

Case Review: *Ajuri et al. v. IDF Commander in the West Bank et. al.*¹

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In the Spring of 2002, contingents of the Israel Defense Forces (IDF) reoccupied most of the West Bank area in an attempt to quell the rising tide of attacks against Israeli civilian and military targets, including suicide bombings in Israel. This occupation could not seal the boundaries hermetically, and as summer approached, these attacks resumed. It was apparent that the phenomenon of suicide bombings was supported, even lauded, by many in the Palestinian population under this new occupation and that the standard military response to the bombings – demolition of the home of the terrorist and his/her family – is not an effective deterrent. Hence the Military Commander of the West Bank decided to resort to what he thought would be a more effective deterrent: deporting, from the West Bank to the Gaza Strip, the family members of terrorists involved in suicide attacks or other serious attacks. The military order he issued, after consulting with Israel's Attorney General, included an important caveat: the order would be applicable only to family members who were actually involved in the relevant terrorist activity. The order referred to this measure not as "deportation", which is illegal under Article 49 of the 1949 Fourth Geneva Convention, but, rather, as "assigning a place of residence," which is permitted under Article 78 of the Convention. This general order established the procedure by which specific "assignment" orders would be issued.

Under the authority granted him by the general order, the Military Commander issued three specific orders vis-à-vis the petitioners in the *Ajuri* case, three family members of terrorists, requiring them to reside in the Gaza Strip, because, as stated in

¹ HCJ 7015/02 *Ajuri et al. v. IDF Commander in the West Bank et. al.* Translation available at <<http://62.90.71.124/mishpat/html/en/system/index.html>> Israel High Court of Justice, September 3, 2002.

the orders, this was “essential for decisive security reasons, and because of the need to contend with acts of terror and their perpetrators.” The orders were to be valid for two years. According to the Military Commander, each of the petitioners had assisted family members in terrorist activity that had resulted in human casualties. In his view, “assigning” the Gaza Strip as the petitioners’ place of residence would prevent them from posing any danger and deter others from similar activity.

In their petition before the Israeli High Court of Justice, the petitioners made both a general claim against the legality of the measure and specific claims against each of the three specific “assignment of residence” orders. The Court decided to increase the panel from three to nine judges, an extraordinary step indicating the importance the original panel attributed to the legal issues raised. In his opinion, joined by the rest of the panel, Judge Aharon Barak, President of the Court, upheld the general order as valid under international law and Israeli law, but did accept the specific claim of one of the three petitioners. The practical effect of the decision was to render the measure of deporting/assigning new residence ineffective.

The general arguments against the measure focused on two issues: first, the authority of the West Bank Military Commander to issue orders concerning the Gaza Strip, the area to which the individuals were to be assigned residence and which is outside his jurisdiction; and second, the lawfulness of a measure that removes “protected persons” from their homes, to which the petitioners referred as illegal deportation. Given the Court’s past ruling that deportation of individuals is not in violation of Article 49,² it is significant that neither the Military Commander nor the Court invoked the Article. Since in the past, the Court had not ruled deportations to foreign countries such as Jordan or Lebanon to be illegal, a-fortiori, there should not

² HCJ (High Court of Justice) 785/87 Affu et al. v. Commander of the IDF in the West Bank et al. 42 (2) P.D. (*Piskei Din, lit. Judgments*) 4 (1988), *trans. in* 29 I.L.M. 139 (1990).

have been any legal barrier to deporting the petitioners to the Gaza Strip. But in its opinion, the Court hints that Article 49 “prohibits the forcible transfer or deportation” without adding any qualifications.³ In another context, the opinion refers to internment and assigned residence as “the most severe and serious measures that an occupying power may adopt against protected residents.”⁴ Although there is no explicit concession that individual -- and not only mass -- deportations are prohibited under Article 49, one can infer that the wide and consistent criticism directed at the Court’s previous interpretation of the Article did leave its mark and ultimately convinced the Court to change course.

