Al-Haq's Position Paper on the Forcible Transfer of Kifah & Intissar Ajuri

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West Bank Affiliate of the
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Introduction

On 4 September 2002, Kifah and Intissar Ajuri were forcibly removed from the West Bank by the Israeli army and transferred to the Gaza Strip. In the Judgement of the Supreme Court sitting as the High Court of Justice, which was delivered on 3 September 2002, Kifah and Initissar Ajuri were "assigned residence" in the Gaza Strip, a practice that is permitted under the law of occupation. It is Al-Haq's contention, however, that what the High Court in fact sanctioned, as a means of collective punishment, was the forcible transfer of civilians protected by the Fourth Geneva Convention (hereinafter the Convention), a practice that is prohibited by international humanitarian law. Al-Haq is concerned that this practice will become routine, and that countless more Palestinians will have to undergo the traumatic experience of being displaced under duress. Al-Haq calls on the High Contracting Parties to the Convention to urgently intervene to arrest a practice that amounts to a grave breach. Below, Al-Haq lays out its reasoning.

The Facts of the Case

On Tuesday 3 September 2002, an expanded nine-judge panel of the Israeli Supreme Court sitting as the High Court of Justice ruled unanimously that the Israeli army was legally entitled to "relocate" two siblings of Ali Muhammed Ajuri (now deceased), who was accused of being involved in armed activity. The individuals concerned, Kifah Muhammed Ahmed Ajuri and Intissar Muhammed Ahmed Ajuri were to be removed from their place of domicile, the West Bank, to the Gaza Strip, for a two year period. Following the ruling, Kifah and Intissar Ajuri were given a change of clothing and some money and were then transferred to the Gaza Strip. A third individual's "relocation" was blocked by the Court on the grounds that insufficient evidence had been presented to prove that he knew his relative was planning an attack against Israeli civilian targets.

According to the arguments that the State of Israel presented before the Court, Intissar Ajuri aided her brother, Ali, in armed activity, by sewing explosive belts to be used by suicide bombers against Israeli civilian targets. Kifah Ajuri was acussed of having knowledge of an apartment that Ali had used as a hideout and that he had a key to the apartment. The State also argued that Kifah had removed a mattress from the apartment and that he had acted as a lookout when explosive charges that

were alleged to have been hidden in the apartment were moved to another location. It is on these grounds that the High Court reasoned that the West Bank Area Commander was entitled to assign the residence of the Ajuris.

Though the High Court does not view the Convention as being enforcible through Israel's domestic courts, in its ruling, it sought to justify the forced transfer of Kifah and Intissar Ajuri under article 78 of the Convention, which grants an Occupying Power the authority to assign residence of an individual if it considers it necessary for imperative reasons of security.

The Background to the Case

The forcible transfer of Kifah and Intissar Ajuri from the West Bank to the Gaza Strip was the end result of a heated debate amongst both Israeli political and military officials on ways to suppress the Palestinian uprising which began on September 29, 2000. As the *intifada* intensified, the government of Ariel Sharon set in train a series of military assaults on Palestinian civic and political institutions, culminating in the "Defensive Shield" and "Determined Path" operations which all but led to the immobilisation of the Palestinian Authority, and left Israel in direct control of almost all the Palestinian towns and cities in the West Bank which had been under limited Palestinian control on account of the 1995 Interim Agreement and the 1997 Hebron Protocol.

Despite these military offensives, however, armed Palestinian groups were still able to mount attacks on Israeli civilian and military targets. As a result, a debate began within Israeli security circles about the possible efficacy of taking collective penalties against family members of armed activists, particularly suicide bombers, as a way of stemming attacks. According to leading figures in the Defence Establishment, collective penalties against the families of suicide bombers would deter individuals from launching such attacks. One of the results of this debate was the recommencing of the practice of demolishing the dwellings of individuals who were involved or suspected of being involved in armed activity. The house of Kifah and Intissar Ajuri in Asker Refugee Camp near Nablus was destroyed in late July 2002 leaving twenty-six people including six women and twelve children homeless. Close on the heels of this policy, the Israeli cabinet adopted the measure of the forcible transfer of family members of armed activists on the recommendation of the Defence Establishment.

