

MERIA

JUDICIAL REVIEW OF ISRAELI ADMINISTRATIVE ACTIONS AGAINST TERRORISM: TEMPORARY DEPORTATION OF PALESTINIANS FROM THE WEST BANK TO GAZA

By Kenneth Mann*

To discourage would-be Palestinian suicide bombers, the Israeli government initiated a policy of ordering family members of those involved in terrorism to move temporarily from the West Bank to the Gaza Strip. The legal case initiated by three deportees provides an interesting look into how a democratic society balances the rights of accused to due process versus the need to provide security for citizens.

TRANSFER ORDERS ISSUED BY THE ISRAELI MILITARY

On September 4 and 5, 2002, the international press reported widely that the government of Israel had decided to expel Palestinians from the West Bank. CNN reported on its electronic web page that "Israel Deports Relatives of Terror Suspect to Gaza," and that "Israel's Supreme Court approved their expulsion." The Associated Press filed the following story on the Court's action, all or parts of which were printed in a number of newspapers across the United States:

GAZA CITY, Gaza Strip -- Israel expelled two Palestinians from the West Bank, driving them blindfolded into the Gaza Strip and leaving them at a deserted fig orchard Wednesday--the first time Israel has forced relatives of militants to leave their home areas.

Palestinian leader Yasser Arafat condemned the court-sanctioned expulsions as a "crime against humanity that violates all human and international laws."

U.N. Secretary-General Kofi Annan echoed Arafat's assessment.

"Such transfers are strictly

prohibited by international humanitarian law and could have very serious political and security implications," said Annan spokesman Fred Eckhard.

"While the secretary-general has consistently condemned suicide bombings and upheld Israel's right to defend itself, he wishes to stress that self-defense cannot justify measures that amount to collective punishments," Eckhard said.

In a ruling Tuesday, Israel's Supreme Court sanctioned the practice of expelling relatives of attackers, but only if they pose a security threat to Israel. The court approved the expulsion of Intisar and Kifah Ajouri, siblings of bomb expert Ali Ajouri, but overturned an order against a third person.(1)

PROCEDURAL DISPOSITION OF CASES FILED AGAINST TRANSFER ORDERS

The Israeli government had long considered the possibility of temporarily deporting family members of West Bank terrorists to Gaza. Although some cabinet members opposed this policy, the new spate of attacks in the Spring of 2002 and

the heightened public criticism against the government for not acting forcefully enough against terrorism prompted the Security Cabinet to decide to apply the temporary deportation policy in selected cases in order to test the plan and possibly also to send a warning to the Palestinian leadership.

Following the Security Cabinet decision, the military commander of Judea and Samaria (the southern and northern sections of the West Bank, respectively) amended a military proclamation granting the military authority to issue transfer orders, what came to be called in the official proceedings orders of "assigned residence."⁽²⁾ Under the particular scheme chosen, the assignment of residence would be made through an order that would compel a person to leave the West Bank and move to Gaza for a specified period of time. On the very day that this new proclamation was issued, the military commander of Judea and Samaria delivered personal transfer orders to three named Palestinians. The orders required them to move their residence from the West Bank to Gaza for a period of two years, and also notified them that the orders had to be reviewed by the military every six months. Under the terms of the orders, the Palestinians would be permitted to return to the West Bank after two years, or earlier if at one of the periodic reviews the order would be revised, shortening the period.

The three Palestinians filed appeals with the Military Appeals Committee, who heard testimony and oral argument. Immediately after the appeals were rejected, the three Palestinians filed petitions asking the Supreme Court to invalidate the personal orders issued against them, as well as the general empowering proclamation. The petitioners were represented by attorneys employed by two Israeli NGOs that have

long been active on issues of human rights in the Occupied Territories--the Association for Civil Rights in Israel and the Center for the Protection of the Individual. Justice Dorner of the Supreme Court issued a temporary restraining order, preventing the carrying-out of the transfer orders until the Supreme Court heard full argument.