To avoid the pitfall of Article 49 and to support the “assignment of residence” thesis, the Court needed to find a basis for the authority of the Military Commander of the West Bank to issue orders in relation to the Gaza Strip, which is outside the Commander’s effective control and subject to a different command structure. In other words, the Court needed to find that: a) the Gaza Strip is occupied by the IDF (and governed by the IDF Military Commander of the Gaza Strip) and b) the Military Commander of the West Bank has authority to assign residence in that area.

Under international law on belligerent occupation, the commander of an occupied territory has authority only in the area under its effective control and not beyond that.⁵ An area is deemed occupied to the extent that it is under the effective control of the occupying army.⁶ The Court seems to acknowledge this when it remarks that, “IDF forces entered many areas that were *in the past* under its control by virtue of belligerent occupation and which were transferred pursuant to agreements to the (full

³ Para. 17 of the judgment.

⁴ Para. 24 of the judgment.

⁵ Article 42 of the 1907 Hague Regulations provides: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

⁶ See Eyal Benvenisti, *The International Law of Occupation* (1993) Chapter 1.

or partial) control of the Palestinian Authority.”⁷ In other words, when and where authority was transferred to the Palestinian Authority, the occupation of those areas by the IDF ended.⁸ But while the West Bank was reoccupied by the IDF during the Summer of 2002, the IDF did not enter Palestinian-controlled areas in the Gaza Strip. Hence, these areas in the Gaza Strip must be deemed unoccupied. The Court, however, does not consider itself obliged to examine this question. Instead, it refers to the parties’ assumption that “in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law concerning belligerent occupation apply.”⁹ However, a close reading of the petitioners’ briefs suggests that while they did not assert explicitly that the areas to which the petitioners were “assigned residency” were unoccupied, the petitioners did argue that the IDF Military Commander of the Gaza Strip had no authority or “sovereign authority” and the most he was authorized to do in terms of controlling movement was to prevent Palestinians from entering IDF-held areas.¹⁰

In ruling that the Military Commander of the West Bank did, indeed, have the authority to assign residence outside its area of effective control, the Court highlighted the socio-political similarities between the two areas and downplayed the legal-bureaucratic differences, namely, the existence of two distinct structures of governance based on two different legal systems.¹¹ The Court refers to the shared historical status (“the two areas are part of mandatory Palestine”) and the “social and political viewpoint” held by all concerned (the Palestinian Authority included), that

⁷ Para. 3 of the judgment. Emphasis mine.

⁸ This argument is developed in Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297 (1994).

⁹ Para. 13 of the judgment.

¹⁰ Para. 54 of the Association for Civil Rights in Israel Brief, Petitioner No. 3. The Center for the Protection of the Individual, another petitioner, equated the order to an order assigning the petitioners to reside in Birmingham, England (para. 82 of their brief).

¹¹ See Benvenisti, *Law of Occupation*, *supra* note 5, at 109-112.

conceives the two areas “as one territorial unit, and the legislation of the military commander in them ... [as] identical in content.” In addition, the Court emphasizes the Israeli-Palestinian agreements that “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” and that call for the establishment of a “safe passage” between the two areas. In a logical leap from the matter of the authority to issue orders to the matter of the contents of those orders, the Court focuses on Article 78 of the Fourth Geneva Convention, whose purpose, per the Court, is to “restrict the harm caused by assigning residence to a foreign place,” with the Court noting “the societal, linguistic, cultural, social and political unity” of the two areas. “Consequently,” the Court concludes, “One military commander is competent to assign the place of residence of a protected person outside his area, and the other military commander is competent to agree to receive that protected person into the area under his jurisdiction.”¹²

The picture drawn by the Court – two territories under similar military regimes, where the measures of one IDF commander can be implemented by the other, where one assumes responsibilities over persons that have so far been protected by the other – has little hold either in law or reality. The relevant parts of the Gaza Strip to which the petitioners were to be assigned residence were not occupied by Israeli forces, as the Court’s own “effective control” approach would suggest.¹³ The decision to treat them as a “single territorial unit” in the interim Israeli-Palestinian agreement was motivated by concerns on both sides that the other would change unilaterally the status of any parts thereof, not by a decision to consolidate Israeli control over them.¹⁴ More importantly, the two individuals whose “assigned residence” was upheld by the

¹² Para. 22 of the judgment.

