

Failure to provide evidence and witnesses requested by the Petitioners

Examination of representative of the commander of the region

48. The Petitioners requested to examine a **representative of the commander of the region** to learn the considerations taken into account in implementing the sanction.

49. The application relied, in part, on the Committee's being represented as an advisor to the commander of the region *who has not formulated his opinion.* The application also relied on numerous precedents of prior advisory committees regarding **deportation, in which questioning of the representative of the commander of the region was always allowed, verbally or in writing**. The precedents were submitted to the Committee.

Recommendation of the attorney general

50. The Petitioners requested that they be provided for their review, or at least for the review of the Committee itself, the summary of the protocol of the hearing that was held in the attorney general's office, as well as his final recommendation. According to public reports, there was dispute over the purpose of the sanction, its manner of implementation, and limitations on its implementation.

51. For example, these reports indicated that the original sanction was only directed against families of **suicide attackers**. How was the jump made to include the Petitioners' families, and was implementation of such a sanction likely to be used against families of persons who committed an offense that was defined as dangerous at a particular time? [We recall that the sanction of house demolition was also used against families of stone throwers!!]

52. It is important that the Petitioners know how the attorney general restricted the deportation sanction such that it did not apply to all relatives because of their *biological* connection, and what definition he gave to the link between the biological connection and the "awareness" of the acts of the family member.

53. The Petitioners were not allowed to obtain this information and were not given proper explanation for the refusal.

Obtaining other evidence gathered from the relatives

54. To implement the deportation sanction, twenty-one people from five families were arrested simultaneously. Most of them remain in detention. They were interrogated on their connections with family relatives who are wanted and related matters.

55. The Petitioners requested information on what was mentioned during these interrogations, whether a policy had been established regarding other family members, whether they are the ones already scheduled for the next deportation? The Petitioners also requested material that would have enabled them to compare the various cases so that they can show the Committee the folly of the sanction.

56. This application was denied, thus restricting the Petitioners' rights.

57. The Petitioners' application for an order to provide them with the *memoranda and the statements made by the members of their nuclear family during their interrogation* was also denied unjustly.

58. We saw how the diverse committees compare the statements of the different families, and we saw how they throw the damaging statements of one family against another family, if they wish to do so. At the same time, the Petitioners were prevented from similar use of vital material that could be disclosed from the statements of the relatives who had been interrogated.

The disclosed statements given to the police

59. The Respondent chose not to place before the Committee all the *unclassified* material in the possession of the agencies that conducted the investigations. Rather, it limited itself., according to Yoni's declaration, to providing the GSS memoranda and intelligence material.

60. During the hearings, it was clearly shown that significant unclassified material, which was used in other proceedings, exists, and that it was ostensibly admissible against the relatives of the wanted persons. Material of this kind was kept from both the Committee and the Petitioners.

Disregarding the testimonies of the Petitioners

61. The Respondent contended that the only evidential material against the Petitioners themselves is their statements and the memoranda of their interrogations by the GSS. Notwithstanding that the material was so crucial, the Committee did not allow

examination of GSS agents who interrogated the Petitioners, nor even, at least, of the policemen who took the statements of the Petitioners.

62. As mentioned above, the Petitioners had grave contentions against the manner in which they were interrogated and the manner in which the information in these documents was obtained.

63. The refusal to allow the agents and policemen to be questioned was improper.

64. At their request, the Petitioners testified and were cross-examined. They were interested in exposing before the Committee the entire evidence and in investigating in detail the contents of the evidentiary material submitted to the Committee.

65. Although their interrogations lasted many hours, the Committee only took the trouble to hold, in one sentence, that it "prefers" the written statements over their testimony. It made this determination even though it refrained from hearing directly from the GSS interrogators and the police officers who took the statements.

66. The Committee did not have any criteria on which to reject the Petitioners' testimonies. The Committee was unable to issue a meaningful judicial holding as to why it preferred the written statement. It also failed to explain the manner in which it made the decision.

67. The grave consequence is that the detailed testimonies and the long series of questions on cross-examination were all for naught.

68. This action by the Committee constituted a substantial denial of the right to be heard in a meaningful manner. The decision to continue the deportation proceedings regarding the Petitioners was reached without factual basis for the suspicions hurled at them.

Summoning an intelligence officer to testify

69. According to press reports (which were submitted to the Committee for its study), the evaluation of one of the intelligence officials who took part in the hearing was that **deportation as a sanction was liable to increase terrorist activity. The Committee paid no heed to the application to have him testify before the Committee in any forum whatsoever.**

An article from *Ha'aretz* regarding this assessment is attached hereto and marked P/14.

. . . . . .

70. In his opening comments, the military prosecutor contended that the orders relating to the appeal sought to combine two elements: prevention, which was based on the danger raised by the Petitioners themselves, and the element of deterrence against potential terrorists. The military prosecutor also mentioned several times during the proceedings (for example, the session of 4 August 2002, at p. 3) that these were "assigned-residence orders" and not "deportation orders."

71. Indeed, the Respondent's line of argument contains two central elements: one – the Petitioners are themselves sufficiently dangerous to warrant the administrative sanction against them (the Respondent agrees, apparently, that a sanction intended solely for deterrence is forbidden), and two – the Gaza Strip and the West Bank are one single occupied area, and forcible transfer from the West Bank to the Gaza Strip does not come within the rubric of prohibited deportation.

72. We shall show below that these two pillars of the Respondent's argument are insubstantial: the Petitioners do not themselves create any danger, and any attempt to consider them "dangerous" is so superficial that it is ridiculous. **In this situation, even according to the Respondent's line of legal argument, the sanction against them is forbidden.**

73. The Gaza Strip and the West Bank are separate occupied territories. Even if this were not the case, the forcible transfer from the West Bank to the Gaza Strip would be a war crime. By choosing this sanction, and not deportation pursuant to Section 112 of the Defence Regulations (Emergency), 1945, the Respondent was of the opinion that his action would not breach international law and would not constitute a war crime. We shall see that this opinion is unfounded.

Severity of the sanction

74. In sections 21-22 of its recommendations, the Committee compares the orders for transfer to the Gaza Strip to administrative detention orders and to orders deporting persons to abroad, and finds that the sanction is less severe. Less severe than administrative detention because the Petitioners will not be behind prison walls, and less severe than deportation to abroad because the order is limited in time, whereas deportation is "permanent."

75. Regarding the comparison between deportation and detention, case law has stated at length that deportation is more harmful.

    See, for example:

HCJ 672/88, *Labdi v. Commander of IDF Forces in the West Bank, Piskei Din* 43 (2) 227, 237;

HCJ 785/87, *Affo et al. v. Commander of IDF Forces in the West Bank, Piskei Din* 42 (2) 4, 52-57;

HCJ 554/81, *Baranes v. OC Central Command, Piskei Din* 36 (4) 247, 252.

76. Regarding the period of the deportation, even deportation pursuant to Section 112 of the Defence Regulations (Emergency), 1945, is not permanent. The justification for continuing the deportation is reconsidered from time to time, and, where appropriate, the deportees are allowed to return:

See, for example:

HCJ 785/87, *Affo et al. v. Commander of IDF Forces in the West Bank, Piskei Din* 42 (2) 4, 66;

HCJ 698/80, *Qawasme et al. v. Minister of Defence et al., Piskei Din* 35 (1) 617, 634.

77. The military prosecutor contended that the deterrent effect of the sanction under review is greater than administrative detention, but the sanction itself is less harmful. How can a sanction that hurts less frighten more? The military prosecutor failed to explain this in his comments or through the testimony of his witnesses.

78. Deportation to the Gaza Strip carries with it all the features of deportation to another Arab country, in addition to other harm to the individual:

- In deportation to another Arab country, the entire world is open to the deportee. He is banished from his homeland, but he is left with broad freedom of movement. The orders presently under discussion remove the Petitioners from their surroundings while also limiting their movement.
- In deportation to another Arab country, the deportee may meet with his friends and relatives when they come to the area in which he resides. Movement from the West Bank to Jordan to make such a visit is generally open. However, going from the West Bank to the Gaza Strip to visit a deportee, or for any other purpose, is not possible.
- The economic situation in Arab countries is much better than the economic situation in the Gaza Strip. The chance of finding a place to live, a job, food, and meeting subsistence needs is dramatically lower than in other Arab countries.

- Security in the Gaza Strip is poor, and the risk to the personal safety of the Petitioners during their stay there is substantial, a situation that does not exist in other Arab countries.

Lack of authority to issue an order relating to the Gaza Strip

79. To deport the Petitioners to the Gaza Strip, the Respondent professed to use his authority to issue orders that apply outside his jurisdiction, i.e., in the Gaza Strip. From a legal, technical perspective, his action was based on Amendment 84 to the Order Regarding Defence Regulations: if the Order had previously limited (in Section 96(b)) the power to restrict the residence of a person to "a certain area **in the region**," the power has been expanded to include the Gaza Strip as well. The Respondent's exercise of rule over the area of the Gaza Strip is also seen in the individual orders, which direct the Petitioners not to leave the territory of the Palestinian Authority in the Gaza Strip.

80. It is undisputed that Respondent 1 is neither a legislative nor an executive authority in the Gaza Strip. The amended order applies to the area of the West Bank, and not to the Gaza Strip. As regards the Gaza Strip, the Respondent has no external power. Respondent 1 was careful to mention in the orders that he received "the power" of commander of IDF forces in the Gaza Strip. However, what does this power mean? Did the commander of IDF forces in the Gaza Strip delegate some power to Respondent 1? Which power? Was he allowed to do this? What significance does such power have in the future? Is the power non-returnable? For example, has the commander of IDF forces in the Gaza Strip relinquished his power as sovereign to allow the Petitioners from leaving the Gaza Strip and going to Israel or abroad? In the case of a dispute between Respondent 1 and the IDF commander in the Gaza Strip regarding the order (now, or in the future, in proceedings on a reconsideration of the matter) – whose opinion controls? These questions were only partially resolved by Amendment 82 to the Order Regarding Defence Regulations in the Gaza Strip, which granted comparable power to the commander of the two areas, and says nothing about potential conflict between them.