POLICY CONSIDERATIONS

From the point of view of the Israeli Security Cabinet and the military, the idea driving the new policy of temporary transfer was that family members create support networks for terrorists. Security Cabinet members argued that it is unreasonable for the government not to take some form of action against such family members. The military argued that the proposed plan would create both a preventive and a deterrent impact: it would prevent the named individuals from continuing to create security risks, and it would deter other families from doing so in the first place. Knowing that their families could be removed from their homes and transferred out of the areas in which they lived, Palestinian radicals would be less likely to engage in terrorism. Knowing that they could be removed from their homes and transferred, family members would be more likely to attempt to influence a family member not to engage in terrorism, or less likely to acquiesce passively in his or her activities.

The new policy was based on the assumption that terrorists are not isolated from their communities, but rather integrated into them, receiving varying kinds of support and encouragement from family and friends. Families and friends personally witness terrorists' preparatory activities or receive first-hand information from others about the preparatory actions undertaken by terrorist family members. Those Palestinians who become terrorists

continue to live within a network of family members, extended family members and associates. Some of the family members only know of the potential perpetrator's intention to carry out a terrorist act, while others aid and abet the potential and actual terrorist in more or less active ways. The Israeli military argued that if the spread of sanctions were broader, there was a possibility of undermining the subculture of facilitation that supports many terrorists acts.

LEGALITY OF THE POWER TO TRANSFER RESIDENTS OF OCCUPIED TERRITORY

Through a line of precedents raising many issues about the lawfulness of military action in the Occupied Territories, the Supreme Court of Israel has decided over the years that it would refer to customary international law as a measure of the legality of actions carried out by the Israeli military in the Occupied Territories, particularly actions that could impinge on the human rights of the residents of the Territories.⁽³⁾ Part of that customary law is understood to derive from the principles and rules of "belligerent occupation," a body of law recognized by nations over many years as creating legal norms for the regulation of the activities of an occupying power.⁽⁴⁾ In the present instance, the Court first had to decide whether the legal norms of belligerent occupation empower a military commander to issue a general enabling rule authorizing the temporary transfer of residents of Occupied Territories from their homes to another part of the Occupied Territory.

A determinative question for the Court was whether the type of transfer order issued by the army is encompassed by Article 49 of the Fourth Geneva Convention, which states that "[i]ndividual 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," or whether it is encompassed by Article 78 of the Fourth Convention, which states that "[i]f 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 internment." Was the planned temporary transfer an act of "forcible transfer" or "deportation" under Article 49, or was it a case of "assigned residence" under Article 78?⁽⁵⁾

Counsel for the petitioners argued that "[t]he prohibition [in Article 49] applies to every type of compelled transfer, in respect to individuals and groups, from the occupied territory to the occupier's territory, or to every other sovereign territory outside of the occupier's territory, and also within the occupied territory itself, whatever its motivation."⁽⁶⁾ Petitioners emphasized that a transfer order for "imperative security reasons" would be valid only if the person subject to the order created a serious security risk for the occupier. Drawing on this limitation, counsel argued that there was no basis for transferring the family members against which the orders had been issued in these cases. It was not enough, so the petitioners argued, that transfer of a terrorist's family member create a deterrent force against the actions of potential terrorists who might refrain from their activity to protect their parents or siblings from transfer out of the West Bank to Gaza.

After reviewing the decisions of the Appeals Committees, and considering the arguments of the petitioners, the Supreme Court rejected the view that the orders come within the ambit of Article 49, which strictly prohibits transfer and deportation, and said that the transfer

intended in the instant cases was covered by Article 78. The Court reasoned that because each of the Articles was concerned with the act of transferring residents of an occupied territory, it was enough to determine that the latter Article, which permits transfer, applied to the situation at issue, that being equivalent, in its view, to deciding that the former Article, which prohibits transfer, is inapplicable.

The military commander claimed to have used the power under Article 78 and thus the question for the Court was whether that Article, which permits "assigned residence" properly fit the situation to which it was applied. The correct characterization of the military order was of course not only dependent on the intention of the military commander, but also on the objective nature of the order. With respect to this question, the critical issue was whether the order required a person to change residence within the Occupied Territory or whether it forced a person to change residence by moving outside of the Occupied Territory. In the latter situation, the order would more properly fit within Article 49, and would thus probably be illegal under international law. The answer to this question hinged on whether the West Bank and Gaza constituted one Occupied Territorial entity or two different and separate Occupied Territorial entities.