¹³ See text accompanying *supra* note 6.

¹⁴ See Joel Singer *The Israeli-Palestinian Interim Agreement on Self-Rule* 24 MISHPATIM 605, 610 (1997) (in Hebrew) (at the time of the signing of this agreement, Mr. Singer was the Legal Advisor to the Foreign Office).

Court were were dumped at the Palestinian side of the Gaza Strip border. The IDF Military Commander of the Gaza Strip could not “receive the protected persons under his jurisdiction,” nor was he able to provide for their physical protection as required under the Fourth Geneva Convention (assuming it were applicable).

Once the two areas had been deemed by the Court as a single territorial unit, the road to finding the measure compatible with Article 78 of the Convention was short and without obstacle. Article 78 does, however, place an important condition on assigning residence, which did not go unobserved by the Court. As Judge Barak noted,

“[A]n essential condition for being able to assign the place of residence of a person ... 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. [...] This conclusion is required by the outlook of the Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents (see Pictet, *ibid.*, at p. 257). Therefore these measures may be adopted only in extreme and exceptional cases.”¹⁵

As to the level of danger, the Court found that, “[I]n view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that — even if inadmissible in a court of law — shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that [the individual in question] will present a real danger of harm to the security of the territory.” Moreover, “just as with any other measure, the measure of 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

¹⁵ Para. 24 of the judgment.

this measure were not exercised against him.” In this context, “each case must be examined to see whether filing a criminal indictment will not prevent the danger that the assigned residence is designed to prevent.” But the consideration of deterring others also could be relevant:

“There is no defect in the military commander taking into account considerations of deterring others. [...] this consideration may be taken into account in choosing between internment and assigned residence. This approach strikes a proper balance between the essential condition that the person himself presents a danger — which assigned residence is designed to prevent — and the essential need to protect the security of the territory. It is entirely consistent with the approach of the Fourth Geneva Convention, which regards assigned residence as a legitimate mechanism for protecting the security of the territory. It is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of ‘human bombs’ that is engulfing the area.”¹⁶

On the basis of its interpretation of Article 78, the Court examined the specific details of each of the “assignment” orders under deliberation. It found the exercise of authority in two of the three cases without fault. The third order was invalid, per the Court, because of the insufficient gravity of the petitioner’s involvement in terrorist activity. “Admittedly,” stated the Court,

“[the second] petitioner was aware of the grave terrorist activity of his brother. But this is insufficient for assigning his place of residence. The active deeds that he carried out, in helping his brother, fall below the level of danger required under the provisions of Article 78 of the Fourth Geneva Convention and the provisions of the [military commander’s] Order. His behaviour 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. [...] It should be noted that we think that the behaviour of the second petitioner — 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 security of the area is foreseen if this measure is not adopted. We do not think that the case of the second petitioner falls into this category.”¹⁷

¹⁶ Para. 27 of the judgment.

¹⁷ Para. 39 of the judgment.

As the decision in *Ajuri* demonstrates, the Israeli High Court of Justice, serving in its capacity as the only and final instance of review of administrative action, has never carved out special rules for war-related jurisprudence that would limit the scope of judicial review of military action.¹⁸ The Court scrutinizes the activity of the military authorities as it does any other administrative agency, whose actions are required to be based on statutory authority, to follow the decision-making procedure prescribed by the authorizing law, and to be based on a proper exercise of discretion. In the past, however, the Court always showed deference to the government's security claims. This deference manifested itself in three main ways: first, in its interpretation of the law – domestic and international – that enabled the military to resort to most, though not all, of the measures it sought; second, in deferring, in most but not all cases, to the discretion of the military administration in balancing individual rights against security interests; and third, in delaying the scheduling of court hearings and postponing the handing-down of decisions.¹⁹ On occasion, however, the Court did set limits to general policies or specific measures of the military.