81. In the orders, Respondent 1 did not even bother to mention if he sought clarification on the power of the Palestinian Authority, which controls the "area" of residence of the Petitioners. According to media reports, the Palestinian Authority stated that it will refuse to accept the Petitioners into its area. In such a situation, does Respondent 1 intend to continue to detain the Petitioners in accordance with the new Section 86(g)

of the Order Regarding Defence Regulations? And how long can such a detention continue, insofar as the Respondent did not specify a time period?

82. This is comparable to an order that the Respondent gives to limit the residence of the Petitioners to the city of Birmingham, England. The Respondent's declaration that the British government agreed to the order is insufficient to grant the extra-territorial order legal effect. Such declaration does not make the order valid. Respondent 1 did not have the power to make the order, pure and simple.

Exceeding substantive authority

83. When the High Court of Justice interpreted a comparable provision in the Defence Regulations (Emergency), 1945, none other than Section 110, the vice-president of the Supreme Court (as his title was at the time), M. Shamgar, held that:

> **The police supervision order is what it name implies, i.e., it is intended to enable the police to *constantly supervise* the movements and acts of John Doe…** (HCJ 554/81, *Baranes v. OC Central Command, Piskei Din* 36 (4) 247, 250)

84. This is, therefore, the objective of Section 86 of the Order Regarding the Defence Regulations, and the purpose of the power granted pursuant thereto.

85. Rather, the assigned-residence order issued against the Petitioners deviates from this objective in that it seeks to banish them to the Gaza Strip, i.e., to an area that is not in Israel's control, but is under the complete Palestinian control, instead of restricting their movements to a particular place in the region, which is under the control of the commander of the region. Thus, the title "Assigned-residence Order" given to the order, whose whole objective is to deport the Petitioners from the region under the control of the commander of the region to a region that is not under his control, does not rectify its defect – its deviation from the legislative purpose – and thus such an order exceeds his power.

The element of prevention

86. In his opening comments, the military prosecutor argued that the orders include an element of prevention and an element of deterrence. The prevention element, even according to the Respondent, is an element without which the sanction is forbidden. The Committee that heard the matter of _____ Ajuri expressed this well when it held that the power should be interpreted in a manner that places the emphasis on the danger personally created by the person who is the subject of the order (p. 12), and

that use of the order for deterrence is allowed – provided that it accompanies the element of prevention as regards the said individual (pp. 13-14).

87. The committee that heard the Petitioners' matter surely mentioned that "the effect of the measure of assigned residence is based on two main features – danger and deterrence" – and even repeated several times that the Petitioners "are not free of security offenses," but did not explain anywhere in its decision why the Petitioners are dangerous and the danger that the orders seek to prevent.

Quite the opposite. In considering the individual cases of the Petitioners, the Committee did not take prevention into account.

Regarding Petitioner 1, the Committee relies on a judgment regarding the demolition of a house for general deterrent purposes. In Section 51 of the judgment, the court held:

> **We reached the conclusion that the element of deterrence is to be preferred over the personal considerations of the appellant, and that the order issued by the commander of the region should be implemented in an attempt to cause potential terrorists to consider the damage that their relatives are liable to suffer if they perpetrate the attacks.**

In the matter of Petitioner 2, the Committee held, in Section 54:

> **We must then prefer the element of deterrence over the personal considerations, and approve the order issued against him by the commander of the region.**

Compare this matter with the Committee's decision in the matter of _____ Ajuri, in which it grounded its decision on the danger that the deportee would continue her activity, based on updated information provided to the Committee regarding the situation following the death of her wanted brother (p. 14 of the decision). In _____ Ajuri's case, the Committee emphasized that:

> **We found that the appellant was involved, in a significant manner, in activity whose sole purpose was to cause the deaths of innocent civilians, and that the expected danger from her has not passed. In these circumstances, the Respondent was allowed to impose a combined sanction, one that prevents the danger expected from the appellant if she moves about freely in the region…**

The differences are readily apparent.

88. **It is not accidental that the Committee says nothing about any future danger reflected by the Petitioners.** As will be shown below, even the Petitioners' past deeds are trivial and are of the kind that are expected between brothers. Petitioner 1, whose brother was killed by the IDF, can no longer assist his activity. Petitioner 2 has not seen his brother for a very long time, and has bumped into him only twice in the past six months. He was not aware of his brother's activity, but only of his fleeing from the authorities who were searching for him on the suspicion that he had committed murder four years ago.

89. The "deeds" attributed to Petitioner 1 can barely be considered deeds. The argument is that he was aware of his brothers acts and took no action in the matter. He was only accused in two contexts: taking household items from a place that earlier served as a hiding place, and a brief act of guarding, about which we shall expand below. As regards Petitioner 2, his deeds did not deviate from the normal conduct of a family member – providing food, clothes, and transportation at a time that his brother was free on bond from a Palestinian Authority prison.

Details of the "dangerousness" of Petitioner 1 – _____ Ajuri

90. Initially, we should state that the assassination of ___ Ajuri, the brother of Petitioner 1, put an end to the possible contention regarding the dangerousness of the Petitioner. All the "accusations" against the Petitioner related to his knowledge and to his "assistance" to his brother in that he was his brother. From the moment that his brother is no longer alive, there is no fear that Petitioner 1 will assist him. In such a situation, the deportation to Gaza does not serve any element of future prevention.

91. Who is Petitioner Ajuri? He is twenty-eight and has been married for five years. He has children aged four and five and a child who was born during the Committee's proceedings. His past is unblemished. He earns around 4,000 shekels a month, from which he provides for his parents and his family. He built his apartment on the third floor of the house belonging to his father.

The IDF demolished the entire building without giving the right to be heard to any of the residents. Petitioner Ajuri, therefore, was a victim of disproportionate collective punishment.

92. The material that the Respondent presented regarding Petitioner Ajuri also contains his statements to the police and a memorandum of the GSS. The weight of these documents will be described below.

According to the material, Petitioner Ajuri ostensibly met with his brother, at which time the Petitioner encountered patently suspicious activity:

A. He was informed that his brother had hidden weapons in their grandmother's room. Contrary to the Committee's decision, there is no proof that he witnessed this with his own eyes.

B. On his way to his apartment, he accidentally saw his brother film an individual making a testament before committing suicide. However, after a number of months had passed, he saw the said individual alive and well.

C. He was asked to return items from his father's house, a bed and blankets, that his brother had kept in his hiding place, and while doing this, saw two satchels with explosives. According to the GSS memorandum of 31 July 2002, Petitioner Ajuri "is aware" of the hiding place, and does not know where his brother moved after leaving the apartment.

D. About six months ago, he saw his brother transfer sacks from his house. The sacks contained charges to lay along the roadway. The prosecutor questioned him at length on this matter (8 August 2002, p. 14, line 17). The Petitioner said that he came home from work, and when he got to the entrance to the house and before he reached to the steps leading to his apartment, his brother asked him to take a look and see if anybody was at the edge of the neighborhood. He did this *without knowing the reason for the request.* He was tired from his day at work and wanted to get to his apartment, and "I was surprised that they were bringing two sacks and putting them into the trunk of the car."

E. Lengthy segments of his statements and of his cross-examination involved the fact that he served his brother tea when he was at his father's house.

93. According to the comments of Petitioner Ajuri recorded in the memorandum of 31 July 2002, the father, mother, and sister were also ostensibly aware of the activity of ___, as were all the residents of the camp. Petitioners' counsel place great emphasis on this fact, because some of the considerations in our matter relate to the question of the **scope of the deportation**.

All the material involves "the Petitioner being *aware* of his brother's activity."

94. This material does not justify, and even more so is insufficient, to prosecute the Petitioner Ajuri. The material is inconclusive, which, apparently, every relative of

every **stone thrower, demonstrator, petrol-bomb thrower, possessor of a weapon** encounters.

95. When the police questioned Ajuri, as early as 23 July 2002, he was warned as follows: "You are suspected of identifying with terrorist acts against Israel and of identifying with individuals who commit these terrorist acts, and of assisting your brother ___." The phrasing of this warning makes it clear that even the interrogators did not know what to attribute to Petitioner Ajuri. There is no such offense as "identifying with a terrorist organization" or "assisting a brother." The warning indicates that the interrogee knows how to defend himself against the accusations against him.

96. Petitioner Ajuri testified and was cross-examined (8 August 2002, pp. 11 ff.) He clearly explained the *difference* between awareness and ability to *control his late brother's acts.* At no time was Petitioner Ajuri able to control his brother's acts.

97. ___ did not use Petitioner Ajuri's apartment for any of his needs, and as regards responsibility, the Petitioner was unable to prevent his adult brother from performing any act, and he had no duty to do so. This lack of duty is even more evident in that his brother had a dominant personality (in the words of "Yuri" at the session held on 8 August 2002, p. 6), whereas the Petitioner gave the impression that he had little capability of opposing that dominance.

98. ___ Ajuri's activity lasted for about one year. Prior to that time, he had been a police officer who almost certainly carried a weapon, and connections with him created no problem whatsoever.

99. It should not be forgotten that Petitioner Ajuri lives in Area A, and the *only* entity responsible for security in his locale is the Palestinian Authority. According to him, his brother ___ was a **member of Fatah**, a body that is part of the Palestinian Authority. This fact alone made it unnecessary for the Petitioner to leave the Palestinian Authority because of his brother's acts. Israel did not control the area, and during ___'s years of activity, Israel was not the "authority" in the territory in which the Petitioner lived.

100. Petitioner Ajuri testified about himself: "My relations with Jews with whom I was in contact were good. I never considered doing anything against public safety. I never thought even once to act or harm Jews." (*Ibid.,* p. 13, line 36). The following exchange took place between the prosecutor and Petitioner Ajuri (*Ibid.,* p. 14, line 12 ff.):

Question: If ___ wanted to hide a Kalashnikov rifle in your apartment, what would you say?

Answer: **I would not have let him. I have nothing to say about the house below, so I wouldn't have said anything to him…** When ___ came, he did not stay in my house. He stayed in the apartment where he was. At my father's.