TRANSFER OUT OF THE WEST BANK

The petitioners argued that even if a security-related transfer order were legal, the geographic scope of that order had to be limited to the change of residence within the West Bank. According to this line of argument, any compelled transfer out of the West Bank was tantamount to an order of deportation under Article 49, because the West Bank and Gaza are not the same territory.

Three factors seemed to support the petitioners' view on this issue. First, historically, the West Bank and Gaza were considered completely different political entities. Before the 1967 War, the West Bank had been under Jordanian rule. Jordanian law was applied to the area, and most West Bank Palestinians held Jordanian citizenship. Even after Israel captured and occupied the area in 1967, Jordanian law continued to apply, under the principle requiring retention of the ousted sovereign's law, so long as the territory remains occupied. Gaza, in contrast, had been under Egyptian control until the war of 1967, and Egyptian military law had applied there. During the period of the Israeli Occupation, Israel continued to apply Egyptian law, again under the concept of local law retention applying to occupied territory. From an historical point of view, the two areas were separate and distinct.

A second factor lending support to the petitioners' argument is the geographic separation between the two areas. The two regions are noncontiguous; the Gaza Strip is a swath of coastal land bordering Israel to the west, while the West Bank, so called because it sits on the west bank of the Jordan River, borders Israel to the east. At no geographic point do the areas have physical contact with each other. Throughout the entire period of the Israeli Occupation, most Palestinians have had to have permits to pass from one of the areas to the other. For a brief period of time, a policy of "safe- passage" was adopted by the Barak government, whereby even "security risk" people could travel back and forth on buses, in convoys, with Israeli military escorts. It should also be noted that the Barak government contemplated an elevated highway linking the two areas. However, during periods of tension, each area was virtually inaccessible to residents of the other area, and at other times the safe-

passage plan operated intermittently and for short periods only.

The third factor supporting the petitioners' argument is the significant cultural differences between the two areas. West Bankers and Gazans have long considered themselves to belong to two different subcultures within which there are distinct differences in family ties, education, religion and local political hierarchies. The extended families of the West Bankers lie in geographically contiguous Jordan, not in Gaza. West Bankers view Gazans as inferior in terms of education, intellectual achievement, and professional training. Gazans, however, view themselves, and are also viewed by West Bankers, as politically savvy and more deeply immersed in the historic struggle to "liberate" Palestine. Animosity and jealousy are recurrent themes in the relations between West Bankers and Gazans.

In contrast to the above, the military argued that beginning with the Israeli-Palestinian Oslo Peace Accords (1993), the West Bank and Gaza were viewed as one entity; the two areas, argued the military, were treated as one political entity both by the Palestinians and the Israelis in all of their political and economic contacts. The Court agreed with the government on this issue, writing in its opinion that:

The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. Thus, for example, our attention was drawn by counsel for the Respondent to the provisions of clause 11 of the Israeli-Palestinian Interim

Agreement on the West Bank and the Gaza Strip, which says:

"The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement.'⁽⁷⁾

Agreeing with the military that the West Bank and Gaza constituted one unified Occupied Territory meant that the transfer order was an order for movement within the Territory, rather than out of one Occupied Territory and into another Occupied Territory. The Court found that there was thus no reason at all to conclude that Article 49's prohibition on deportation applied to the transfer authority created in the military proclamation at issue. Basic legal authority for making a transfer, that is for "assigning residence," existed in the Fourth Convention and could be used in the Israeli Occupied Territories. The question then was whether the military could use that power to transfer family members of suspected terrorists. For the Court, this was a question of whether the transfer orders passed the test of reasonableness.

REASONABLENESS OF THE TRANSFER ORDERS

The court could have ended its judicial review by deciding that the military had the authority to transfer Palestinians from their West Bank homes. The Court could have concluded that the question of whether that authority was being applied correctly by the military in a specific case is not within its jurisdiction, because a court, so the argument would go, does not sit in judgment of specific military actions at a time of war or other military conflict. According to this view, the role of the court is to decide only if the military has authority to undertake the action in question, not whether the

military's actions in specific cases were justified. Consistent with its expansive view of justifiability, the Court rejected that narrow view of judicial capacity and asked whether the transfer power as used in these cases lies within the boundaries of reasonableness that limit the authority of administrative agencies.