The Legal Justification for Forced Transfer

A legal opinion was sought by the Government from the Attorney-General, Elyakim Rubenstein, and the Ministerial Committee for National Security decided within the framework of the Attorney-General's ruling that "assigning a place of residence of family members of suicide bombers or the perpetrators of serious attacks and their senders from the West Bank to Gaza, provided that these family members were involved in terrorist activity" was permissible.[1]

On 1 August 2002, OC Central Command, amended Military Order 378 (1970) to allow "assigning a place of residence." According to the amended provisions of the Order, 86 (b) (1):

a) A military commander may direct in an order that a person shall be subject to special supervision.

b) A person subject to special supervision under this section shall be subject to all or some of the following restrictions, as the military commander shall direct:

1) He shall be required to live within the bounds of a certain place in Judaea and Samaria or in the Gaza Strip, as specified by the military commander in the order.

In conjunction with the aforementioned amended Military Order, the Gaza Strip Area Commander issued the Security Provisions (Gaza Strip) (Amendment no. 87) Order (no.1155). Section 86 (g) of this order provides:

> Someone with regard to whom an order has been made by the military commander in Judaea and Samaria under section 86(b)(1) of the Security Provisions (Judaea and Samaria) Order (no.378), 5730-1970, within the framework of which it was provided that he will be required to live in a specific place in the Gaza Strip, shall not be entitled to leave that place as long as the order is in

[1] See the Supreme Court Judgement (3 September 2002), HCJ 7015/02 Kifah Mohammad Ahmed Ajuri, Abed al Nasser Mustafa Ahmed Asida, Centre for the Defence of the Individual v. IDF Commander in West Bank, IDF Commander in Gaza Strip and Bridget Kessler, and HCJ 7019/02 Intissar Mohammed Ahmed Ajuri, Centre for the Defence of the Individual, Association for Civil Rights in Israel v. IDF Commander in Judea and Samaria, IDF Commander in Gaza Strip and Bridget Kessler, p 6 (Official English Translation.

> full force, unless the military commander in Judaea and Samaria or the military commander in the Gaza Strip so allow.[2]

In its ruling the Court laid down a number of conditions concerning the circumstances in which "assigning residence" could or could not be used as a measure against an individual. According to the Court, a military commander could assign the residence of an individual who constitutes a danger and that assigning residence will nullify that danger. However, the place of residence of an innocent person who does not himself present a danger may not be assigned, with the purpose to achieve a deterrent effect; one may not assign the place of residence of a person who is not innocent and did carryout acts that harmed security, when in the circumstances of the case he no longer presents any danger; and one may not assign the place of an innocent family member, or a family member who is not innocent, but does not present a danger to the area. This is the case even if it would deter.[3] The Court did note, however, that a military commander may take into account the consideration of deterring others when making a decision to assign residence.

The Court also opined that the purpose of assigned residence is not penal, its purpose is prevention. "It is not designed to punish the person whose place of residence is assigned. It is designed to prevent him from continuing to constitute a security danger."[4] The Court also noted that assigned residence must be exercised proportionately, "An appropriate relationship must exist between the purpose of preventing danger from the person whose place of residence is being assigned and the danger that he would present if this measure were not exercised against him."[5]

Assigned Residence & The Law of Belligerent Occupation

According to article 78 of the Convention, an Occupying Power may assign residence if it considers it necessary for imperative reasons of security. This measure is deemed an exceptional one, and article 78 lays down the criteria to which an Occupying Power must adhere when utilising its discretion under the

[2] Ibid,amendments to military Orders p8.

[3]Ibid p19.

[4]Ibid p20.

[5]Ibid p21.

article. For example, decisions regarding assigned residence must be made according to a regular procedure. The procedure shall include the right of appeal for the parties concerned, and in the event that the decision is upheld, the decision shall be subject to periodic review, ideally every six months, by a competent body. Individuals assigned shall enjoy the benefits of article 39.[6] Article 39 in pertinent part reads:

> .....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.....

According to the authoritative Commentary to the Convention, "Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures..." The Commentary further states that "Article 78 relates to people who have not been guilty of any infringment of the penal provisions enacted by the Occupying Power, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action.....the protected persons concerned will benefit by the provisions of Article 49 and cannot be deported; they can therefore only be interned or placed in assigned residence, within the frontiers of the occupied country itself....**such measures can only be ordered for real and imperative reasons of security**; their exceptional character must be preserved" (emphasis added).[7]

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[6]Article 78 of the Convention reads in its entirety, "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at most, subject them to assigned residence.....Decisions regarding such assigned residence.....shall be made according to a regular procedure to be prescribed by the occupying power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodic review, if possible every six months, by a competent body set by the said Power."

[7]Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 ed Jean Pictet (International Committee of the Red Cross) pp 367-8.