101. Petitioner Ajuri's father testified that his son the Petitioner is not to blame. "I threw ___ out of the house. I did not see him for a long time. I was afraid that they would demolish my house, and ___ did not change his ways , and later on, I did not see him…. **The Petitioner provides for the whole family. They demolished the house… My house had three stories. The house they demolished was home to six families…** I undergo medical treatment at the hospital" (*Ibid.,* p. 11, line 11).

It should be mentioned that the father was in the group of twenty-one who were arrested, and was released.

102. In examining the exercise of judgment by the military commander, one must ask why he chose to deport Petitioner Ajuri, why he held to his decision even after ___was assassinated, *and why he did not think it was important to evaluate the father's conduct?* **The father banished ___from his house, rebuked him, tried to prevent his activity, and the like.** These acts ostensibly were deemed favorable in the eyes of the military commander, and also worthy of praise. Despite this, rather than honor and reward the father, Respondent 1 destroyed the father's world even more. Not only did he *assassinate* his son Ali, he also **demolished his house***,* his house and the house of his children, **threatened to deport two of his children, and cut off the source of livelihood for the ailing father**.

The Respondent denied himself the right to speak about reasonable security needs when he did not grant any rights to the father, who acted in a favorable manner.

<u>Details of the "dangerousness" of Petitioner 2 – Abed Alnasser Asida</u>

103. The Committee was honest in mentioning that the acts of Petitioner 2 are less serious than those of Petitioner 1, and directed Respondent 1's attention to this matter "for the purpose of setting a period of proportionate length."

104. First of all, it is important to mention that the disclosed material contains no evidence that Petitioner 2 knew that his brother has been involved in attacks since the murder in Yitzhar four years ago, or that he was responsible for the shooting attacks in Immanuel in which he was allegedly involved. The only thing that Petitioner 2 knows

is that his brother was suspected of having committed the murder in Yitzhar (the state alleges that he received information from his brother in the matter – but he insists that he learned about it from the Palestinian Authority) and that the authorities are searching for him.

105. No expert analyzed the activity of Petitioner 2 or sought to give it hidden meaning. The Respondent only contends that the contents of the material makes Petitioner Asida a candidate for deportation.

What does the material tell us about Petitioner Asida?

106. *Who is Petitioner Asida*: Abed Alnasser Asida appeared before the Committee. He gave extensive testimony and underwent cross-examination. We also saw his wife and two of his daughters come to court to embrace him.

He was born in 1968 in [Kafr] Tel one year after Israel occupied the West Bank. **His past is completely clean**. He is married with five children – four daughters and a three-month-old son. His eldest son died in an accident at age three.

Abed told the Committee about his past, his various jobs, and mentioned that his last job was at a filling station, where he had worked for six years.

Although he never assisted his wanted brother, N. Asida, *he was arrested twice by the Palestinian Authority.* He did not hesitate to testify about the two arrests. In both cases, the Palestinian Authority arrested him to bring about the arrest of his brother. On one of these occasions, he was interrogated, under torture, on the suspicion that he was collaborator.

His other involvement with his brother, *based on the evidence accepted by the Respondent, was inconsequential. He used to visit his brother in jail from time to time, which was allowed, of course. Other relatives also visited him.*

Several times, he transported his brother in his car when he [the Petitioner] was on his way to work. He never *went out of his way* to transport him. **Every such meeting with his brother was completely legal, and was done after his brother was released from jail on bail. No meeting with his brother** *can be deemed providing a service to a criminal, even if he had not done it for his brother*.

On page two of his statement translated from Arabic, Abed said that, about a year ago, a member of Force 17 asked him to sign a bond to enable his brother's release. The Petitioner signed it, after which his brother was released by the sole authority that was holding him, the Palestinian Authority.

Only during the period of his release on bond did his brother come to the Petitioner's house for a few minutes and the Petitioner gave him clean clothes. Petitioner Asida's statement of 28 July 2002 mentioned that his brother used to take the car from him. *This was not during the period that the brother was wanted,* but during the period in which he was released on bond.

After the Palestinian Authority again wanted to arrest his brother, and his brother became "wanted" by the Palestinian Authority, a Palestinian Authority official came to the Petitioner. The Petitioner indeed attempted to get in touch with his brother, but he did not succeed, and the Petitioner was, as mentioned above, twice arrested by the Palestinian Authority. Since that time, he did not have any contact with his brother that could create any *control* by the Petitioner. There was one instance in which his brother came to him in the darkness of night, knocked on the door, **but did not enter**. When he congratulated the Petitioner on the birth of his son, he gave his congratulations and disappeared. The second time, the Petitioner saw his brother pass hurriedly in a car by the garage where he worked, and he only saw a wave of his brother's hand.

107. It should be mentioned that, according to the testimony of a GSS agent:

> **I am unaware of any declaration that Nasser is a wanted person** (5 August 2002, p. 5, line 16)

Insofar as there was no formal public declaration that the brother was wanted by Israel, no accusation can be made against a person who assisted him, and such person does not become liable for punishment for providing refuge.

Improper evidence against the Petitioners

108. The Petitioners underwent prolonged interrogation by the GSS and were questioned at length by prisoners planted in the cell with them. They were not cautioned before being questioned by the GSS, or when their statements were taken by the police, that they were to be deported, but that they were suspected of having connections with military activists. None of these suspicions were proven.

109. The Petitioners contend that their statements contain nothing to justify deportation, and certainly not prosecution. However, if Respondent 1 wishes to rely on the statements or the memoranda from the interrogations, **he is barred from doing so**. He cannot use them because he did not properly establish the memoranda and statements. The Respondent is aware that the Petitioners challenge the contents of these statements and memoranda. The Petitioners testified and described the manner

in which they "exaggerated" or "turned themselves nationalists" to satisfy the planted prisoners and protect themselves. See the testimony of Petitioner Asida on 8 August 2002, pp. 8 ff.; testimony of Petitioner Asida, *Ibid.,* p. 9, line 37: "The policeman played around with me with words… yelled at me… changed things." Regarding the GSS testimony, *Ibid.* , p. 10, line 5: "He did not translate for me, I did not sign, and do not know what he wrote." See the testimony of Petitioner Ajuri of 8 August 2002, pp. 11 ff.: "I was in solitary confinement and then they began to question me day and night…"and "I was in a poor emotional state when they told me my house had been demolished" and "I was in solitary confinement for thirty-six hours in the Russian Compound."

Petitioner Ajuri further testified (*Ibid.* p. 38) that, "somebody by the name of A. N. was with me. He was in charge of the room, and he asked me… and he told me that we have to be sure about every person who comes in because he may be a collaborator, and if he is, *we shall kill him and put him in the corridor, and the police will take him away.* **These words frightened me… I made nationalistic comments… I wanted them to tell others that I was an honest man***"* (*Ibid*., p. 13, line 29).

As for the manner in which the statement was given, Petitioner Ajuri testified (*Ibid.*, p. 13, line 26) that he did not read Hebrew or Arabic, and that he signed the statement after the policeman promised that it would not harm him. Both Petitioners were forbidden to meet with counsel and insist on their rights throughout the period of their interrogation. The two Petitioners described the scare they were under following their arrest, and after *they were told that their houses had been demolished.*

110. The Petitioners wanted the GSS agents and the officials who took the statements made to the police to testify, and they wanted the opportunity question them regarding the circumstances in which the statements were made. However, Respondent 1 opposed the request, and the Committee refused to call them. Taken cumulatively, these facts greatly weaken the evidentiary value of the statements.

`It should be noted that GSS agents do not question detainees under caution, and the courts have held that, as a result thereof, the written memoranda are insufficient grounds for conviction. Although we are not involved here in a criminal proceeding, this fact should be taken into account, thus lessening the evidentiary value of the memorandum.

Legal norms relating to relatives

111. The cross-examination by Respondent's counsel took a peculiar approach. The Petitioners were asked, "Did you ever tell your brother that you suggest that he not take part in attacks?" (8 August 2002, p. 10, line 25).

"Not one place in your testimony do you oppose what ___is doing" (*Ibid.,* p. 14, line 5).

The military prosecutor erred in posing these questions, which implied that either of the Petitioners had the statutory duty to act as stated, and that either of them had breached his duty. This is not the case.

Even worse, the Respondent is unaware of the ***statutory norms relating to activity of relatives and to knowledge that they have, particularly as regards security offenses***.

112. The military commander, the Respondent in the present case, with all due respect, is not the only ruling authority who has battled against those who threaten security in his region. His predecessors did this. All of them always set boundaries for themselves on what was allowed, and these were also drafted into statute.

In the Israeli penal law

Chapter 7 deals with the defence of the state, foreign affairs, and official secrets, i.e., the most serious offenses in the statute books. In these provision, **a family relative is exempt from involvement in the acts of his relative.**

Section 95, titled "Cover-up of offense":

> (a) A person who, knowing that a particular person is planning to commit or has committed an offense under this chapter *punishable by imprisonment for fifteen years or a heavier penalty*, does not take reasonable action to prevent its commission, completion or consequences, as the case may be, is liable to imprisonment for seven years.
>
> (b) …
>
> (c) **The provisions of this section shall not apply to a spouse, parent, descendant, *brother or sister* of a person who has planned to commit, or has committed an offense as aforesaid.**

Can the legislature state in clearer terms its opinion and intention regarding intra-family *immunity*? It is well known that it is neither possible nor necessary *to punish a relative* **for** involvement of this kind, as grave as the offense may be. This exemption for the relatives *exists precisely in the serious offenses*.

In the Jordanian penal law

Section 84(2) states: **Parents of the concealed criminals shall be exempt from punishment, as shall their descendents, spouses, brothers, and sisters.**

In the Order Regarding Rules of Responsibility for an Offense (Judea and Samaria) (No. 225), 5728 – 1968

Section 17 A of the said order exempts relatives for the offense of receiving, concealing , and assisting an offender from fleeing punishment as accomplices after the act.