The second level of review stems directly from the Court's longstanding attitude that the military, as an agency of the state, is subject to legal norms of reasonableness. While the standard of review of reasonableness may change according to the subject under review, there is little possibility under Israeli law to escape some measure of judicial testing of reasonableness. The rule of reasonableness is regarded by the Court as a universal rule of judicial review of agency action, including the actions of the military as an agency of the State.⁽⁸⁾

What is the meaning of reasonableness in the context of the power to compel transfer of Palestinians to leave their homes in the West Bank and temporarily live in Gaza? It was absolutely clear from the outset that the Court would not permit arbitrary use of the transfer power. There had to be some rational link between the use of the transfer power and the obtainment of a legitimate end. The end desired by the government--preventing terrorism--was well-defined, and its legitimacy was beyond doubt. What then could be a specific and defined use of the power to transfer residents that would have a rational relationship to the end sought?

In fashioning a substantive test for the military's action in these cases, the Court considered first a test of reasonableness that coupled a factual requirement of knowledge to a "duty of prevention." Under this definition, transfer could be used against any person who had knowledge of another person's intention to carry out a terrorist act, as long as the act was in fact carried out, and the person

with prior knowledge failed to take steps to prevent it. This definition would include, in many instances, family members--mothers and fathers, sisters and brothers, but also additional associates of the terrorist. Arguably, this would not be an arbitrary use of power, because it would establish a close connection between ends and means by balancing the potential harm caused to innocent family members against the gravity of the injury that could be deterred by such preventative measures.

The absence of arbitrariness would be supported by the fact that Israel prosecutes, even though infrequently, Israeli citizens who know of plans to commit felonies but fail to take action to prevent their commission. The general criminal law relies on two justifications for imposing a sanction on a person who knows of any impending felony but fails to take action to prevent it: first, the person deserves the sanction for his or her blameworthiness in failing to act, where action might have saved life and limb. Second, punishing such a person will deter others from remaining passive when they could act to prevent serious bodily injury. The Court could have said that if an Israeli citizen can be imprisoned for not taking steps to prevent a murder, a resident of the Occupied Territories can be compelled to leave his residence in the West Bank and move to Gaza for a defined period of time for failing to take action to prevent the commission of a terrorist act. Yet, the Supreme Court rejected this notion of a broad power to transfer as a rational means to obtain the end goal of preventing terrorism.

The Court defined a more demanding and rational relationship between means and ends; it required as a precondition to the issuance of a transfer order production of evidence of personal participation in the network of support given to the terrorist himself or herself by the person subject to the sanction. In

asserting this precondition to this particular use of the transfer power, the court drew on its own caselaw that previously made the important distinction between preventive and deterrent sanctions. Under the Court's jurisprudence, the essence of a preventive sanction is that it is addressed to a proven source of danger--an individual against whom evidence of dangerousness has been presented and a determination of actual dangerousness made. In contrast, a deterrent sanction addresses a general population within which it is assumed that there is a statistically supported latent danger, but imposition of the sanction is not based on proving the dangerousness of any particular individual.

The Court said that in this regime of sanctions, it is not enough to show that imposing a sanction on certain individuals will create an effective deterrent against transgressions by others; a deterrence rationale will not meet the criterion of reasonableness with respect to use of the power to transfer residents of the Occupied Territories. It must be shown that the particular person presents a risk, a risk that his or her own actions will endanger the security of the area in the future, so that the transfer of this person to a new residence reduces the likelihood that he or she will undermine security in the area. In this part of its opinion, the Court thus agreed with the position taken by the petitioners' counsel, that Article 78 could not be applied without proving the particular person's dangerousness. For this reason, and on this issue, the differences between the petitioners and respondents would turn on the facts: Did the military establish that the persons against whom the orders were issued constituted themselves a threat to security?

To meet the Court's requirements, the military had to present evidence of the petitioner's involvement in terrorist activities. The military had to

demonstrate that the person subject to the order in some way collaborated in the terrorist act committed by the family member. This notion of reasonableness entails not only a future-looking rational connection to prevention *vis-a-vis* the person subject to the order, but also elements of blameworthiness and just desserts. The person against whom the order is issued is not just dangerous because of his or her character or previous bad acts; dangerousness arises out of a past voluntary decision to take part in the support network of terrorism. The Court required active support, not just passive knowledge. The Court declared:

One may not assign the place of residence of an innocent family member who did not collaborate with anyone... [T]his is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror.(9)

The question addressed by the Court was then, what is the degree of involvement of an associate with a principal that will allow the military to reasonably exercise its power to issue transfer orders. The Court's answer to the question set an evidentiary limitation on the actions of the military in carrying out a transfer order, applying the abstract and general norm of "involvement" caustically to the facts of the cases of the three Palestinians who petitioned the court.