With reference to article 39, an Occupying Power that assigns residence must ensure that individuals so assigned are materially taken care of upto and until their residence is no longer forcibly determined by the Occupying Power.[8]

The Distinction Between Assigned Residence, Transfer & Deportation

In order to determine the legality of the forced relocation of Kifah and Intissar Ajuri, it is essential to try to achieve a distinction between transfer, deportation and assigned residence. As noted above, assigned residence is a measure that an Occupying Power may use for imperative reasons of security and is deemed an exceptional measure. In *Kordic & Mario Cerkez*, the International Criminal Tribunal for the Former Yugoslavia defined assigned residence as consisting of "....moving people from their domicile and forcing them to live, as long as the circumstances justifying such action continue to exist, in a locality which is generally out of the way and where supervision is more easily exercised."[9] Assigned residence may not, however, be used as a collective penalty. Thus, any attempt to move a protected person from one locale to another, and forcing them to live there as part of a policy of collective punishment would make any invocation of assigned residence under article 78 invalid and thus unlawful.

Forcible transfer is prohibited by article 49 (1) of the Convention. According to the article:

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

According to Black's Law Dictionary, transfer is to convey or remove persons from one place to another[10], while deportation is defined as banishment to a foreign

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[8] Ibid see pp 249-252.

[9] see Prosecutor v. Dario Kordic & Mario Cerkez, International Criminal Tribunal for the former Yoguslavia (ICTY), Para 283, IT-95-14/2, Judgement.

[10] See Black's Law Dictionary, Fifth Edition, (West Publishing Company, 1979), p 1342.

country...[11] According to Cherif Bassiouni, deportation is the forced removal of people from one country to another,[11] while population transfer applies to the compulsory movement of people from one area to another within the same state.[12] The Commentary to the *Draft Code on Crimes Against the Peace and Security of Mankind* defines deportation and transfer as follows, "Whereas deportation implies expulsion from national territory, forcible transfer of population could occur wholly within the frontiers of one and the same state."[13] According to customary international law, deportation presumes transfer beyond state borders whereas forcible transfer relates to displacement within a state.[14]

In reference to article 49 (1) of the Convention, "individual or mass forcible transfers" would mean involuntary and unlawful movement of protected persons from where they reside, to another locale within the occupied territory. As the West Bank and the Gaza Strip are recognised internationally, and by Palestinians in particular, as constituting a cohesive national territorial unit, despite their geographic separation, any involuntary and unlawful movement of protected persons from the West Bank to the Gaza Strip and vice versa, by Israel, the Occupying Power, would constitute a forcible transfer.

Intissar and Kifah Ajuri: A Case of Forcible Transfer

In Al-Haq's opinion, the Ajuris were forcibly removed from the West Bank to the Gaza Strip because of their sibling relation to Ali. Though the High Court Judgement sought to illustrate that "assigned residence" was being taken against the Ajuris because of their individual contribution to an enterprise deemed illegal

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[11]Ibid p 394. Please note that there is a caveat to this definition of transfer. The commentary to Article 45 of the Convention construes transfer as "Any movement of protected persons to another state, carried out by the Detaining Power on an individual or collective basis is considered transfer for the purposes of article 45. The term "transfer", for example, may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition. The Convention makes provision for all these possibilities." (Opcit Commentary to the Fourth Geneva Convention) p 266. For our purposes we have taken the international customary law definition to interpret the meaning of transfer used in article 49.

[12]See M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, (Martinus Nijhoff Publishers, 1992), p 301.

[13]See the Commentary to the International Law Commission Draft Code on Crimes Against The Peace and Security of Mankind p 122.

[14]See Prosecutor v. Radislav Krstic, (ICTY), IT-98-33-T, Para. 521, Judgement.

by the Occupying Power, it is, however, unlikely that without the familial relation to Ali Ajuri, the two would have been arrested and detained and then forcibly removed to the Gaza Strip. Moreover, neither the State, nor the High Court in its judgement mention that the Ajuris constituted a future danger that could justify the use of a preventative measure such as assigned residence. The debate in Israel revolved around the possible deterrent effect if the families of attackers were harmed in some way by the state. In otherwords, harm should be caused to persons not involved in illegal conduct in order to deter others in the community. Thus, transfer evolved out of this debate and is an integral part of a policy which is intended to inflict collective penalties on family members of suicide bombers, which includes house demolitions, and should be seen in this context. As noted above, the familial home of the Ajuris was destroyed in July and in his ruling on the issue, the Attorney-General, Elyakim Rubenstein, had himself noted that "assigning residence" of family members of suicide bombers was permitted under certain circumstances.

