At the Supreme Court **HCJ /10**
Sitting as the High Court of Justice

In the matter of:

1. **HaMoked: Center for the Defence of the Individual**
2. **Gisha - Legal Center for Freedom of Movement**
3. **The Association for Civil Rights in Israel**
4. **The Public Committee against Torture in Israel**
5. **Al-Dameer Association for Human Rights**
6. **Adameer prisoner's support and Human Rights Association**
7. **Yesh Din – Volunteers for Human Rights**
8. **Al Mezan Center for Human Rights**
9. **Jerusalem Legal Aid and Human Rights Center**
10. **Gaza Community Mental Health Programme**
11. **PCHR - Palestinian Center for Human Rights**
12. **Physicians for Human Rights – Israel**
13. **Rabbis for Human Rights**

all represented by counsel, Att. Ido Bloom (Lic. No. 44538) and/or Hava Matras-Irron (Lic. No. 35174) and or Sigi Ben Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Leora Bechor (Lic. No. 50217) and/or Elad Cahana (Lic. No. 49009)
Of HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Commander of the West Bank**
2. **Commander of the Gaza Strip**
3. **Coordinator of Government Activities in the Territories**
4. **Minister of the Interior**
5. **Defense Minister**
6. **Deputy Defense Minister**
7. **State of Israel**

The Respondent

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause:

A. Why they will not cancel the "Procedure for Processing Applications for Settlement by Residents of the Gaza Strip in the Judea and Samaria Area", which is in contravention of the law – both in its essence and in the procedure it sets forth;

B. Why they will not uphold the right of residents of the Territories to family life in practice and determine that any family relationship – particularly family relationships between spouses and between children and parents – constitute grounds justifying the permission of **passage** from the West Bank to the Gaza Strip for the purpose of conducting a shared family life;

C. Why they will not process any application for passage from the Gaza Strip to the West Bank submitted to them, regardless of the identity or the political function of the person transmitting the application.

Contents

Introduction

1. This petition concerns an issue of principle which directly affects the lives of many families, and it is submitted as the direct continuation of individual petitions submitted in this matter as described below.

2. This petition concerns family members who seek to have a normal human life: a life of spousal partnership, earning a livelihood and raising children. They are all Palestinians, residents of the Territories. They have the same civil status, are registered in the same population registry and carry the same identity cards. One family member lives in the West Bank, the other in the Gaza Strip.

3. For several years, the respondents have been blocking the ability of such families to maintain a family life in the West Bank.

4. Recently, the situation has reached an unprecedented record, with the publication of a new procedure entitled "Procedure for Processing Applications for Settlement by Residents of the Gaza Strip in the Judea and Samaria Area" (hereinafter: **the new procedure**).

5. **With the stroke of a pen, the procedure severs the fabric of life between Gaza and the West Bank for residents of the Territories. It effectively cancels Palestinians' right to family life, tearing apart families and separating spouses, parents and children, grandparents and grandchildren. The procedure is, in effect, the last nail in the coffin of the connection between Gaza and the West Bank and their status as a single territorial unit (and in the future, perhaps, a single Palestinian state)**.

6. The respondents' policy, as reflected in the new procedure, is based on the position that family ties, in and of themselves, do not constitute a "humanitarian" issue and do not justify allowing Palestinian residents whose registered place of residency is in the Gaza Strip to enter the West Bank (this, even if passage does not involve entry into Israel). It is superfluous to note that this is a position and a definition of the term "humanitarian" which are in stark contradiction to humanitarian law itself.

7. The new procedure specifies a number of demands, conditions and criteria for allowing passage from the Gaza Strip to the West Bank. In practice, the new procedure presents a series of near impassable blocks and obstacles – both bureaucratic and substantive – which strip the possibility of obtaining a permit of meaning and in so doing, unravel the right to family life.