With respect to the first petitioner, Amtassar, a sister of a terrorist, the Court said:

[Amtassar] knew that her brother was wounded when he was engaged in preparing explosives, and prima facie she also knew that her brother was armed and had

hidden an assault rifle in the family apartment. [The Appellate Committee found] that ...[Amtassar] aided her brother by sewing an explosive belt....this was a case of 'direct and material aid in the preparation of an explosive belt, and the grave significance and implications of this aid were without doubt clear and known [to the petitioner].(10)

With respect to the second petitioner, Kifah, a brother of the same terrorist, the Court noted:

[Kifah] admitted that he knew that his brother was a member of a military group that was involved 'in matters of explosions.' He also said that he saw his brother hide a weapon in the family home under the floor, and that he had a key to the apartment in which the group stayed and prepared the explosive charges... [Kifah also] said in his police interrogation that he acted as look-out when his brother and members of his group moved two explosive charges from the apartment to a car that was in their possession. On another occasion... he saw his brother and another person in a room in the apartment, when they were making a video recording of a person who was about to commit a suicide bombing, and on the table in front of him was a Koran. [He] said in his interrogation that he brought food for his brother's group.(11)

The Court found with respect to this petitioner that:

[Kifah] helped his brother, and he is deeply involved in the grave terrorist activity of that

brother...Particularly serious in our opinion is the behavior of [this] petitioner who acted as a look-out who was supposed to warn his brother when he was taking part at that time in moving explosive charges from the apartment where he was staying... By this behavior ... [Kifah] became deeply involved in the grave terrorist activity of his brother and there is a reasonable possibility that he presents real danger to the security of the area.(12)

The Court found that the Military had met the evidentiary burden with respect to the first two petitioners. With respect to the third petitioner, Abed, a brother of a different terrorist, the Court stated:

[Abed] admitted that in this interrogation (on 28 July 2002) that he knew that his brother was wanted by the Israeli Security Forces for carrying out the attack on Yitzhar [a Jewish Settlement in which two Israelis were murdered]. [He] said that he gave his brother food and clean clothes when he came to his home, but he did not allow him to sleep in his house. He even said he gave his private car on several occasions to his brother, although he did not know for what purpose his brother wanted the car.... On another occasion, he drove his wanted brother to Schem (Nablus), although on this occasion too [he] did not know the purpose of the trip. [He] also said that he saw his brother carrying an assault rifle.... [Abed] told the police that he drove his brother to the hospital when he was injured in the course of preparing an explosive charge and he lent his car--on another

occasion--in order take another person who was injured while handling an explosive charge.(13)

In respect to this petitioner the Court found that the Military had not met the required burden of proof. The Court said:

Admittedly, [Abed] was aware of the grave terrorist activity of his brother. But this is insufficient for assigning his place of residence. The active deeds he carried out, in helping his brother, fall below the level of danger required under the provision of art. 78 of the Fourth Geneva Convention... His behavior does not contain such a degree of involvement that creates a real danger to the security of the area, thereby allowing his place of residence to be assigned.(14)

Further, the Court stated:

It should be noted that we think that the behavior of [Abed]--even though it derived from close family ties--was improper. It is precisely that help that family members give to terrorists that allows them to escape from the security forces and perpetrate their schemes. Nonetheless, the mechanism of assigned residence is a harsh measure that should be used only in special cases in which real danger to the security of the area is foreseen if this measure is not adopted.[cites omitted](15)

In the application of the general principle of involvement to these three petitioners, the Court elaborated on the nature of the factual picture that would constitute a reasonable, that is rational, basis for the use of the transfer power. The Court held that one family member's prior

knowledge of another family member's intention to carry out a so-called "successful" terrorist activity is not sufficient grounds to carry out a transfer order. In one of these matters, the Court found that even prior knowledge of a family member's intention to commit a terrorist act joined by active assistance to the family member in meeting his food and housing needs, at a time when it was clear that the family member was a fugitive terrorist and may be preparing new terrorists acts, would not constitute sufficient grounds for affirming a transfer order. In each of the two orders that the court affirmed, the family members had been substantively "involved" in the terrorist act or acts committed by a family member. In one the family member had acted as a look-out; in the other, the family member had sewn the explosive belt worn by a suicide terrorist.