113. These provisions are not confined to the criminal law; rather, they express a legal principle that must also apply in our case: the law does not expect an individual to inform on his relative. The opposite is true. In balancing between safeguarding the family unit and the interest in preventing crime, protection of the family unit prevails. On this point, the military court in Lod held:

> **The legislature does not seek to undermine the primary family unit, and it does not expect that individuals will act counter to their natural instinct to help a relative fleeing from prosecution by the authorities and from punishment...** (Mil. Ct. Lod 9/96, *the State of Israel v. Rahbi Sharif)*

114. The committee that heard the matter of _____ Ajuri made a clear distinction on this point. Regarding the accusation against her, it said:

> **It will be said, and immediately, that this does not involve humanitarian assistance, of the kind that even if it is forbidden, it is accepted among the family. Our case involves the direct and substantial assistance in preparing a belt of explosives..**. (p. 9)

Duty to be selective in instituting administrative sanctions

115. According to the case law, dangerousness alone is insufficient to justify deportation, nor even assigned residence in the true sense of the term. Sanctions of these kinds are to be imposed only on the most dangerous individuals, with scrutiny and selectively:

HCJ 792/88, *Matur v. Commander of IDF Forces in the West Bank, Piskei Din* 43 (3) 542, 551.

Thus, we found that deportation was used as a sanction in the 1980s and 1990s only against major activists who formed the foundation of the broader organizational activity. The judgments described a deportee as, for example, "one of the individuals standing at the head of the pyramid of the intifada" (HCJ 792/88, *Ibid.*); "among the senior leaders in Judea and Samaria of the Democratic Front of Naif Hawatmeh, whose said activity is continuous, extensive, and dangerous… there is no alternative means to cease the Petitioner's said activity. Past experience teaches that his detention will not effectively put a stop to his activity" (HCJ 672/88, *Labdi v. Commander of IDF Forces in the West Bank, Piskei Din* 43 (2) 227, 237); "the nature of the activity in which he was involved, the part he played, and his seniority and status in the Popular Front make him a person who poses, as does the continuation of his activity, a substantial danger to the security of the region. The applicant did not learn his lesson from the past. Three prosecutions were ineffective. Even while he was in prison, he continued to advance the organization's goals... As noted, the applicant was categorized as a leader of the Popular Front in the prison…" (HCJ 785/87, *Afo et al. v. Commander of IDF Forces in the West Bank, Piskei Din* 42 ((2) 4, 52); "he is in charge of the Islamic Jihad in the Gaza Strip, and possibly elsewhere as well… a guiding figure of that organization… an influential figure… there is no chance that he will cease his dangerous activity any time in the foreseeable future. It does not appear to us that the restrictions placed on him will be sufficient to prevent him from being a negative influence on the residents of the region" (*Ibid.,* p. 57); "he holds the status and power, influence, and ability to foment and lead public disturbances of relatively large proportions… The applicant's activity has continued for years… His persistence in using, and in getting others to use, violence… there is a substantial and ongoing likelihood that he will be a source of danger in the future …" (*Ibid.,* p. 62).

116. Even if we assume all the allegations raised against the Petitioners in the disclosed material, we see that their "dangerousness" is very minimal; if it justifies deportation, at least hundreds of thousands of residents of the West Bank should be deported with them, for they are just as dangerous as Petitioners. Thus, it is clear that the principle of selectivity has been breached.

117. In this regard, the Committee's hearings showed the following:

A. Petitioner 2 is accused, inter alia, of providing food and clean clothes to his brother (at a time that the brother was released on bond by the Palestinian

Authority, and was not wanted). The interrogator "Yuri" grinned when he was asked about the source of the clothes and food provided to the brother. When asked about the importance of locating the source of the food, he did not argue that the food providers were dangerous, but only that through them it was possible to reach the wanted person himself (5 August 2002, p. 7).

B. Petitioner 2 is accused, inter alia, of giving a ride to his brother (at a time that the brother was released on bond by the Palestinian Authority, and was not wanted). "Yuri's" response to a question asked at the session on 5 August 2002 (page 7 of the transcript) is instructive as to the danger inherent in someone who transports wanted persons. He was asked about the brother of Petitioner 2, and whether he knew if he, the Petitioner, had transported wanted persons. "Yuri" said that he did not know, and that transportation of this kind, if it took place, does not indicate that a danger exists.

C. The GSS agent "Yuri" was asked what he meant when he contended that the brother of Petitioner 2 was "responsible" for terrorist attacks. "Yuri" responded that, "of course," the reference is not to the fact that he washed clothes for a person who committed the attack. A moment of sanity had come to the Committee, all of whom had convened to discuss – at length and thoroughly – the responsibility of launderers.

D. The examination of Petitioner 1 dealt at length with the question of whether he served tea to his brother at his father's house, and why. The military prosecutor also questioned Petitioner 1 about his "hosting" his brother (8 August 2002, p. 14). When counsel for Petitioners sought to question "Yuri" on the danger inherent in serving tea, the Committee strongly objected to the question. Indeed, serving tea and food to his brother, and the like are trivial matters. They are actions that do make an individual a danger, and discussion of them is a waste of time. Clearly, these are not actions that would justify issuance of a deportation order.

E. Another long section of the examination of Petitioner 1 deals with his taking bedding from the site that his brother used as a hiding place. When "Yuri" was asked whether such an act – taking items, as distinct from delivering them – assist the wanted person. The Committee refused even to record the question, in that the answer was obvious.

F. As regards the number of persons who provided food to the wanted brother of Petitioner 2, "Yuri" responded that there were more than one. As for the

number of persons who supply him with clothes, he responded, "all kinds of people." Regarding transportation, "Yuri" stated that he uses "cars", i.e., more than one. Thus, a significant number of persons assisted and were assisting the wanted man in the same degree, or greater, that Petitioner 2 was allegedly assisting him. On a wider basis, we see that dozens of wanted persons are currently moving about the Occupied Territories who are at least as dangerous as N.A., and each of them has a circle of persons who provide assistance. Based on a cautious estimate, the number of these persons reaches into the hundreds. (See "Yuri's" responses, *Ibid*.).

G. The material that has been disclosed in Petitioner 1's case also indicates the large number of persons involved in activity against the IDF – by means of gunfire, placing of explosive charges, recruiting suicide-attackers, and so on. According to "Yuri," Petitioner 1's late brother ___was active in the cell with five or six others. In addition, there was a person who provided a camera, persons who supplied food, others in whose houses ___stayed – such that the circle of those assisting him ("pool" in "Yuri's" language) increased in size (see transcript of 8 August 2002). In response to a question that is defectively recorded in the protocol, "Yuri" responded that, in addition to this circle, there is even a larger circle of persons who are aware of the wanted person's activity. In this context, it should be recalled that the accusations against Petitioner 1 are accusations of "awareness." We again see that the level of dangerousness that justifies, in the Respondent's opinion, the extreme act of deportation, would justify the deportation of thousands persons throughout the Occupied Territories.

118. The Committee that heard the case of _____ Ajuri clearly distinguished between the kind of acts attributed to the Petitioners and actions that constitute genuine involvement in terrorist acts:

> **The appellant revealed by her actions that she was prepared to cross the line that separates between persons who are willing to provide assistance that is humanitarian in nature, and persons who are prepared to take an actual part in acts that are liable to kill innocent persons; in doing so, we see the dangerousness that she constitutes in the future.** (p. 14)

The Committee that heard the matter involving the Petitioners did not make this distinction, and not in vain. Had the Committee done so, the entire foundation for the request to approve the orders issued by Respondent 1 would have collapsed.

Summary of the issue of "dangerousness"

119. "Yuri," the expert in the matters involving the brothers of the Petitioners, admitted that:

> **The appellant was not wanted nor was he a subject for interrogation prior to his arrest.** (8 August 2002, p. 6)
>
> **He began to be considered dangerous from the moment they [the Israeli authorities] decided he was**. (*Ibid.*)

120. Indeed, the label "dangerousness" imprinted on the Petitioners is purely arbitrary. The brother of Petitioner 1 was killed, and even had he wanted to assist him, he no longer could. Petitioner 2 has not seen his brother for the past six months other than on two fleeting occasions (once through the window after his son was born, and the other from a passing vehicle). All the acts attributed to the Petitioners are trivial, acts of the kind, and worse, that are committed by hundreds and thousands of residents of the West Bank.

121. The Respondent did not manage to point out any dangerousness reflected by the Petitioners that will be prevented by transferring them to the Gaza Strip. He certainly did not point out dangerousness of the high level demanded when taking an act of this kind. **The Committee's recommendations do not mention that the Petitioners constitute a future danger.** The military prosecutor's contention that the orders have a "preventive element" falls. We are left only with the deterrent element, whose origin lies in the Petitioners' blood relationship with the wanted persons, an element that even according to the Respondent's position, is insufficient to justify the orders.

The element of deterrence

122. We saw that, in its recommendations, the Committee did not balance the dangerousness of the Petitioners and their personal circumstances; rather, it only balanced the element of deterrence against these circumstances. We also saw that analysis of the evidence cannot support a claim of such dangerousness.

