

Disclaimer: The following is a non-binding translation of the original Hebrew document. It is provided by **HaMoked: Center for the Defence of the Individual** for information purposes only. The original Hebrew prevails in any case of discrepancy. While every effort has been made to ensure its accuracy, **HaMoked** is not liable for the proper and complete translation nor does it accept any liability for the use of, reliance on, or for any errors or misunderstandings that may derive from the English translation. **For queries about the translation please contact site@hamoked.org.il**

Date: November 25, 2015
In your response please note: 37230

To:
Adv. Yehuda Weinstein
Attorney General
Ministry of Justice
29 Salah a-Din St.
Jerusalem 91010

By facsimile: 02-6467001

Extremely Urgent

Dear Sir,

Re: **Plans by the government and the security establishment to expel relatives of individuals who perpetrated attacks against Israelis to the Gaza Strip**

1. I am contacting you with respect to a measure of punishment and pressure the Government of Israel and the security establishment are considering imposing on relatives of individuals who perpetrated attacks against Israelis. We have learned from the media of a plan to expel relatives of individuals who have perpetrated attacks on Israelis to the Gaza Strip if it is revealed that they had prior knowledge of the attackers' plans or supported their actions. We request your intervention to prevent this unlawful measure.
2. It is difficult to overstate the gravity of expulsion and its fatal impact on all aspects of a person's life and rights. Expulsion means separating the expelled individuals from their families, removing them from their property, possessions, livelihoods, from their physical and social surroundings and making them vagabonds in the Gaza Strip.

The complete ban on the forcible transfer of protected persons under Article 49 of the Fourth Geneva Convention (1949)

3. The military commander's powers to order the expulsion, or deportation, of a protected person from the OPT originates in mandatory legislation, Regulation 112 of the Defense (Emergency) Regulations 1945. However, this formal power completely contradicts unequivocal international legal norms according to which the forcible transfer of a protected person from the occupied territory is strictly prohibited.
4. Article 49 of the Fourth Geneva Convention explicitly forbids the forcible transfer of protected civilians from the occupied territory, a prohibition which applies to all types of transfers: whether individually or en masse, whether from the occupied territory to the territory of the occupying power, from the occupied territory to the sovereign territory of a country other than



4 Abu Obeidah St.
Jerusalem 97200
Tel. +972.2.6283555
Fax. +972.2.6276317

شارع أبو عبيده ٤
القدس ٩٧٢٠٠
هاتف. ٦٢٨٣٥٥٥. ٠٢.
فاكس. ٦٢٧٦٣١٧. ٠٢.

mail@hamoked.org.il
www.hamoked.org.il

the occupying power or from occupied territory to occupied territory – whatever the reason.

5. The only exception to this ban allows the temporary, partial evacuation of a certain area when required for the security of the population, or for imperative military reasons. Even then, the exception allows for displacement **only within the occupied territory**.
6. The prohibition on forcible transfers is one of the gravest in the Geneva Convention and its violation is considered a grave breach under Article 147 of the Convention. This means that anyone who forcibly transfers or orders the forcible transfer of protected residents is bears international criminal liability for his or her actions, and all States Parties to the Convention must seek such persons and prosecute them irrespective of their country of citizenship.
7. The Rome Statute of the International Criminal Court also lists deportation or transfer as a war crime which comes under the jurisdiction of the court (Article 8(2)(a)(vii)). Deportations or forcible transfers on a large scale are considered crimes against humanity under the statute.

The application of Article 78 of the Fourth Geneva Convention and the changes that have occurred since the **Ajuri** judgment

8. Article 78 of the Fourth Geneva Convention allows the military commander of an occupied territory to determine that a protected person must live in a particular area within the occupied territory. The conditions for making this determination are that the person in question must constitute a threat to the security of the area and that assigning his or her residence would neutralize this threat. The military commander is prohibited from using this power in order to circumvent the provisions of Article 49 of the Convention, which prohibits the forcible transfer of protected persons.

[A]s we are dealing with occupied territory, 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.

Commentary on the Geneva Convention, Jean S. Pictet, 1958, p. 368).