ASSESSING A COURT'S ROLE IN REVIEWING ACTIONS OF OTHER BRANCHES OF GOVERNMENT

To what extent does the Supreme Court of Israel act as a counterforce to questionable Israeli military activities? Does the Court restrain the army's activities when they act excessively, or does it give constitutional and administrative affirmation to all of the army's activities?

Any answer to this question must presuppose a theory of assessment: how does one assess the role of a court in constitutional-type litigation. One possible way to measure a court's role is to determine whether the court properly finds and applies the law. From this perspective, a critique of a court's role would require obtaining a firm grasp on the substance of the law on the issues in question, comparing the court's decision to the legal standard. Another way of critiquing a court's role is to attempt to determine whether the court made a

moral decision, or in other words, whether the Court found and applied a highly regarded moral norm about the conduct of the government in regard to the questioned activity. If one can identify a moral norm about which there is a broad and clear consensus, a moral evaluation can lead to a determinant assessment of the correctness or incorrectness of a court's decision. Often however, a strong consensus around a definite moral norm is absent, a fact that pulls toward reliance on "what is the law" in order to find a recognized measure upon which to evaluate a court's work.

Still another way of looking at the role of a court is to attempt to assess the extent to which the court actually sets boundaries around the authority of other institutions. This perspective looks at a court as one policy-influencing institution in the larger context of governmental institutions that make and carry out policy. Courts, as agents in a larger institutional context, strive to exercise influence over other institutions--the measure of a court's effectiveness being the extent to which it is successful in influencing other institutions. This perspective on the role of a court defines the court as a representative of a cluster of values which are distinctive to judicial institutions, while it emphasizes the court's need to negotiate and maneuver *vis-a-vis* other institutions of authority within the larger political arena of which it is a part. Here the core question about a court is not whether it accurately applied the substantive law on the issue in question, or whether it chose the morally correct position, but whether, in its ongoing negotiations with other institutions, it takes the most affirmative positions possible in advancing, *vis-a-vis* the other institutions, values which are distinctive to it as a judicial institution. Within this framework, the question of whether a court has given the best possible decision in any particular case at any particular

time has to be assessed not only in connection with the case at hand, but also in connection with the continuing role of the court *vis-a-vis* the executive and the legislature in the dynamic political setting in which it operates.

If we ask only the question of whether the Court influenced another branch of government, then the answer provided in this case is clearly in the affirmative. The Supreme Court of Israel limited the power of the executive branch by issuing a decision which prevents the military from executing a policy that it would choose to carry out but for judicial review. This is not to say that the Supreme Court of Israel always takes this role, but we do have a case in point from which we can say that it sometimes plays this role. Assuming that the government and military seriously entertained using the power of transfer against family members who only had knowledge of the terrorist activities of another family member, then the Court's action will result in the military abandoning this part of its plan. In this context it is important to take note of the post-decision response of unnamed military sources who spoke with Israeli reporters about the Court's decision. On September 4, 2002, the day after the decision, the following story appeared in Ha'aretz, a reliable Israeli daily:

Persons in the Security Establishment [said yesterday] that they desire to deport [le'gareh, k.m.] in the future additional family members of terrorists, even while they heaped stiff criticism on the part that [government] legal counsel took in the recent cases. Senior security personnel said that the entire procedure [the planning for and executing of the transfer sanctions] absolutely missed the point, and departed from the main

objective.' In their words, Israel wanted to deport to Gaza family members of suicide terrorists, in order to produce 'a system of deterrence that will put at stop to the phenomenon of suicide missions.'