The *Ajuri* decision departed from the prevailing case-law in two important aspects. First, in *Ajuri*, the Court did not leave any door open for the Israeli legislature or the

¹⁸ From time to time, however, the Court has declared specific questions to be non-justiciable, such as the legality under international law of Jewish settlements in the territories(##). At this moment in time, the Court is contending with a petition against the so-called “targeted killings” or “eliminations” of Palestinian terrorists. A previous petition raising the same matter was rejected by a panel that deemed the “choice of means of warfare” non-justiciable (HCJ 5872/01 Barake v. Prime Minister (unpublished opinion, 29 January 2002)).

¹⁹ For analyses of the Court's jurisprudence with respect to the occupied territories, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* (2002); Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 *LAW & SOC'Y REV.* 319 (1999); Dan Simon, *The Demolition of Houses in the Israeli Occupied Territories*, 19 *YALE J. INT'L L.* 1 (1994); Benvenisti, *Law of Occupation*, *supra note 5*, Chapter 5; Ronen Shamir, “*Landmark Cases*” and the *Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 *LAW & SOC'Y REV.* 781 (1990).

military commanders to circumvent the ruling. In previous key decisions, where the Court had declared specific measures *ultra vires*, the decision had been based on the incompatibility of a specific measure with Israeli law, not with international law. For example, in a 1999 decision, the Court ruled that the use of physical force in interrogations was not authorized under Israeli law and hence not within the competence of the Israeli interrogators.²⁰ In 2001, it ruled that the indefinite detainment of so-called “illegal combatants” was not within the authority of the Israeli authorities and that an authorizing statute is necessary.²¹ The Court took great pains to sidestep international standards, looking only to Israeli legal principles and even to Jewish heritage as sources of interpretation. The Court’s reliance on Israeli law as the basis of its constraining decisions apparently is motivated by the greater domestic legitimacy of national law, but this reliance on domestic law enables the Court to share the weight of responsibility for the consequences of its decisions with the legislature, which is given the opportunity to overturn the Court’s decisions by enacting new laws. In the *Ajuri* decision, Jewish heritage is invoked,²² but the Fourth Geneva Convention gains prominence, and Pictet’s commentary is heavily relied upon and presented as reflecting the Convention’s approach.²³ This is a clear departure from the Court’s prior unilateral, peculiar, and widely disputed interpretations of the Geneva Convention.²⁴ The interpretation in *Ajuri* leaves absolutely no room for unilateral circumvention of the Court’s decision.

²⁰ HCJ 5100/94 Public Committee against Torture in Israel v. Government of Israel P.D. 53(1) 721 (1999).

²¹ CrimFH (Appeals Court in Criminal Matters, Further Hearing) 7048/97, Anonymous v. Government of Israel, P.D. 53(1), 721 (2000).

²² In its conclusion regarding the strict conditions for assignment of residence, the Court adds the following assertion:

“[B]eyond all this, this conclusion is required by our Jewish and democratic values. From our Jewish heritage we have learned that ‘Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing’ (Deuteronomy 24, 16 [38]).”

Para. 24 of the judgment.

²³ Para. 27 of the judgment.

²⁴ On these questionable interpretations, see especially Kretzmer, *supra* note 18.