123. We are left, then, solely with the element of deterrence. The orders were issued against the Petitioners only because of their family relationship to persons who had committed attacks, and were based on the belief that deportation will deter potential

perpetrators of attacks. This is the pretext for the deportation. This is the *sine qua non* of the deportation. All the other talk about dangerousness, as it were, is nothing more than a ruse intended to support the claim of deterrence in that the Respondent himself and his legal advisors know very well that **deterrence is not a basis for imposing a sanction of this kind.**

Israeli case law on orders for assigned residence and deportation forbids the use of deterrence as a grounds for issuing the order

124. The powers relating to deportation and assigned residence are construed in Israeli case law as applying only to persons whose acts are liable to endanger the security of the region:

> **Indeed, petitions of the kind under discussion by representatives of the two parties emphasize that *the Respondent is not allowed to use the sanction of the issuance of deportation orders only for the purpose of deterring others.* Such an order is legitimate only if the person issuing the order is convinced that the person to be deported is a danger to the security of the region, and that he believes that this means is necessary to neutralize such danger**. (HCJ 814/88, *Nasrallah v. Commander of IDF Forces in the West Bank, Piskei Din* 43 (2) 265, 271 (emphasis added))

> **The power to deport is preventive, is future oriented, and is intended to prevent anticipated meaningful damage to the region *by the deportee that cannot be prevented by any other means than deportation***. (HCJ 1361/91, *Maslem v. Commander of IDF Forces in the Gaza Strip, Piskei Din* 45 (3) 444, 456 (emphasis added))

> **In sum on this point, the power pursuant to Section 110 [which is comparable to Section 86 of the Order Regarding Defence Regulations] can only be exercised if the entirety of the evidence presented to the military commander indicates a danger, *anticipated to come from the Petitioner* in the future, if the measures are not taken to restrict his activity and prevent a substantial portion of the danger anticipated**

from him, and these proofs were indeed before the military commander. (HCJ 554/81, *Baranes v. OC Central Command, Piskei Din* 36 (4) 247, 250)

See also:

HCJ 488/83, *Branasi et al. v. Head of Visas and Citizenship Department et al., Piskei Din* 37 (3) 722, 724 B, C.

HCJ 513/85, *Nazal et al. v. Commander of IDF Forces in Judea and Samaria, Piskei Din* 39 (3) 645, 654 – the norms that are capable of application are similar in restraint orders and deportation orders.

HCJ 672/87, *Atamalleh et al. v. OC Northern Command, Piskei Din* 42 (4) 708 (for example: a question is raised regarding the "degree of probability that a person's behavior will drag the injury with it…" – Justice Barak, as his title was at the time, at p. 712).

In construing Article 49 of the Fourth Geneva Convention, the court in *Affo* rejected the "broad construction that seeks to impose the prohibition on deportation also on terrorists or enemy agents"(p. 26). The court did not allow use of the weapon of deportation against a person who was not himself a "terrorist, infiltrator, or enemy agent."

125. Indeed, the case law on restraining orders and deportation orders shows that these sanctions were never used only against persons who themselves were involved in acts aimed against security; they were a leading and operative factor for others as well. The use of this power was never based solely on the danger entailed in this personal activity, and the reason was never given that deportation is liable to deter others.

126. In its decision, the Committee contended that deterrence is also a lawful consideration. However, every judgment given regarding the power to demolish houses pursuant to Section 119 of the Defence Regulations (Emergency), 1945, regulations that can only be understood to allow collective punishment. Other sanctions, that can be construed more narrowly, have been construed ever since as allowing harm to the dangerous person and to him only.

Considerations unrelated to dangerousness of the individual:

The fundamental prohibition in Israeli law

127. The power of the military commander to issue an order pursuant to Chapter 5 of the Order Regarding Defence Regulations is limited to cases in which

> **He thinks that the action is necessary for manifest reasons of security.** (Section 84A)

A similar provision, though more moderate, is found in Section 2 of the Emergency Powers (Detentions) Law, 5739 – 1979 (hereinafter: the Detentions Law), which states:

> **Where the Minister of Defence has reasonable grounds for assuming that reasons of State security or public safety require that a certain person be held in detention…**

The above provision in the Detentions Law was construed in CrimAFH 7048/97, *John Does v. Minister of Defence, Piskei Din* 54 (1) 721 (hereinafter: the Lebanese hostages case). A nine-justice panel of the Supreme Court headed by the president held that , based on a literal reading of the provision, reasons of state security could also include reasons that are not inherent in detentions themselves: in the particular case, the detainees were used as bargaining chips in negotiations for the return of captives. However, the court rejected the literal interpretation that enable detention for this reason.

> ***The harm to liberty and dignity in administrative detention of an individual who does not himself constitute a danger to state security is harsher, to the point that the interpreter is not allowed to assume that the law was intended to achieve this grave harm…***
>
> **Indeed, the transition from administrative detention of an individual who constitutes a danger to state security to the administrative detention of an individual who does not constitute a danger to state security is not a "quantitative" transition. It is "qualitative." The state detains, by means of the executive authority, an individual who has not committed any offense, who does not constitute any danger, and his only "sin" is being a "bargaining chip."** ***The infringement of liberty and dignity is so substantial and profound that it is intolerable in a state that advocates liberty and dignity, even if reasons of state security underlie the taking of this measure.*** **My colleague, Justice M. Heshin, made this point in regard to Section 119 of the Defence Regulations (Emergency), 1945. The basic assumption is that, a person shall be liable for his sins… a person is only punished following warning and only the offender is to be harmed" (HCJ**

> **2006/97, *Jamiyyat v. OC Central Command – Uzi Dayan, Piskei Din* 51 (2) 651, 654). A similar approach must be taken regarding administrative detention. An individual will be detained for his misdeeds and an individual will be held in administrative detention for his sins. A person is not to be administratively detained unless the individual himself, by his acts, constitutes a danger to state security. This was the situation before enactment of the Basic Law: Human Dignity and Liberty. This is certainly the situation following enactment of this Basic Law, which raises the liberty and dignity of an individual to constitutional status…** (comments of President Barak in the Lebanese hostages case, pp. 73-74.).

128. It should be recalled that the Petitioners in the Lebanese hostages case were not choirboys. As mentioned in the judgment, they were prosecuted in Israel for belonging to hostile organizations and for involvement in attacks against the IDF and SLA [South Lebanon Army]. They were convicted and sentenced to prison. After completing their sentences, Israel continued to hold them as bargaining chips. The court emphasized that the hostages' past cannot render proper their use as bargaining chips (see, for example, p. 765 of the judgment).

129. The court also related to the possibility of taking steps against relatives of enemy personnel:

> **If the law does not expressly prohibit the detention of relatives of enemy personnel, or of other persons who for one reason or another the enemy is liable to be interested in their release, can we interpret the law as enabling their detention?** (Justice Dorner in PPA 10/94, *John Does v. Minister of Defence, Piskei Din* 53 (1) 97, 112, and also in an opinion in the rehearing in the Lebanese hostages case, at p. 765)
>
> **A different answer would empower the Respondent to detain the family members, relatives, and friends of John Doe, as to whom there is a reasonable basis for assuming that he is liable to endanger state security, only to pressure him to talk or to hand himself, or others, over…** (the deputy

president in the rehearing in the Lebanese hostages case, at p. 752)

130. What the Supreme Court brought as an example of an absurd result, as something that was inconceivable, is taking place in front of us, and is turning into reality that which the Respondent seeks to achieve!

Considerations unrelated to dangerousness of the individual:

The prohibition in international law

131. International law allows the occupying state to take security measures against a civilian population in occupied territory ("protected persons" in the language of the Fourth Geneva Convention). The maximum scope of the measures is set forth in Article 78 of the Fourth Geneva Convention:

> **If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to interment.**

A similar arrangement, with the same restrictions, is found in articles 41 and 42 of the Convention. Relying on Article 78, which allows the designation of place of residence of a protected person, the Respondent refers to the deportation orders that he issued as "assigned residence orders," However, Article 78 does not stand alone. It stands alongside other provisions in the Convention, and also has an official, accepted commentary that was issued by the International Committee of the Red Cross as far back as 1958.

According to this official commentary, edited by the learned Pictet, an order for assigned residence is only allowed to prevent a danger that results personally from the person who is the subject of the order:

> **…a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that *they are* members of organizations whose subject is to cause disturbances, or that they *may* seriously prejudice its security by other means, such as sabotage or espionage…**
>
> **To justify recourse to such measures, 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 of future security**. (Pictet, p. 258, emphasis added)

132. Imposition of a sanction on the Petitioners that even partially results from a consideration regarding general deterrence is collective punishment. Even if we assume that the Petitioners' acts are liable to justify a sanction, the desire to respond sternly to the acts of their brothers and to deter many people affected the magnitude and severity of the sanction.

133. The prohibition on collective punishment is found in international customary law. Article 50 of the Hague Regulations attached to the Convention on the Laws and Customs of War on Land (The Hague, 1907), states:

> **No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.**

Article 33 of the Fourth Geneva Convention states categorically:

> **No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited…**
>
> **Reprisals against protected persons and their property are prohibited.**

The claim of deterrence:

The failure to prove the efficacy of deportation

134. We saw that deterrence is not a lawful consideration. Although superfluous, we shall argue that the deterrent effect of deportation is also not proven.

135. In his opening comments, the military prosecutor described the orders that were the subject of the appeal as a "new measure that we shall test," as an "experiment," and the Committee was requested to examine, inter alia, the merit and effectiveness of the measure.

136. For the purpose of this examination, the Committee was presented with confidential material by "Gidon." Comments made by the military prosecutor several times during the hearing indicate that the Committee was presented only the professional material that supports deportation to Gaza, whereas other positions, which were described as

"minority views," were not presented; obviously, the persons holding those other views were not brought before the Committee to testify. It must, therefore, be concluded that the Respondent feared that views which deem deportation to Gaza an ineffective and dangerous measure would likely persuade the Committee.

137. However, the material that was presented to the Committee provides strong indications of the ineffectiveness of the proposed measure:

- Since the 1980s, the Respondent has accepted the sanction of demolishing the houses of relatives of perpetrators of attacks. The various judgments cited by the Committee – given from the 1980s to the present – indicate that the Respondent continually contended that, in light of the extreme circumstances, more stringent and extraordinary steps were necessary to deter potential attackers. Reality proved the Respondent wrong, and from time to time he needed more stringent and inordinate measures to describe the severity of the situation. In similar manner, the more stringent the sanctions became, the greater the opposition, and the sanctions failed to prove their efficacy.