The sources said, that from the moment it was decided that only persons who were actually involved in terrorist acts can be deported (but not those who only knew about the act) [in original], then 'the whole thing lost its justification, because those people, we can charge with a crime and put them on trial in Israel'.(16)

Should the Court have done more? Was it right to allow the military to transfer from the West Bank to Gaza the Palestinians determined to be both involved in the terrorist act of their brother and dangerous, or should the Court have prohibited the use of the transfer sanction against these Palestinians from the West Bank to Gaza? One can ask why the military did not bring these people to trial in a criminal court. It is quite clear that the military commander was empowered to criminally charge the persons against whom the orders of transfer had been made. In both cases, counsel for the military commander stated that she either lacked the necessary evidence to carry out a criminal trial or was unable to present such evidence in an open court, making impossible or impractical the issuance of criminal charges against these petitioners. In both cases, the Court accepted the military's explanation that its inability to bring to a courtroom the persons who supplied the information about the petitioners' activities prevented them from pursuing a criminal proceeding.

If the military could not conduct a criminal trial, was it right for the Court to

allow the military to use a transfer order rather than keeping the petitioners in administrative detention, that is under arrest without trial for an indeterminate period of time, with administrative and judicial review occurring periodically?

The Court found only a small amount of interpretive law relevant to the meaning of the term "assigned residence" under the Geneva Conventions. This meant that the Court had to make its own first impression interpretation in order to determine whether the type of transfer of residents of an occupied territory defined in Article 78 is the type of transfer that the Israeli military had used in its proclamation and personal orders. In this situation, the judicial work of interpretation caused the court to rely on broad interpretive tools--including analogous precedent, context, legislative intent, as well as the Court's own notion of what the appropriate humanitarian rule should be, given the fact that it was, after all, interpreting a quintessential humanitarian law, the Geneva Conventions.

One could argue that there were strong grounds upon which the Court could have relied to decide that the transfer orders from the West Bank to Gaza were not included in the type of transfer that can properly be inferred from the term "assigned residence" under Article 78. These grounds all derive from the symbolic meaning of "transfer" within the Palestinian community and with the lack of proven necessity, from a security perspective, for using the West-Bank-to-Gaza mode of transfer, as opposed to transfer within the West Bank or administrative arrest.

In choosing the transfer policy, the Security Cabinet and the military had to know that the sanction of temporary transfer would have a substantially strong impact on Palestinians because of the particular way in which the term transfer would be perceived. Much of the heated

controversy over this policy, amongst Israelis as well as Palestinians, has to be attributed to the fact that the history of Israeli-Palestinian relations is burdened by pictures of Palestinians leaving their homes during successive military conflicts over territorial rights. The term transfer connotes the uprooting of families, destruction of communal life, and forcible removal of persons in order to create the State of Israel. It is also associated in the minds' of Palestinians with the political platform of Israel's extreme right-wing parties that advocate transfer of the Palestinians en masse out of the West Bank. Whatever distortions of history there may be in Palestinian notions of transfer, the Cabinet and military planners who approved the new policy understood that Palestinians would view transfer through a tragic set of lenses and that it would stimulate deep-seated anger.

There may have been those who thought that while the legal justification for such a sanction could be formulated in terms of prevention, Israel's taking advantage of Palestinian sensitivities to the idea of transfer was an appropriate punishment for families of terrorists and for the Palestinians generally who identify with the actions of terrorists. Some of these policymakers may also have liked the idea that the media, politicians and commentators would use the terms "deportation" and "expulsion" for what the court called assigned residence, and that would cause some Palestinians to think that the Israeli government was permanently deporting Palestinians from the West Bank.. The Court could have found that it was the intent of the military to use the transfer sanction because of its symbolic meaning in the Palestinian community, and that absent any proof of necessity to transfer the petitioners from the West Bank to Gaza, transfer out of the West Bank was an unreasonable use of power to obtain a

legitimate end. The Court could have made this finding even without determining that the government intended this result.

In light of this background, was the Court's affirmation of the use of the transfer sanction--a temporary transfer of Palestinians family members involved in the terrorist acts of other families members from the West Bank to Gaza--an appropriate decision? The answer to this question is that it is neither appropriate or inappropriate standing by itself, isolated from the larger picture of institutional maneuvering for power. The Court exercised substantial influence over the military's activities in the West Bank, putting up a bar to the military's plan to transfer families of terrorists based on their knowledge of the terrorist activities of a family member. The question of whether the Court should have prevented use of the West-Bank-to-Gaza transfer authority altogether requires not only a position on the law and moral aspects of the case, but also an assessment of the long-term impact of such a decision on the ability of the Court to continue in the future to review, critique and invalidate actions of the government in general and the military in particular.