8. In fact, the new procedure is so strict and extreme, that, absurdly, it is currently easier for a citizen of a foreign country to live with his Palestinian relative in the West Bank – and even obtain Israel's authorization for permanent residency in the Territories – than it is for a Palestinian who has been a resident of the Territories since birth, and who is registered in Gaza, to live with his relative in the West Bank (in recent years Israel has authorized the granting of permanent residency to tens of thousands of foreigners under these circumstances. See for example: HCJ 5813/07 **Sawafta v. State of Israel** (unpublished, decision dated December 10, 2008)).

9. Moreover, the procedure is no more than a component in a policy of one-way passage between the West Bank and Gaza Strip, which allows transit only in one direction: permanent relocation from the West Bank to Gaza. In so doing, Israel exerts immense pressure on Palestinians from the West Bank to leave their homes and permanently relocate to the Gaza Strip as a condition to fulfilling their right to family life.

10. In the background of this petition lies the judgment of this honorable court in HCJ 7052/03 **Adalah – Legal Center for Arab Minority Rights v. Minister of the Interior** (hereinafter: the Adalah case). As shall be argued in detail below, following this judgment, it is not possible to claim that the petitioners do not have the right to fulfill their fundamental right to family life in the West Bank.

11. Sec. A will describe the new procedure and its regulations; sec. B will present a review of arrangements for passage between the West Bank and the Gaza Strip from both the legal and practical aspects since the occupation of the Territories to this day; sec. C will present the legal argumentation which proves that the procedure is in extreme contravention of the rules of international law, Israeli law, case law and military legislation.

The Parties

12. The petitioners are thirteen human rights organizations, Israeli and Palestinian, who work, *inter alia*, each in its own way, toward protecting the rights of the residents of the Occupied Territories.

13. Respondent 1 is the military commander of the West Bank Area on behalf of respondent 7, the State of Israel, which has been holding the West Bank under military occupation for over forty years. The respondent has the power to permit the passage of Palestinians to and from the West Bank.

14. Respondent 2 is empowered to allow Palestinians from the Gaza Strip to travel through Israel according to the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 and by virtue of powers delegated by the minister of the interior under powers delegated by the minister of defense ("Empowerment of Commanders of the Area" and "Empowerment to Grant Permits" dated 19 January 2009 (Y.P. 5913, 5 February 2009, 2265)).

15. Respondent 3, the coordinator of government activities in the Territories is the official responsible, on behalf of respondent 5, the minister of defense, for implementing Israel's policy in the West Bank and Gaza Strip. He is in charge, *inter alia*, of the coordination administration to the Gaza Strip. Respondent 3 is the official who established the new procedure.

16. Respondent 6, the deputy defense minister, is the official in charge, on behalf of respondent 5, the minister of defense, of establishing the policy relating to passage between the Gaza Strip and West Bank and the new procedure was established in accordance with his instructions.

Sec. A: The New Procedure

The petitions in the course of which the new procedure was received

17. Over the course of 2008, HaMoked: Center for the Defence of the Individual filed four HCJ petitions the hearing of which was consolidated:

    HCJ 2905/08 **Abu Shnar v. Commander of the Army Forces in the West Bank**;
    HCJ 3592/08 **Hamidat v. Commander of the Army Forces in the West Bank**;
    and HCJ 3911/08 **Bardawil v. Commander of the Army Forces in the West Bank**;

18. The three petitions concerned Palestinian women who sought to travel from the Gaza Strip to the West Bank in order to live there with their spouses. In all three cases, the respondents did not present any security impediment regarding any of the petitioners.

19. The **Abu Shnar** and **Hamidat** cases concerned Palestinian women from the Gaza Strip whose fiancées live in the West Bank, yet the respondents refused to allow them to travel to the West Bank in order to marry their betrothed and live with them.

    In their response, the respondents did not present any relevant explanation or individual reason for the refusal, aside from a general statement regarding "restrictive policy". However, the respondents announced that they would allow the petitioners to travel to the West Bank to marry their betrothed on condition that they deposit a NIS 20,000 guarantee to ensure that immediately upon termination of the wedding ceremony, they would leave their new husbands and return to the Gaza Strip.