The *Ajuri* decision is significant also in the fact of its interference with the Military Commander's assessment of the danger posed by a certain individual. In the past, the Court invalidated security considerations only in rare and exceptional cases, when it ruled that such considerations were not asserted *bona fide*²⁵ or when the planned measures (demolition of houses) could affect innocent third parties.²⁶ A bolder judicial stance was demonstrated a year before the *Ajuri* decision, when a five-member panel invalidated the Minister of Defense's decision not to allow Red Cross representatives to visit two Lebanese citizens held in administrative detention since the late 1980s. The Court found that due to the significant lapse of time, the humanitarian consideration outweighed security concerns and that therefore the decision not to allow Red Cross visits was "unreasonable" under standards of Israeli administrative law.²⁷ In that case, however, the Court's caution came through in its procrastination in rendering judgment: the petition was submitted in 1998; it was heard only in January 2001 and the decision handed-down in August 2001.²⁸ In contrast, the quickly rendered *Ajuri* decision is indicative of the new judicial resolve to intervene in the discretion of military authorities, as though they are garden-variety administrative agencies subject to the uniquely intrusive Israeli doctrine of unreasonableness.²⁹

Indeed, the *Ajuri* decision marks another stage in the growing judicial involvement in military decisions concerning the Israeli-Palestinian conflict, which

²⁵ H CJ 390/79 Doikat v. Minister of Defense, P.D. 34(1) 1 (1979).

²⁶ H CJ 5510/91 Turkeman v. Minister of Defense, P.D. 48(1) 217 (1993).

²⁷ H CJ 794/98 Oubeid v. Minister of Defense, P.D. ## (August 23, 2001). The Court did not linger on the question of whether or not the detainees were entitled to such visits under international law.

²⁸ It took an additional eight months for the Court to reject a petition for a rehearing of the case (RHCJ 7060/01 Arad v. Dirani, decided April 23, 2002).

²⁹ On this doctrine, see Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, 11 TEL AVIV U. STUDIES IN LAW, 131 (1992). In the judgment, the Court makes its standard disclaimer (which many Israeli commentators take issue with):

"[W]e will not replace the discretion of the military commander with our discretion. We will consider the legality of the military commander's discretion and whether his decisions fall into the 'zone of reasonableness' determined by the relevant legal norms that apply to the case."

Para. 30 of the judgment.

turned violent in September 2000. A few months into the so-called second *Intifada* (also known as the *Al-Aqsa Intifada*), the Court refused to adjudicate the legality of the policy known as “targeted killings” or “eliminations” of individual Palestinians who, according to the IDF, are terrorists. In a paragraph-long opinion, a three-member panel ruled that “the choice of arms, with which the respondents act in order to preemptively prevent bloody acts of terror is not among the issues this court gets involved with.”³⁰ But subsequent decisions have confirmed the trend of increased judicial involvement in the conduct of armed hostilities. With the country in the midst of combat, the Court stressed the obligation to respect medical personnel and ambulances, despite their being used by Palestinians to transport combatants and weapons, and required the IDF to issue specific guidelines regarding the treatment of Palestinian ambulances.³¹ The Court deliberated the situation of civilians held captive by Palestinians who had fled into the Church of Nativity, when, at the time, the Church was surrounded by IDF soldiers, and examined the means the IDF had been using to alleviate the hardships of those civilians;³² and it interfered with the process of locating, identifying, and burying Palestinian corpses in the aftermath of the battle in Jenin.³³ With respect to the measure of demolishing houses of terrorists, a measure the Court had found to be legal in the past,³⁴ it reiterated the right to prior hearing for the families of terrorists whose houses are subject to demolition orders, “unless the circumstances in a specific case raise serious concern for the lives of the soldiers or the success of the operation.”³⁵ Finally, the Court has agreed to examine the legality of the “targeted killings” policy and has invited both parties to present their arguments

³⁰ *Barake*, *supra* note 17.

³¹ HCJ 2936/02 (###)(April 8, 2002); HCJ 2117/01 Association of Physicians for Human Rights v. IDF Commander in the West Bank (April 28, 2002).

³² HCJ 3451/02 Almadani v. Minister of Defence (April 25, 2002).

³³ HCJ 3114/02 Barake v. Minister of Defense (April 14, 2002).

³⁴ *See* Simon, *supra* note 18.