For those who have a negative view on the type of transfer power approved in this Court decision, the job of critiquing the Court is not simply to say that the Court was wrong in its legal-moral interpretation of the statute. From the perspective presented here, one must also be convinced that the Court underused its potential power, and that a decision to prohibit transfer in all of these cases would not have had serious negative consequences for the Court's continued role as a checker and balancer, and boundary-setter for the other institutions of government.

Assessment of the potential institutional impact of any court decision affecting fundamental rights requires

extensive empirical inquiry. The critic should assess the impact of previous sensitive decisions on the legislature and the executive, the legislature's and the executive's responses to those decisions and, in turn, the impact of those responses on the Court's legitimacy in such matters. The critic should attempt to assess what would have been the institutional consequences for the Court of a decision to entirely prohibit transfer. The critic should also assess what cases the Court is expected to hear in the future, and whether protecting the Court's role now is important as a strategy for its ability to give future sensitive decisions.

In Israel, rightwing parties have been attacking the Supreme Court of Israel for several years, and the Court recently survived a series of attempts to deprive it of the jurisdiction it now exercises over fundamental questions of state power. Political parties have attacked the Court for its intervention in religious affairs, and for decisions affecting other fundamental rights. In particular, the Right in Israel has vehemently attacked the Court for three recent decisions, one prohibiting the use of torture in interrogation of security suspects, another compelling release of Lebanese citizens taken hostage and imprisoned for years in anticipation of their exchange for captured Israeli soldiers, and a third striking-down a long standing administrative rule preventing the sale of housing rights in certain Jewish settlements to non-Jews. Taken together, these decisions caused leaders of adverse political organizations, including political parties represented in the legislature, to call for the creation of an alternative constitutional court, "more representative in nature," to consider questions of fundamental rights.

In these particular transfer cases, the government wanted the Court to approve the transfer of Palestinian family members without proof of their

involvement in terrorist activities. On the other hand, some Israeli politicians and rights' activists strongly preferred to see the Court prohibit such transfers completely, going further in setting limitations on government sanctions. Given the balance of political powers in Israel and the capabilities of government officials to hurt the Court in different ways, including through budget restraints, there were very substantial risks for the Court in deciding these cases.

Based on what we can know about the Court's institutional vulnerability, the decision in these cases should be viewed as assertive rather than deferential. The Court's decision is value-assertive, putting it in the role of institutional leader on the issue of where and when temporary transfer is a legitimate sanction. As shown here, the decision substantially limited the transfer sanction to a discrete population of morally culpable individuals, rather than families with passive knowledge. The particular cases here lay in a zone of ambiguity for the Court when the petitions were filed. There was good reason to try to convince the Court to prohibit transfer without exception. The decision finally arrived at sought a moral balance; it set real limits on the military, putting the Court into an important role as boundary-setter in the larger structure of institutional policy makers, but also permitted assigned residence in circumstances of moral responsibility. The decision exposed the Court to criticism from other branches of government. But given the respect that the Court has within the elites of Israel as well as in the broader population, the Court could absorb the criticism, just as good shock-absorbers allow high quality vehicles to go forward even though the road may be quite bumpy.

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NOTES

1. Ibrahim Barzak, Associated Press, September 4, 2002.
2. High Court of Justice 7015/02, p. 7 [September 3, 2002] as published in [2002] IsrLR p.1. All future reference to this decision are noted as HCJ 7015/02.
3. David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (Albany, NY: State University of New York Press, 2002).
4. See, Eyal Benvenisti, The International Law of Occupation (Princeton, NJ: Princeton University Press, 1993).
5. See, Jean S. Pictet, The Geneva Conventions of 12 August 1949 and Commentary (Geneva: International Red Cross, 1952-1960).
6. Brief for the petitioners, on file with the author.
7. HCJ 7015/02, p. 17.
8. HCJ 7015/02, pp. 24-25.
9. HCJ 7015/02, p. 24.
10. HCJ 7015/02, p. 26.
11. HCJ 7015/02, p. 28.
12. HCJ 7015, p. 29.
13. HCJ 7015/02 p. 30.
14. HCJ 7015/02 p. 31.
15. HCJ 7015/02 p. 31
16. Ha'aretz (Hebrew), September 4, 2002.