



# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

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## **Expert Opinion of Louise Doswald-Beck and Ian Seiderman of the International Commission of Jurists regarding the transfer of West Bank residents Kifah Ajuri and Abd al-Nasser to Gaza**

I. Louise Doswald-Beck, am Secretary-General of the International Commission of Jurists, with expertise in public international law, international humanitarian law and human rights law.

II. I. Dr. Ian Seiderman, am legal adviser for the International Commission of Jurists, with expertise in public international law and international human rights law.

III. It has come to our attention that Kifah Ajuri and Abd al-Nasser, both West Bank residents, have been ordered removed from the West Bank and transferred to Gaza. They are the brothers of persons suspected of involvement in suicide and other attacks against Israelis. The order is said to be an administrative measure undertaken pursuant to a newly instituted policy of the Government of Israel, intended to deter attacks on Israelis by transferring the families of alleged attackers from the West Bank to Gaza. Neither Mr. Ajuri nor Mr. al-Nasser is reported to have been charged with a criminal offense.

IV. The deportations, if carried out, would constitute a grave breach under articles 49 and 147 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, to which Israel is a party. Article 49 of the Fourth Geneva Convention provides, in pertinent part: *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 International Committee of the Red Cross (ICRC) has made clear that this prohibition includes deportation to any other location, whether within or outside of the territory occupied. (B. Zimmermann, 'Art. 85', in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 350). This principle has been affirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY), an organ of the United Nations Security Council (Prosecutor v. Radislav Krstic, IT-98-3-T, para. 522). The only exceptions to this prohibition concern measures carried out for the security of the population within the occupied territory and for imperative military reasons, neither of which is germane to the present case. The military imperative exception applies only to urgent military necessity "of the moment", and not a pre-planned policy (ICTY, Prosecutor v. Krstic, IT-98-3-T, para. 526). Article 147 of the Fourth Geneva Convention designates the violation of this provision

as a grave breach of the Convention, meaning, in the present case, that Israeli officials complicit in the carrying out the deportation would bear criminal responsibility for their actions.

V. The deportations would also constitute a war crime under customary international law. Articles 8(2) (a) (vii) of the Rome Statute of the International Criminal Court, which has been signed by Israel, incorporates this customary law norm, identifying as a war crime the grave breach of unlawful deportation or transfer or unlawful confinement, within the meaning of the Fourth Geneva Convention. In identifying the precise elements of this offence, the United Nations Preparatory Commission has expressly identified situations whereby "the perpetrator deported or transferred one or more persons to another State or to another location." Article 8 (2) b (viii) of the Rome Statute explicitly designates as a war crime "the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory." The prohibition on such transfers is applicable without exception.

VI. To the extent that the instant deportations are to be carried out pursuant to a more general policy of the Government of Israel, they may also constitute a crime against humanity. Under article 7(d) of the Rome Statute, deportation or forcible transfer of civilian population, when committed as part of a "widespread or systematic attack directed against any civilian population", is identified as crime against humanity. The language "attacks against any civilian population" is defined under article 7(2) as "a course of conduct involving the multiple commission of [deportation or forcible transfer], pursuant to or in furtherance of a State or organizational policy to commit such attack." Assuming that the deportations at issue are to be carried out as the first of a number of measures directed against the relatives of alleged offenders in accordance with Government policy, rather than as isolated actions, the requirements as to the "systematic attack" would appear to have been met. Officials complicit in the execution of such deportations would therefore be criminally responsible for their actions.

VII. The proposed deportations would further amount to an unlawful collective punishment under Fourth Geneva Convention. Article 33 thereof provides that "*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.*" This provision is derived from the earlier conceived Hague Regulations annexed to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land, which provide that "*no general penalty....shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.*" The bar on collective punishment in article 33 of the Fourth Geneva Convention is peremptory and a principle of general international law. Whether or not the primary purpose of the policy is to punish the prospective deportees, there can be little doubt that the sanctions imposed upon them are punitive in effect. As expressed in the ICRC Commentary, the prohibition of collective punishments "does not refer to punishments inflicted under penal law..., but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed...Responsibility is personal and it will no longer be possible to inflict penalties on

persons who have themselves not committed the acts complained of." (J. Pictet, Commentary IV Geneva Convention (1958), p. 225). Such acts also fall into the category of similarly prohibited "intimidation." In this regard, the ICRC commentary to this article 33 is worth restating:

During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorize the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at the guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be. (Pictet, Commentary, p. 225-26.)

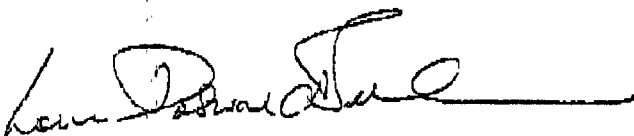
By this reasoning, the consideration that the deportation policy of Israel may be intended to deter future attacks cannot not remove it from the ambit of the proscriptions contained within article 33.

VIII. It has been suggested that the removal of Kifah Ajuri and Abd al-Nasser may be effectuated not as a transfer or deportation within the terms of article 49 of the Fourth Convention, but rather as a measure of "assigned residence", the possibility of which is envisaged under the terms of articles 42 and 78 of the Fourth Convention. Article 42 does provide that the "placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." Yet, as the ICRC commentary makes clear, the assigned residence provision is directed towards acting against persons who themselves may potentially endanger the security of the Detaining Power. Thus, the occupying power may assign residence to persons "if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage....[T]he State must have good reason to think that the person concerned by his activities, knowledge or qualifications, represents a real threat to its present or future security." (Pictet, Commentary, p. 258). Article 78, which also provides for the possibility assigned residence, is likewise limited to imperative reasons of security. In the present case, the only demonstrated nexus between the subject individuals and the security concerns is the association of the former by blood relation to alleged perpetrators of acts that have already transpired. Both articles 42 and 78 are intended to allow the occupying power to assign residency to persons who themselves may constitute a direct threat to security, whereas the intended aim of the present deportations is to deter prospective attackers from their course of conduct by placing their relatives at risk of deportation.

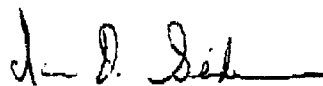
IX. Both customary human rights law and the provisions of the International Covenant on Civil and Political Rights (ICCPR) impose obligations on States vis-a-vis all persons who may come under their jurisdiction. Even under a state of emergency, a State may not derogate from its

human rights obligations in this regard if such derogating measures would be inconsistent with its "other international obligations under international law, particularly the rules of international humanitarian law." (United Nations Human Rights Committee General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, para 9). In carrying out the proposed deportations, Israel would run afoul of its international human rights obligations, including those to respect the rights to liberty and security of the person (ICCPR article 9) and the right to liberty of movement and freedom to choose one's own residence (ICCPR article 12(1)). As the UN Human Rights Committee has affirmed, "States parties may in no circumstances invoke article 4 [allowing for derogating measures] of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance...by imposing collective punishments, through arbitrary deprivations of liberty, or by deviating from fundamental principles of fair trial, including the presumption of innocence." (UN Doc. CCCPR/C/21/Rev.1/Add.11, para. 11).

Respectfully submitted,



Louise Doswald-Beck  
9 August 2002



Dr. Ian D. Seiderman