³⁵ HCJ 6696/02 Amer v. IDF Commander in the West Bank (August 5, 2002).

as to the legality of the measure under international law.³⁶ The case is still pending at the time of writing.

The above manifestations of the Court's new willingness to intervene in military matters should not be misread to suggest that the Court places no limits on its involvement. It still strives to avoid clashing with the military authorities. In its *Ajuri* decision, the Court did not reject the general order in its entirety as invalid, although there was certainly room for such a decision.³⁷ Instead, it rejected only one of the three specific orders. With this seemingly less intrusive outcome, the Court in fact rendered the entire general order ineffective. This dashed the hopes of some for swift "assignments" of residence that would perhaps deter Palestinians, but, more likely, would only satisfy Israelis seeking revenge.

This new judicial involvement may seem odd in that it coincides with the intensification of the military conflict between the Palestinians and Israelis. It runs counter to the adage *inter armas silent leges*, which proved itself in Anglo-American jurisprudence during the two World Wars,³⁸ and it offers a model that is significantly more interventionist than the British one in the context of the struggle with the IRA.³⁹ One would have expected the generally deferent Israeli High Court – as it has been with respect to military measures in the West Bank and Gaza – to become even more compliant with the clashing of arms. One explanation for the decisive change may be the growing demand from Israeli officials for a more assertive judiciary, one that both legitimizes Israeli policies in the face of the widespread foreign criticism and protects

³⁶ HCJ ### (still pending).

³⁷ As suggested in *supra* text accompanying note 11.

³⁸ See Eyal Benvenisti, *Inter Armas Silent Leges? National Courts and the "War on Terrorism"* forthcoming in Andrea Bianchi (ed.)...

³⁹ On the British courts' treatment of IRA terrorists, see Conor Gearty, *Reflections on Human Rights and Civil Liberties in Light of the United Kingdom's Human Rights Act 1998* 35 U. Rich. L. Rev. 1, 17 (2001).

those same officials from being subject to international criminal liability. The evolving possibilities of international criminal adjudication (highlighted by, amongst other things, the criminal charges brought against Prime Minister Sharon in Belgium and the entry into force of the ICC Statute) has increased public awareness in Israel regarding the potential consequences of violating international law. The Court's recent interventionist decisions have offered Israeli officials legal backing for their policies, and if they have been denied such backing – an explanation to the Israeli public as to why harsher measures cannot be adopted. These considerations are voiced in the Court's decision on the location, identification, and burial of corpses in the Jenin refugee camp. In concluding its decision, which was rendered at the time of widespread criticism of an alleged (and ultimately refuted) massacre in Jenin, the Court adds,

“In Jenin there was a battle - a battle in which many of our soldiers fell. The army fought from house to house, not by bombing from the air, in order to prevent, to the extent possible, civilian casualties. Twenty-three IDF soldiers lost their lives. Scores of soldiers were wounded. The Petitioners did not lift the burden of evidence which laid on their shoulders. A massacre is one thing. A difficult battle is something else.”⁴⁰

The decision in this matter, along with the *Ajuri* decision and only three other key cases, are translated into English and posted at the Court's website.⁴¹ This selective translation and publication of decisions by the Court attests to the Court's sensitivity to external criticism of Israeli policies and its own contribution to those policies.

An alternative explanation for some of the interventionist decisions may be the Court's simple realization that harsher measures, such as “assignment of residence”, are nothing more than misplaced retribution. While Israeli politicians compete to find new and hopefully effective measures to fight terrorism, the Court is in the unique

⁴⁰ *Supra* note 31, sec. 11

⁴¹ <http://62.90.71.124/mishpat/html/en/system/index.html> (visited October 26, 2002).

position of being able to exercise restraint. After all, many would agree that the “assignment of residence” of the second petitioner in the *Ajuri* case, a thirty-five-year-old father of five who was not directly involved in terrorist activity, may lead yet another family into miserable, abject poverty and breed even greater defiance and resolve in the fight against Israel.

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