    It shall be noted that the two petitions were deleted after the petitioners travelled to the West Bank under circumstances unrelated to their petitions.

20. The **Bardawil** case concerned a Palestinian woman and her three young children who sought to travel to the West Bank in order to reunite with the family's father who lives in Ramallah.

In their response, the petitioners flatly refused to allow passage. Here too, they provided no relevant, individual explanation for the refusal, apart from a general statement regarding an Israeli government decision to impose limitations on the movement of people to and from the Gaza Strip.

21. Following submission of the petitions, the honorable court consolidated the hearing thereof and in its decision dated June 11, 2008 (in HCJ 3592/08) instructed:

> Ahead of the date of the hearing on the question of principle, the respondents will submit a response detailing the procedure regarding spouses one of whom lives in Gaza and wishes to unite with [the other] spouse in the Judea and Samaria Area and the reasons for the policy which will be formalized in the procedure.

22. On December 8, 2008, the petitions were heard and at the end of the hearing the honorable court ordered:

> We have heard today from counsel for the state, that a written procedure relating both to the method of submitting applications for passage from the Gaza Strip to the Judea and Samaria Area and to the issue of setting criteria for granting the permit itself is being formalized… an updating notice shall be submitted to us within 90 days.

23. On March 8, 2009, the respondents filed an updating notice to which the newly formalized procedure entitled '**Procedure for Processing Applications for Settlement by Residents of the Gaza Strip in the Judea and Samaria Area**', which was signed that very same day, was attached. As we shall demonstrate below, contrary to the instruction of the honorable court, according to which the respondents were to specify the procedure "regarding spouses one of whom lives in Gaza and wishes to unite with [the other] spouse in the Judea and Samaria Area", the new procedure imposes a complete ban on such unification between spouses.

A copy of the new procedure as appended to respondents' notice dated March 8, 2009 is attached and marked **P/1**.

24. It shall be noted that concurrently with this petition, a motion to amend the petition and an amended petition is being submitted in the Bardawil case, due to, *inter alia*, the publication of the procedure as well as changes in the factual circumstances.

25. Naturally, in light of the fact that the new procedure was formalized in the context of those petitions, indeed it did not form part of the basis for them and reliefs pertaining to the procedure, as sought in this petition, were not sought in the former. In fact, one might also say that the new procedure is not at all relevant to those petitions as at the time the petitioners' applications were examined, this procedure did not exist and did not form part of the basis for their consideration.

Consolidation of the petitions concerning passage from the Gaza Strip to the West Bank with other petitions

26. The court consolidated the aforementioned petitions with two other petitions in different stages.

27. The first was HCJ 660/08 **'Amer v. Commander of the Army Forces in the West Bank**, which originated in a petition for passage similar to the aforementioned petitions, however, as shall be explained forthwith, it now concerns a different matter in terms of substance and purpose.

28. In the **'Amer** case, a previous petition was submitted which is substantively similar to the aforementioned petitions for passage (HCJ 2680/07). However, unlike the petitions for passage, the respondents allowed the petitioner to travel to the West Bank in the framework of the previous petition, in accordance with the court's suggestion at the time that the petitioner could remain in the West Bank for two months following her wedding and would, in the interim, take action toward legalizing her continued residence therein.

    HCJ 2680/07 was consensually deleted and shortly thereafter the aforesaid HCJ 660/08 was submitted. It no longer addresses the issue of the petitioner's passage to the West Bank, as passage by the petitioner had been agreed upon and granted as stated, but rather, it addresses the petitioner's request that the respondents update her registered address in the population registry in accordance with her de facto place of residents and allow her to lead an ordinary family life in her home. A temporary injunction prohibiting the petitioner's removal from the West Bank was issued in HCJ 660/08.