Collective punishment is expressly prohibited by article 33 of the Convention. According to the article:

> 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 terrorism are prohibited. Reprisals against protected persons and their property are prohibited.[15]

The prohibition of collective punishment is anchored in the principle of personal liability, meaning that a person is only liable for offensive conduct personally attributable to him or her. Following this reasoning, the International Committee of the Red Cross (ICRC) in its Commentary on the Convention states that collective punishment is in "defiance of the most elementary principles of humanity" and hence "responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of."[16]

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[15]It is worth noting, as mentioned in the ICRC commentary, that article 33 is deduced from article 50 of the 1907 Hague Regulations, which states: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly or severally responsible."

[16]Opcit Commentary to the Fourth Geneva Convention p 225.

Procedural Flaws

& Imperative Reasons of Security: A Disproportionate Response

If, however, the State of Israel could legitimately assign the residence of the Ajuris under article 78, by arguing authoritatively that the measure was not a collective penalty, the manner in which it was carried out breaches the procedural guarantees of the article and as a result, would in fact make the measure illegal. According to article 78, an individual who is assigned residence, should have the decision reviewed, preferably every six months, with the only criterion being whether the individual continues to pose a possible threat. The fact that Israel has "assigned" the Ajuris for a set two year period implies that any review would be perfunctory and seems inconsistant with the spirit of the article. Furthermore, under article 39, Israel would be under an obligation to ensure the welfare of the Ajuris and that of their dependents. The fact that the Ajuris were given a small monetary grant and a change of clothing fails to meet the obligation that an assigning power has under article 39. Moreover, according to information available to Al-Haq, the wife and three children of Kifah Ajuri have not, upto the time of writing, been granted any financial or material assistance from the State of Israel.

According to article 78, assigned residence is a measure, along with internment (administrative detention) that an Occupying Power may take against individuals for imperative reasons of security. It is an exceptional measure. Thus the measure must be in proportion to the threat that the individual poses. As the Court itself noted, "An appropriate relationship must exist between the purpose of preventing danger from the person whose place of residence is being assigned and the danger that he would present if this measure was not exercised against him."

Intissar and Kifah Ajuri were not accused of being members of an organization of armed resistance, nor were they accussed of masterminding or directly carrying out any activity that could be construed as prejudicial to the security of the Occupying Power. Instead, in the case of Intissar Ajuri, she was accused of sewing explosive belts and Kifah of being a look out on one occasion for his brother and having knowledge of a safehouse. Since the purported evidence against the two is priviledged, Al-Haq is not in a position to clarify the veracity of these claims. Nonethless, judging by the fact that captured Palestinian individuals who were accused of far graver offences were not subject to assigned residence, implies that the measure was disproportionate to the gravity of the alledged offence and

suggests that the measure was more to do with deterrence and punishment than with prevention. Moreover, if the Ajuris were such a threat to Israel, it is unlikely that they would be released into the Gaza Strip to be left to their own devices.

Concluding Remarks

In conclusion, Al-Haq views the "assigned residence" of Intissar and Kifar Ajuri as forcible transfers because the measure was used as part of an overall policy of collective punishment directed against the family members of armed activists, particularly suicide bombers. Though this finding is not immediately apparent from the wording of the High Court Judgement which lays out the individual culpability of the Ajuris in their purported contribution to illegal conduct, the circumstantial evidence such as the overall policy debate in which the transfer policy was adopted, the fact that the house of the Ajuri family was destroyed, the fact that the High Court failed to make any meaningful case that the siblings posed any future threat to Israel and the fact that the evidence against the Ajuris was priviledged all inform Al-Haq's position that the measure under discussion is a collective penalty. As collective punishment against protected persons is absolutely prohibited by article 33, the High Court's judgment based on Article 78 is null and void. In otherwords, what Israel has in fact carried out in the case of the Ajuris is a forced transfer and cannot be legitimately construed as an assigned residence because of its collective character.

The unlawful transfer of protected persons is a grave breach as enumerated in article 147 of the Convention. Article 85(4) of Protocol I also enumerates that "...the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory..." is a grave breach. Unlawful transfer is also enumerated as a war crime in article 8(2)(a)(vii) of the Statute of the International Criminal Court.

There are legal consequences for individuals who order the commission or who directly commit or who facilitate by for example through an omission, a grave breach of the Convention. As expressed in article 146 of the Convention, the High Contracting Parties have a legal obligation to search out and bring to trial individuals who are responsible for such grave breaches. As noted above, Al-Haq views the forced relocation of the Ajuris as a grave breach, and calls on State Parties to uphold their legal obligations under the Convention.