- In the cases of the present Petitioners, we have clear testimony that the wanted persons knew about the danger they were causing their family; this fact did not bring about a cessation of their activity, or their surrender to the authorities. Regarding the brother of Petitioner 1, see, for example Petitioner 1's testimony of 31 July 2002, at the top of p. 5, regarding the comments his father and mother made to his wanted brother; in the testimony of witness A. Ajuri (8 August 2002, p. 11). Even after ___Ajuri's sister was detained in June, and even after the family house was demolished and her father and brother were detained, and even after they were ordered deported to Gaza, Ajuri did not cease his activity. Regarding Petitioner 2, he was detained twice by the Palestinian Authority, yet this fact did not get his brother to surrender. The Petitioner testified (8 August 2002, p. 7) that "Nasser Aldin knew that they would put pressure on all of us and on the family members; despite this, he did not surrender" and he "did not believe that the transfer of people to Gaza would deter my brother or others like him, because they do not ask about the relatives" (*Ibid.,* p. 8). After his relatives were detained and his parents' house was demolished, Nasser Aldin continued to move about in the area, and no reports indicating that his conduct had changed were received.

- In the past, the defence establishment and external experts raised serious doubts about the effectiveness of deportation. See, for example, the article of Leon Shelef,

"Mass Deportation as Failed Deterrence," 4 *Plilim* (5754 – 1994) 47. We shall do with a single quotation from the article:

> **Ariyeh Shalev, who served in the military roles of IDF Spokesperson, head of Military Intelligence research, and commanding officer of the Judea and Samaria region, related to the result of the deportation in a book on the intifada that he wrote as senior researcher in the Jaffe Center for Strategic Studies, of Tel Aviv University [Ariyeh Shalev, *The Intifada: Reasons, Characteristics, and Implications* (1990)] He writes: "The punishment of deportation may have a deterrent effect in the long run, but the conclusion from this table [table of effect of deportations on the magnitude of events – L.S.] is that there is a positive denominator between the number of persons deported… and the number of violent events or Israeli casualties following each deportation. However, the results were negative for decision-makers in Israel, because the deportations achieved opposite results: the number of violent events and of casualties even increased… The minister of defence, Rabin, said to the Knesset's Committee on Foreign Affairs and Defence that the IDF decided to reduce the number of deportations because of the questionable effectiveness of this measure."**

- Study of the statement of a youth who volunteered for a suicide-attack mission, which was submitted to the Committee, reveals that the harm caused to his relatives was the main motivating factor in his deciding to act against Israel. It may very well be, therefore, that extensive harm to the civilian population will create additional attackers, and may even add to the motivation of the brothers of Petitioner 2, who are still moving about in the region.

- Under cross-examination (8 August 2002, p. 4), "Yuri" stated that he did not know why the late ___Ajuri began his activity against Israel. The tone of his response indicated that he was not very interested about this point. If the Respondent wants to get at the root of the problem of attacks, he should learn what motivated ___Ajuri and uproot the phenomena that created that motivation. The Petitioners surmise that the kind of measures taken by the Respondent – ostensibly to

eliminate terror – such as closures, comprehensive closures, demolition of houses, mass detentions, and so on, play a major role in motivating people like ___Ajuri.

- "Yuri," who was presented as an expert on ___Ajuri and N.A., testified that he did not know if an evaluation was made regarding the response of wanted persons to the detention of their relatives and to the intention to deport them. "Yuri" added that he, the expert, was not requested to make such an evaluation (5 August 2002, p. 11). It seems likely that such an evaluation is the minimum that should be done before deporting relatives of those wanted persons.
- According to a press clipping that was submitted to the Committee, the contents of which were not subject to doubt, Military Intelligence made an assessment that deportations to Gaza were liable to exacerbate the attacks. This assessment should have been placed before the Committee for it to consider when making its determination regarding the desirability of the orders.
- The interrogatories that the Petitioners submitted to the Committee deal, in inter alia, with this question. The interrogatories were not forwarded to "Gidon" for response; thus, the Committee did not receive additional information on this matter.

The prohibition on deportation and forcible transfer

138. The Respondent is aware of the grave prohibition set forth in international law against deportation and the forcible transfer of civilians in occupied territory. The Respondent and his legal advisors well understand that deportation – even of individuals – is a war crime and threatens them and persons involved with them with prosecution before international tribunals. For them to argue that this grave prohibition does not apply in the present case, the Respondent seeks to rely on three points:

A. The argument that the West Bank and the West Bank comprise a single, integral occupied area; thus, the action does not entail the removal of protected persons from the occupied territory.

B. The argument that the prohibition in international law applies only to the removal from the occupied territory and not on forcible transfer within it.

These arguments combine in the argument of the Respondent that he is acting pursuant to the power given him by Article 78 of the Geneva Convention to subject civilians to "assigned residence." We have already seen that the conditions for using this power do not exist in our case. We see now show that the two arguments mentioned above are baseless.

The Gaza Strip and West Bank are separate occupied areas

139. The Gaza Strip and the West Bank constitute two separate occupied areas *de jure*:

A. Each of the regions was occupied separately – one from the Egyptian army and the other from the Jordanian army.

B. In each of the regions, the military administration was established by separate acts – by means of two different proclamations, one issued in the West Bank and the other in the Gaza Strip.

C. The law in the two regions has never been unified. In the Gaza Strip, Egyptian law continued to exist alongside the law that preceded it, while in the West Bank, the Jordanian law (along with the Ottoman and British law) continued to apply.

D. The Israeli military legislation was enacted separately in the two regions. In the Gaza Strip, the military legislation was enacted by the military commander of the Gaza Strip, while in the West Bank, the legislation was enacted by the military commander of the West Bank. There are differences in the two bodies of legislation. Recent examples are Order 1500 Regarding Detention during Hostilities and Amendment 84 to the Order Regarding Defence Regulations. Corresponding orders do not exist in the Gaza Strip.

E. Appointments in the two regions are made separately and independently. For example, military court judges in the Gaza Strip are appointed by the commander of IDF forces in that region, while military court judges in the West Bank are appointed by the commander of IDF forces in the West Bank. Lacking appointment by the commander of IDF forces in Gaza, a judge cannot hear a case in a military court in the Gaza Strip, even if he is appointed a military court judge by Respondent 1.

140. Israeli legislation is especially important in this matter. This is particularly true of the Israeli legislation that was enacted to implement the Oslo Accords, agreements that set forth the empty declaration that the parties consider the Gaza Strip and the West Bank as one territorial unit:

A. In Section 9 of the Implementation of the Interim Agreement regarding the West Bank and the Gaza Strip (Legal Jurisdiction and other Provisions) Law (Legislative Amendments), 5756 – 1996, the term "region" is defined as follows: "Each of these: Judea and Samaria and the Gaza Strip." Had the legislature considered the areas one territorial unit, the definition should have

been: "region – Judea, Samaria, and the Gaza Strip," without the words "each of these," and without the conjunction "and" before the word "Samaria."

B. A similar definition is found in Section 1 of the Extension of the Validity of the Emergency Regulations (Judea and Samaria and the Gaza Strip – Adjudication of Offenses and Legal Assistance) Law, 5727 – 1967.

C. Similar provisions are found, for example, in Section 16A of the Taxation of Land (Appreciation, Sale, and Purchase) Law, 5723 – 1963; Section 3A of the Income Tax Ordinance; Section 29C of the Broadcasting Authority Law, 5725 –1965; Section 1 of the Value Added Tax Law, 5736 – 1975; Section 1 of the Property Levy (Emergency) Law, 5745 – 1985.

141. In practice, too, the two regions are treated as separate areas. The regions are detached, and to perceive them as "one territorial unit whose integrity will be maintained" is not reflected in reality. By way of illustration:

A. The movement of persons between the regions is almost completely forbidden. There is greater freedom of movement between each of the areas and Arab countries and Israel than between the two regions themselves.

B. Residents of the West Bank are not allowed to enter the Gaza Strip from Egypt via the Rafah crossing, while residents of the Gaza Strip are not allowed to enter the West Bank from Jordan via Allenby Bridge.

C. In several cases, persons who were detained in the West Bank who had identity cards from the Gaza Strip (who had gone to the West Bank prior to the current intifada) were returned to the Gaza Strip.

D. Postal services between the two regions are almost nonexistent, and telephone and fax contact is faulty. The witness Victoria Metcalf was supposed to testify on this point, but the Committee did not allow the question, and even refused to record it in the protocol.

142. The article in the Oslo Accord that discusses the Gaza Strip and the West Bank as one territorial unit has never been anything more than a meaningless declaration, lip service, unrecognized in Israeli legislation, which nobody intended or did anything to effectuate it on the ground.

143. The Committee found a creative solution to this problem. It stated that the areas are one unit, "the same state." On this point, the Committee held that:

The Palestinian Authority is the sovereign in the two regions – Judea and Samaria and also the Gaza Strip.

With all due respect to the Committee, its holding is innovative and difficult to accept (even if there are surely persons who welcome it). The need to create, from nothing, a Palestinian sovereign entity comprising the 1967 borders, in accordance with the demands that the Palestinian people have made for many years, only illustrates the blind alley that the Committee had come to in its attempt to justify the deportation orders.

Forcible transfer within occupied territory is prohibited just like deportation outside the territory

144. Article 49 of the Fourth Geneva Convention prohibits the forcible transfer and deportation of protected persons:

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

The distinction between "forcible transfer" and "deportation" is that "forcible transfer" does not cross borders, while "deportation" does. This distinction is unrelated to the magnitude of the prohibition of these acts, and both constitute war crimes.

This matter was summarized by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, as follows:

> **Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacement within a State.**
>
> **However, this distinction has no bearing on the condemnation of such practices in international humanitarian law. Article 2(g) of the statute, Articles 49 and 147 of the Geneva Convention concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Article 85(4)(a) of the**

Additional Protocol I, Article 18 of the ILC Draft Code and Article 7(1)(d) of the Statute of the International Criminal Court all condemn deportation or forcible transfer of protected persons. Article 17 of Protocol II likewise condemns the "displacement" of civilians. (Case no. IT-98-33-T *Prosecutor v. Krstic*, judgment of 2.8.01, paragraphs 521-522)

Accordingly, the defendant was convicted of the forcible transfer of civilians (but not for deportation), because the civilians were not required to cross an international border.