29. Recently, another petition was consolidated with the aforesaid petitions, HCJ 6685/09 **Kahouji v. Military Commander of the West Bank**, which addresses a related issue, somewhat similar to the issue in the **'Amer** case: expulsion of Palestinians living in the West Bank to the Gaza Strip based on the fact that their registered address is in Gaza despite that fact that they had been living in the West Bank for some time (in some cases for decades, and in some they were even born in the West Bank). The petitioners are of the opinion that there is no legal flaw in their presence in the West Bank and that their settlement therein was carried out in accordance with the law as it was at the time of their move. Therefore, their expulsion is nothing short of a forcible transfer which is strictly prohibited under international law.

30. Therefore, in tandem with this petition, a motion to separate the review of in this petition and the petitions for passage from the Gaza Strip to the West Bank – which relate to the policy of preventing passage from Gaza to the West Bank at the present time, as reflected in the new procedure – and the **'Amer** and **Kahouji** petitions, which relate to the policy of expelling Palestinians living in the West Bank to the Gaza Strip based on their registered address in Gaza and while refusing to update their addresses in the copy of the population registry held by Israel.

The new procedure and its provisions

31. In practice, the new procedure almost completely prevents the possibility that Palestinians from Gaza might live in the West Bank. It sets forth a number of strict conditions which constitute an almost impassable obstacle to moving from the Gaza Strip to the West Bank.

32. The procedure's premise – which is diametrically opposed to Israeli and international law – is that "family ties in and of themselves do not qualify as humanitarian grounds". The procedure effectively completely prevents passage, save for individuals suffering from chronic diseases, orphaned children and disabled elderly persons, who have first degree relatives in the West Bank and who have proven that there is no other relative (immediate or distant) who is able to care for them in the Gaza Strip. Applications by spouses to unite with their loved ones, by children to live with their parents, by grandparents to spend their golden years with their children and grandchildren – will not be considered!

33. According to the procedure, the only official empowered to examine applications by Gaza residents to "settle" in the West Bank is the coordinator of government activities in the Territories himself (Sec. 6 of the procedure).

34. However, the procedure also determines and dictates who is the internal-Palestinian official who "may" forward applications and from whose hands alone, respondent 3 is willing to receive

applications (sec. 6 of the procedure).

In effect, this is one specific person: **the Director General of the Office for Civilian Affairs in the Palestinian Authority, Mr. Hussein Al-Sheikh – who also holds the office of general secretary of Fatah in the West Bank.**

It should be noted that Mr. Al-Sheikh and his office are located and operate **in the West Bank** and not in the Gaza Strip (where the petitioners and others wishing to file applications are located).

The procedure clarifies that applications forwarded by any other person will not be considered.

35. The procedure then specifies a number of **preliminary conditions** (sec.s 8-9 of the procedure):

36. **The first preliminary condition** is **the absence of a security preclusion**. However, it is not just an absence of a security preclusion regarding the applicant himself (i.e., the orphaned child, disabled senior or chronic patient), but rather also the absence of a security preclusion regarding the person with whom he wishes to live.

This means, for example, that the application of an orphaned child to move to live with his mother in the West Bank would be rejected outright if there are any security allegations against his mother (who, in effect, is not requesting anything but that her child be allowed to live with her).

37. **The second preliminary condition** is that the applicants are first degree relatives of a person living in the West Bank and whose registered address is in the West Bank and "whose cases are concerned with **objective** humanitarian circumstances, as a consequence of which they are unable to continue living in Gaza, **and the solution to their humanitarian needs lies exclusively in the Judea and Samaria Area**".

38. As can be seen, these are extremely restricted and limited conditions. It is almost impossible to imagine that some people might actually meet them.

Yet the procedure does not stop here:

39. According to the procedure, even in the very few cases which may, perhaps, meet the preliminary conditions, passage to the West Bank will most likely not be approved, as, after having met the preliminary conditions, the applicant is required to be included in one of the three following groups exclusively (Sec. 10 of the procedure):

- Persons suffering chronic diseases;
- Orphaned children (under the age of 16);
- Disabled seniors (over the age of 65).