9. In [HCJ 7015/02 Ajuri v. IDF Commander in the West Bank](#), [2002] IsrLR (hereinafter: **Ajuri**), the Court ruled that the orders for assigned residence in Gaza issued to the Petitioners, residents of the West Bank, met the threshold requirements of Article 78 of the Fourth Geneva Convention and were therefore lawful. The ruling relied on the finding that the Gaza Strip and the West Bank constituted a single territorial unit and therefore, the transfer of a person between these two areas did not constitute “deportation” outside the occupied territory, which is prohibited under Article 49 of the Fourth Geneva Convention (paragraphs 20-23 of the judgment).
10. As is known, dramatic changes have taken place in the political and security situation in the Gaza Strip since 2002, when the **Ajuri** judgment was

handed down. In 2005, Israel implemented the Disengagement Plan, removing the Israeli population out of the Gaza Strip and retreating its military forces into Israel.

11. Israel has since consistently held the position that the Gaza Strip is no longer under its control and that the laws of occupation no longer apply to its relationship with Gaza's residents. The Court also ruled, in a number of cases, that after disengagement, and even more so, after Hamas took power in the Gaza Strip, Gaza can no longer be said to be a territory that is occupied by the State of Israel:

[S]ince September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there.

[\(HCJ 9132/07 Jaber Al-Bassiouni Ahmed v. Prime Minister](#), paragraph 12 of the judgment).

[F]ollowing the implementation of the disengagement plan from the Gaza Strip and northern Samaria, on September 12, 2005, the GOC Southern Command issued a proclamation regarding the termination of the military administration and **since then, the Gaza Strip is no longer under "belligerent occupation" as far as international law is concerned, and Israel has no effective control over what transpires in this territory.**

[\(HCJ 5268/08 'Anbar Sager Isma'il 'Anbar et 14 al. v. GOC Southern Command](#), paragraph 6 of the judgment, emphasis added).

12. As is known, we disagree with this legal thesis, the sole purpose of which is to undercut the State's responsibility to uphold the rights of Gaza residents and allow the policy of separation between the Gaza Strip and the West Bank to continue. However, the State cannot have it both ways. If it indeed believes that the Gaza Strip and the West Bank ceased to be a single territorial unit after disengagement, then Article 78 of the Fourth Geneva Convention does not apply, as noted by the Court in **Ajuri**.
13. The outcome of all this is that **given the changes in the status of the Gaza Strip, the Ajuri ruling no longer applies**. It is impossible to argue that the military commander's decision to forcibly transfer Palestinians from the West Bank to the Gaza Strip meets the requirements of Article 78 of the Fourth Geneva Convention – and where Article 78 does not apply, the military commander's decision comes under Article 49 of the Fourth Geneva Convention which defines this expulsion as a forcible transfer and strictly prohibits it.
14. This is all the more relevant with respect to protected persons in East Jerusalem, who have residency status in Israel.

Collective punishment

15. The media reports that expelling relatives of individuals who perpetrated attacks even when they had no personal involvement in the attacks themselves, is also under consideration.
16. As is known, collective punishment is prohibited under international law, both under the laws of war and under international human rights law. The supreme principle that forbids the use of sweeping, arbitrary punitive measures that harm entire groups of people also constitutes an important part of customary international law.
17. In this context, Article 50 of the Hague Regulations stipulates:

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 and severally responsible.

Article 33 of the Fourth Geneva Convention stipulates:

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.
Pillage is prohibited

18. It should be noted, that in contrast to the interpretation given by the Court to the provisions of Regulation 119 of the Defense (Emergency) Regulations 1945, as allowing deterrence measures, such as house demolitions, even when they harm innocents, the deportation powers granted under Regulation 112 pertain only to **the actual person** whose actions may threaten the security of the area:

[T]he Respondent may not use the sanction of issuing deportation orders solely in order to deter others. Such an order is legitimate only if the issuer is certain that the candidate for deportation constitutes a threat to the security of the area and believes this measure is vital to neutralizing said threat.
(HCJ 814/88 **Nasrallah v. IDF Commander in the West Bank**, IsrSC 43(2) 265, 271).

19. The same has been held with respect to the use of Article 78 of the Fourth Geneva Convention:

[A]n essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent

person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others.
(**Ajuri**, p. 19).

Conclusion

20. If the State of Israel is, in fact, planning to use the draconian measure of expelling relatives of persons who perpetrated attacks on Israelis to the Gaza Strip, we seek your intervention to prevent its implementation, given the blatant unlawfulness of such a measure, as explained in detail above.

Adv. Anat Gonen
Legal Department
Coordinator

CC:
Minister of Defense, Mr. Moshe Ya'alon
Osnat Mendel, HCJ Department