145. The exception to the prohibition, which appears in the second paragraph of the article, teaches us that the prohibition of Article 49 of the Fourth Geneva Convention also applies to transfer within the occupied territory. The second paragraph allows, **"nevertheless"** total or partial evacuation of a given area if the security of the area or imperative military reasons require it. In that case, too, transfer of the population is only allowed **within the occupied territory**. Only as an exception to the exception, when it is impossible to avoid such displacement, is it allowed to transfer protected persons outside the bounds of the occupied territory. The wording of the second paragraph rejects the interpretation that the prohibition in the first paragraph of the article, which includes the prohibition on transfer from occupied territory to the territory of the occupying state, does not apply to the forcible transfer from one place to another within the occupied territory itself. Transfer of this kind is also absolutely prohibited, if the specific conditions set forth in the second paragraph of the article are not met.

146. The prohibition on forcible transfer is among the most severe in the convention. Its violation is considered a grave breach (Article 147). A person who commits, or orders the commission of, the act of forcible transfer of protected persons bears personal international criminal responsibility for his acts, and every signatory to the convention is obliged to seek and prosecute such individuals, regardless of their nationality.

147. The statue of the International Criminal Court, too, defines deportation and forcible transfer as war crimes that the court is competent to adjudicate (Article 8(2)(a)(vii), and the definition expressly includes forcible transfer within the occupied territory. Forcible transfer also constitutes a crime against humanity pursuant to the court's

statute when it is done as part of a systematic policy. In this context, the stature states (in Article 7(2)(d) that:

> **Forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.**

Thus, the definition relates to every forcible transfer, including from area to area within the occupied territory itself.

Deportation of individuals

148. In its decision, the Committee repeats the contention that the Geneva Convention's prohibition on deportation and forcible transfer applies only to deportations made in circumstances comparable to the Nazi's deportations. We shall now relate to this contention.

149. Justice Bach disputed this contention. In his opinion in HCJ 785/87, *Affo v. Commander of IDF Forces in the Wet Bank, Piskei Din* 42 (2) 4, 70-71, he stated:

> **The language of Article 49 is unequivocal and clear. The juxtaposition of the words individual or mass forcible transfers as well as deportations with the phrase regardless of their motive, admits, in my opinion, no room to doubt that the Article applies not only to mass deportations but to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional…**
>
> **The language of the Article, seen in its own context and in light of the treaty in its entirety, does not admit, in my opinion, the construction that it is intended to prevent only acts such as those committed by the Nazis for racial, ethnic or nationalistic reasons.**
>
> **We must not deviate, by way of interpretation, from the clear and simple meaning of the words of an enactment when the language of the provision is unequivocal and when the literal meaning does not contradict the legislative purpose or lead to an illogical and absurd result.**

150. A similar interpretation of Article 49 was given by the deputy president (as his title was at the time) H. Cohen in HCJ 298/80, *Qawasme v. Minister of Defence, Piskei Din* 35 (1) 617, 653 ff.

151. Following the decision in *Affo,* Prof. Yoram Dinstein published an article – "Deportations from Held Territories," *13 Iyuney Mishpat* (5748 – 1988) 403 – critical of the judgment. Prof. Dinstein argues that the majority opinion in *Afo* suffers from a fundamental flaw regarding the principles of interpretation of conventions and of interpretation of Article 49.

Regarding the interpretation of convention, Prof. Dinstein writes that the proper method of interpretation is the textual approach, pursuant to which the natural and ordinary meaning of the words in their context prevail over the original intent of the parties and also on the purpose of the convention. Regarding interpretation of Article 49 of the Fourth Geneva Convention, Prof. Dinstein writes that this article applies both to mass deportation and to the deportation of individuals, and that there is no basis for limiting its application.

152. Central to the interpretation of Article 49 by the court was the background that, in the opinion of the court, the drafters of the convention faced: mass deportations such as those that took place in World War II (*Affo,* pp. 24-28). However, a study of the legislative history of Article 49 teaches that the draft of the Convention was prepared by a committee of the Red Cross and was submitted to the Fifteenth International Red Cross Conference, which was convening in Tokyo in 1934 (hereinafter – the Tokyo draft).

Article 19 of the Tokyo draft deals with deportation and states:

> **Deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of military operations, to ensure the security of the inhabitants**
>
> (Pictet, Commentary on the Fourth Geneva Convention, vol. 4., p. 4)

Article 49 of the Fourth Geneva Convention is based on this article (*Ibid.*, p. 278).

153. The committee of experts on behalf of the governments that prepared the initial drafts of the Geneva Conventions following World War II relied extensively on the Tokyo draft, and redrafted the said Article 19(b), as follows:

> **Mass or individual deportations or transfers, performed under physical or psychological pressure, to places outside the occupied territory, regardless of the motive, are prohibited.**

This text formed the basis of Article 49 as it appeared in the final draft of the Fourth Geneva Convention.

154. The broad interpretation, supported by Justice Bach in *Afo* and Deputy President Cohen in *Qawasme,* was adopted by this Honorable Court in CrimAFH 7048/97, *John Does v. Minister of Defence, Piskei Din* 54 (1) 721, which involved the holding of Lebanese detainees in Israel as "bargaining chips." The context in which they were held differed – one hundred and eighty degrees – from the context in which the Nazis held hostages, and even executed them, to pressure members of the resistance to surrender to the authorities. Nevertheless, this Honorable Court construed the provisions of Article 34 of the Fourth Geneva Convention to apply also to the holding of the Lebanese detainees in Israel (opinion of the president, at p. 742; opinion of Justice Dorner, at pp. 765-766).

Prohibition on forcible transfer as enshrined in international humanitarian law

155. This court has held that the prohibition on forcible transfer is a rule of international treaty-based law, and thus is not applicable in domestic law unless it is enacted into the domestic law. However, this conception has changed, both in international public law and in the judgments of this court. Now, it is almost undisputed that the Fourth Geneva Convention reflects customary law and binds all states – even those that have not signed it – because it enshrines basic principles accepted by all states.

156. In CrimAFH 7084/97, *John Does v. Minister of Defence, Piskei Din* 54 (1) 721, 742, President Barak quotes Article 34 of the Fourth Geneva Convention – which prohibits the taking of hostages – and leaves open the question of whether it constitutes a rule of international treaty-based law or customary law. Justice Dorner, on the other hand, states expressly (*Ibid.,* at p. 766) that:

> **There are even some who hold that the grave prohibitions in the Geneva Convention, which are stated in Article 146 of the Convention, among them the holding of hostages, has attained with the passing of years the status of international customary law.**

See the references that the justice brings, *Ibid.* The prohibition on deportation is among the grave prohibitions mentioned in the said Article 146.

157. In this context, it is important to mention that, regarding the prohibition on the taking of hostages, this court held in *Affo* that, "at the same time, Article 34 of the Convention prohibited the taking of hostages, which is referred to by Pictet as 'an innovation in international law'" (p. 25 of the judgment), and also when giving its reasons that the prohibition on deportation, too, is not within the rubric of customary law.

158. Dr. Pictet writes, at page 9, that:

> **The Convention does not, strictly speaking, introduce any innovations in this sphere of international law. It does not put forward any new ideas. But it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war – a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt.**

159. The International Court of Justice held that all the Geneva Conventions of 1949 constitute customary law:

> **It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'... that the Hague and *Geneva Conventions* have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.** (International Court of Justice, *Advisory Opinion: Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, par. 79)

160. In 1993, in his report presenting the statute of the international tribunal on Yugoslavia, which was approved by the General Assembly in Resolution No. 827, the Secretary General of the United Nations stated:

> **In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law... The pare of conventional humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War victims...** (Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993))

161. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 held that the Fourth Geneva Convention is considered international customary law. The court's statute empowered it, inter alia, to hear accusations regarding grave breaches of the Fourth Geneva Convention. In the tribunal's judgment in *Prosecutor v. Dusko Tadic aka Dule* (given on 7 May 1997), the tribunal stated several times that the accusations were breaches of international customary law. For example, in Paragraph 4 of its decision, the tribunal details the kinds of offenses within its subject-matter jurisdiction, including the grave breaches of the Fourth Geneva Convention (one of which is the forcible transfer of protected persons), and held that they all are "**beyond any doubt part of customary international law**." Similar statements can also be found in paragraphs 558 and 559 of the judgment.

In Paragraph 577 of its judgment, the tribunal explains as follows:

> **Article 2 of the Statute provides that the "International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949," and there follows a list of the specific crimes proscribed. Implicit in the Appeals Chamber Decision is the conclusion that the Geneva Conventions are part of customary international law, and as such their application in the present case does not violate the principle of *nullum crimen sine lege*.**

162. The opinion that the Fourth Geneva Convention constitutes international customary law also appears in the writings of international law experts. For example, Meron writes that:

> **There is considerable judicial and scholarly support, which is also endorsed by the International Committee of the Red Cross (ICRC), that the rules contained in the four Geneva Conventions of 1949 for the Protection of Victims of War and in the Hague Convention (IV) of 1907 on the Laws and Customs of War on Land (except for administrative, technical, and logistical provisions) reflect customary law.** (T. Meron, "Customary Law," in Roy Gutman and David Rieff (ed.), *Crimes of War: What the Public should Know* (New York: W. W. Norton & Company, 1999), pp. 113-115)

See also:

F. Bouchet-Saulnier, *The Practical Guide to Humanitarian Law (*New York: Rowman & Littlefield Publishers, Inc., 2002), p. 65.

F. Kalshoven & L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2001), p.16.

Prohibition on deportation in Israeli domestic law

163. Israeli law has also undergone significant developments since the last judgments given regarding the deportation of residents of the Occupied Territories that was based on the Defence (Emergency) Regulations.

The Basic Law: Human Dignity and Liberty enshrined the **constitutional** status of human dignity and brought about a constitutional revolution in Israel. This law granted, inter alia, constitutional status to the right of every citizen to live in the state:

> **Every Israeli national has the right of entry into Israel from abroad.** (Section 6(b))

It is understood that this provision, as a constitutional provision, must be given fundamental and broad interpretation. The provision enshrines in law the right of an individual to live in the country of his nationality, insofar as the matter is contingent on those who are subject to the Basic Law, and not necessarily the characteristic case in which an Israeli citizen is involved.

Every governmental authority, including the Respondent, is required to respect the human rights set forth in the Basic Law (Section 1 of the Basic Law).