40. Yet, even this does not bring the process to an end. As, **even belonging to one of these categories does not suffice**.

41. According to the procedure, it is insufficient that the applicant seek to unite with an immediate relative in the West Bank (mother, father, children etc.) – **he must also prove that there is no other relative (of any degree) in the Gaza Strip who can care for him or take him under his wing!**

42. In light of the above, let us try to describe the way in which the procedure applies to a child who lost his father in the Gaza Strip and wishes to move to live with his mother who lives in the West Bank:

First, assuming that child is able to transmit his application through the only available channel (which is limited to such an extent as to raise a strong sense of arbitrariness), indeed, following this, both he and his mother in the West Bank would have to undergo a comprehensive security screening.

Yet even if they meet all the aforesaid conditions, indeed, the passage of the orphan child to his mother will not be authorized – unless he proves that there is no other relative in Gaza – immediate or distant – who is able to take him under his wing.

43. In the procedure, the respondents expressly declare (sec. 10) that they intend to examine "the nature and scope of the existing relationship with the parent who is a resident of the Judea and Samaria Area … in relation to the degree, nature and scope of the relationship with other family members in the Gaza"!

It is clearly inconceivable that military officers should decide, using a procedure which stipulates arbitrary criteria, the fate of children and make determinations regarding the nature of the best family relationship for an orphan child – an area which is not coincidentally reserved for social workers, psychologists and welfare staff. This condition unravels the concept of "the best interest of the child".

Moreover, since the respondents prevent Palestinians living in the Gaza Strip from visiting the West Bank and vice versa, that same orphaned child will most likely have closer relationships with a cousin living in the Gaza Strip than his mother who lives in the West Bank whom he has not seen for a long time.

44. According to the procedure, even those who meet all the preliminary conditions and all the cumulative demands and criteria – will not be allowed to live with their family in the West Bank, but will rather receive temporary, renewable "permits to remain" **for seven years**, subject to repeated examinations that all conditions and criteria are met (sec. 13 of the procedure).

45. Only at the end of seven years, will a "permit" for "settlement" in the West Bank, and a change of the official address in the Palestinian population registry held by Israel be considered (sec. 15 of the procedure).

46. As can be seen, the new procedure imposes a flat ban on passage from the Gaza Strip to the West Bank, including passage without crossing through Israel, while clarifying that applications which, at the outset do not meet a list of near impossible criteria – will not be considered at all.

47. As described below, the new procedure effectively seeks to drastically alter the existing legal situation and almost completely severe ties between family members, some of whom are in the Gaza Strip and some in the West Bank. This is an almost complete violation of the right to family life in a manner which strictly contradicts the respondents' obligations under Israeli and international law.

The implementation of the procedure and the petitioners' appeals

48. On September 14, 2009, HaMoked: Center for the Defence of the Individual contacted respondent 3 requesting the procedure, which is unlawful – both in substance in the procedure it sets forth – be revoked immediately and replaced by a new procedure which conforms to the law

and is based on the right to family life being a supreme fundamental humanitarian right, and whose premise is that family ties constitute a reason which justifies permitting passage from the Gaza Strip to the West Bank.

49. A copy of the letter was sent, *inter alia*, to the deputy defense minister, the attorney general, the state attorney's office and the military advocate general.

A copy of HaMoked's letter to respondent 3 is attached and marked **P/2**.

50. For almost three months, nothing happened. Only on December 3, 2009, a brief response was received from respondent 3's public appeals officer who notified that as "a number of petitions were filed to the HCJ regarding the issue at hand, which are currently pending before the Supreme Court", indeed "the response to the claims made in your letters will be provided in the context of the aforesaid petitions and there is no room to expand on the issue at this stage.

A copy of the response by respondent 3's public appeals officer is attached and marked **P/3**.