164. International law, including international treaty-based law, plays an important role in construing this provision:

> **Even where it is not adopted [in domestic law], international treaty-based human rights law is significant for interpretation. This significance is grounded on three separate sources. *First*, the shared material – human rights – and the conception that the protection of human rights on the international level must serve as inspiration in understanding the rights in Israel. This is true about each right on its own, and also as regards the overall purpose, which is based, inter alia, on the State of Israel being a democratic state…** (A. Barak, *Interpretation in Law, Vol. Three: Constitutional Interpretation* (Nevo Publishing: Jerusalem, 1994) 353.

The Basic Law injects, into Israeli constitutional law, therefore, the treaty-based provisions of international humanitarian law and international human rights law. If you wish, the conventions are enshrined within the domestic legislation. If you wish, it makes such incorporation superfluous. The need to enshrine explicitly international humanitarian law in Israeli legislation to make that law binding in the domestic law is not an unequivocal principle of law in Israel:

> **Indeed, I am willing to assume – without deciding – that there is no such prohibition in international customary law. I am also willing to assume - *without deciding* – that the treaty-based prohibition on taking hostages does not bind the State of Israel in the domestic law of the state where it has not been adopted in Israel statutory law.** (emphasis added) (From the opinion of President Barak in CrimAFH 7048/97, *John Does v. Minister of Defence, Piskei Din* 54 (1) 712, 742)

It should be mentioned that, since enactment of the Basic Law: Human Dignity and Liberty, Israel has not used the power to deport found in the Defence Regulations (Emergency), 1945, except in the case of the deportation of Hamas activists. That case occurred some months after the enactment of this Basic Law, and before it was

realized that a constitutional revolution had taken place in the legal system and had made its mark. Indeed, in that case, the court did not discuss at all the implications of the Basic Law on the deportation: the Basic Law is not mentioned in the judgment, and my review of the relevant documents located in the offices of HaMoked has not revealed any mention of it in the arguments submitted to the court.

165. Not only the said Basic Law enshrines the relevant international law in the domestic law in Israel and in the region: General Staff Command 33.0133 imposes on IDF soldiers, including the Respondent, the duty to act in accordance with the provisions included within the four Geneva conventions. The command has the status of law (Section 2A of the Military Jurisdiction Law, 5715 – 1955.

Also, Section 1 (the purpose section) of the Imprisonment of Illegal Combatants Law, 5762 – 2002, which was passed by the Knesset on 4 March 2002, should be perceived as enshrining international humanitarian law in Israeli law. The section states:

> **The objective of this law is to regulate the imprisonment of illegal combatants, who are not entitled to prisoner-of-war status, in a manner consistent with the obligations of the State of Israel pursuant to international humanitarian law.**

Whether or not the statute meets its declared purpose or not, it constitutes a declaration of the legislature regarding the duty to treat prisoners of war and others (such as protected persons according to the Fourth Geneva Convention) in accordance with international humanitarian law, in that it constitutes a conduit through which international humanitarian law flows into, and is enshrined in, Israeli law.

The duty of IDF forces to act in accordance with international humanitarian law is grounded in recent decisions of this Honorable Court:

HCJ 2936/02, *Physicians for Human Rights v. Commander of IDF Forces in the West Bank, Piskei Din* 56 (3) 3;

HCJ 2977/02, *Adalah v. Commander of IDF Forces in Judea and Samaria, Piskei Din* 56 (3) 6;

HCJ 3114/02, *Barakeh v. Minister of Defence, Piskei Din* 56 (3) 11.

Results of implementation of the order:

Avoiding responsibility for the Petitioners and violating the principle of proportionality

166. Before concluding, it is proper to discuss once again the effects on the Petitioners and their families, who also will be harmed by the deportation orders.

167. Petitioner 1 is the sole supporter of his family, including his ailing parents. He is illiterate and works as a physical laborer in painting and construction. He is married and has three children. His eldest child, T., is four and a half years old; his son Tamer is one and a half. While the Committee was conducting its hearings in his matter, his wife gave birth to another son. In addition to the deportation of Petitioner 1 to the Gaza Strip, his sister was held in administrative detention and she, too, now faces an order deporting her to Gaza. His sister used to take care of her ailing parents. On the day that Petitioner 1 was detained, Respondent 1 demolished the building in which the entire family lived in separate apartments. The demolition left the family members homeless and destroyed all their property that was in the building.

168. The deportation of Petitioner 1 will severely harm his wife and infant children, all of whom are unarguably completely innocent. It will also harm his aged father, who testified before the Committee, as to whom there is much favorable information regarding his opposition to the acts committed by his wanted son (see, for example, "Yuri's" testimony on 8 August 2002, at p. 5). It is unclear what the Respondent seeks to attain by harming the family members indiscriminately, especially after they acted as the Respondent would have wished, i.e., to pressure their [activist] family members to refrain from their activity.

169. Petitioner 2 is married and has five children, and he also supports his parents. He is a laborer and was working at a petrol station. His five children are E., 9, who is going into the fourth grade; Y., who is going into the first grade; S., 4; I., 2; and the infant Y., who is three months old. Two of Petitioner 2's daughters came to the hearing before the Committee and went over to him during a recess. The military prosecutor and soldiers who witnessed the meeting can testify to the extremely emotional meeting that took place, which brought tears not only to the eyes of the Petitioner and his daughters. In his testimony to the Committee, the Petitioner stated that, "I have my way on how to raise my children. I want to raise my children by myself, which is better than having others raise them."

170. In addition to the proposed sanction against Petitioner 1, his father and brother were detained, and his parents house, with all its contents, was demolished. The family was given no warning about the intended demolition, and were not given the opportunity to remove their possessions from the house.

171. The current conditions in the Gaza Strip are known to all. However, the numbers that the witness Metcalf presented to the Committee illustrates the situation better than anything: more than eighty-four percent of the population of the Gaza Strip live under

the internationally-recognized poverty line. In the West Bank, that figure is fifty-seven percent. Unemployment exceeds sixty-five percent. Average monthly family income fell from NIS 2,000 a month before the current intifada to NIS 800 a month in February 2002; in the West Bank, monthly income fell from NIS 3,000 to NIS 1,500 during the same period. Furthermore, family size in the Gaza Strip is twice as large as in the West Bank. Close to ninety percent of Gaza Strip residents rely on assistance from humanitarian-aid organizations.

Nutrition in the Gaza Strip is appalling. Thirteen percent of the children there suffer from *severe* malnutrition. This figure reflects the widespread nutrition problem existing throughout the population.

The housing situation in the Gaza strip is known to be extremely poor, in part because of IDF attacks and the destruction they have sown and continue to sow there. Metcalf was supposed to testify also on this matter, but the Committee cut her off.

Personal security in the Gaza Strip is poor. IDF actions, including air attacks, are common in the region.

172. It is clear that the Petitioners will not be able to earn a living in the Gaza Strip, either for themselves or for their families. It is very doubtful that they will find suitable housing. They will not attain proper nutrition. Their personal security will certainly be at constant risk. Even if their families join them, and even if the Respondent and the commander of IDF forces in the Gaza Strip, as well as the Palestinian Authority, allow them to join the Petitioners, the families can look forward to a dismal future there, without housing, an income, or food on their table.

173. The Geneva Convention established certain guarantees for the personal safety and welfare of protected persons against whom security sanctions were instituted, or who were transferred from one entity to another (in circumstances that allow transfer, such as in the case of a person who was found in the territory of a state involved in the conflict and not in occupied territory). These guarantees include the prohibition on transferring a person to a state that does not apply the Geneva Convention (Article 45 of the Convention). To the best of the knowledge of Petitioners' counsel, the Palestinian Authority in Gaza, into whose territory the Petitioners are being transferred, does not meet this condition. Another guarantee is the prohibition on holding a person in territory that is particularly exposed to the dangers of war (the end of Article 41 together with the beginning of Article 83). The territory to which the Petitioners are being given "assigned" residence is such a territory.

174. The main provision that the Committee must take into account in its considerations is Article 39. According to paragraph two of Article 39:

> **Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.**

Article 39 is explicitly mentioned also in Article 78 of the Convention, which deals, inter alia, with assigned residence.

The subject of allotments to the Petitioners and their families has not yet been discussed by the Respondent. Neither the Petitioners nor their counsel have been informed about this matter, and "Yuri" was unable to provide the Committee any information on this point (5 August 2002, at p. 6). It seems that the Respondent does not intend to meet his obligation under this article, and intends to send Petitioners to fend for themselves.

175. The total harm to Petitioners and their families is extensive and exceptional. House demolition, detention of family members, banishing the breadwinners– all of which constitute manifold and excessive cruel and extreme punishment, particularly insofar as they are meted out against persons who themselves have not been accused of committing attacks.

Conclusion

176. The Committee did not find – and justifiable so – that the Petitioners constitute any future danger, and that there is reason to take a preventive act against them. Nevertheless, the Committee recommended approval of the orders for many reasons related to deterrence. These reasons are forbidden. Deterrence itself is not a lawful reason, nor has it been proven that they have any chance of success. The orders are nothing more than an experiment on human beings.

177. The order of deportation to the Gaza Strip was made without authority. It violates international law and constitutes a war crime, forming a basis for international criminal prosecution. As part of a broad policy, it also constitutes a crime against humanity.

178. The action is unjust, injurious, and disproportionate, whose perpetrators – IDF soldiers – are liable to find themselves in the dock for violating international criminal law.

179. The desire to take every desperate measure conceivable in the attempt to stop the cycle of death is understandable. However, not every effective measure – even more so measures whose effectiveness has not been proven – is allowed. This court must stop such adventures, which expose the Petitioners to grave and unjustified violation of their rights, and the state's soldiers and officers to the infamy of war criminals.

For these reasons, the Honorable Court is requested to issue an order nisi and temporary injunction as requested at the beginning of the petition, and after receiving the Respondent's response, make them absolute, and to order the Respondents to pay the costs entailed therein.

Jerusalem, 13 August 2002, 5 Elul 5672

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