51. In the mean time, the petitioners began appealing to the respondents in individual cases as well. The response in all these cases was that the applications "did not meet the criteria".

52. Thus for example, Mr. Muhammad Bassaineh's request to travel from the Gaza Strip to the West Bank in order to have his wedding and live with his betrothed in her city of Hebron was denied using laconic reasoning that "it does not meet criteria".

A copy f the response of the Gaza DCO dated January 14, 2010 in Mr. Bassaineh's matter is attached and marked **P/4**.

53. Similarly, applications made by Ms. Nariman Shadid and Ms. Suzie Abu Sha'aban were also refused. Both women requested to travel to the West Bank in order to marry their betrothed with whom they had already signed marriage contracts.

A copy f the response of the Gaza DCO dated December 13, 2009 in Ms. Shadid's matter is attached and marked **P/5**.

A copy f the response of the Gaza DCO dated January 26, 2010 in Ms. Abu Sha'aban's matter is attached and marked **P/6**.

54. The 'Abit family suffered a similar fate: Mr. Kamal 'Abit, a resident of Tulkarem, found himself trapped in the Gaza Strip for six years after he had arrived there to visit his ailing father and after his many attempts to return to his home in Tulkarem failed. As time went on, Mr. 'Abit married Ms. Basma 'Abit in the Gaza Strip and the couple had two children. Recently, after many attempts to contact the Gaza DCO and after years of being trapped in the Gaza Strip, the DCO finally notified that Mr. 'Abit's request to return to his home in Tulkarem was approved – but, that <u>his wife and children could not move and live with him</u>**,** since they "do not meet criteria". Since then, Mr. 'Abit has been waiting in vain, in his home in Tulkarem for his wife and young children to come.

A copy f the response of the Gaza DCO dated January 27, 2010 in 'Abit family's matter is attached and marked **P/7**.

55. Similarly, Mr. Saad Shashniya, also from Tulkarem in the West Bank, entered the Gaza Strip to visit his ailing sister. Since then, for three years, the respondents have refused to allow him to

return to his home in Tulkarem. During this time, Mr. Shashniya married Ms. Maha Shashniya and the two had their infant son Ahmad. Here too, after three years, Mr. Shashniya was finally permitted to return home to the West Bank, but the request of his wife and son to join him was refused since it "did not meet criteria". Mr. Shashniya is currently in his home in the West Bank while his wife and infant son are in the Gaza Strip.

A copy f the response of the Gaza DCO dated February 25, 2010 in the matter of the Shashniyas is attached and marked **P/8**.

56. Other cases have received similar responses – this also in cases where people have already left the Gaza Strip and now wish to enter the West Bank from Jordan.

57. Ms. Wafaa Sufi married Mr. Subhi Sufi who arrived at the Gaza Strip from the West Bank. For a time they lived with their four young daughters in the Gaza Strip, but some three years ago, Mr. Sufi had to return to the West Bank, for the purpose of work and securing a livelihood, among other things. **They have not seen each other since**. Ms. Sufi has recently arrived in Jordan with the girls and sought to enter the West Bank. However, despite the fact that the family does not wish to travel through Israel at all, the military legal advisor for the West Bank notified, on January 28, 2010, that inasmuch as the family's entry into the West Bank is required for the purposes of "settlement", indeed it must follow the "Procedure for Settlement by Residents of the Gaza Strip in the Judea and Samaria Area".

A copy of the military legal advisor for the West Bank's response dated January 28, 2010 in Ms. Sufi's matter is attached and marked **P/9**.

Sec. B: Background - Arrangements for Movement between the Gaza Strip and West Bank

The West Bank and Gaza Strip as "closed zones"

58. In 1967, following the seizure of the Territories, the West Bank and Gaza Strip were declared "closed military zones".

59. This declaration did not necessitate holding a written permit specifically, did not distinguish between entering the West Bank and being present therein and imposed no restriction on "settlement" neither in its language nor in the manner in which it was implemented.

60. Nevertheless, for some twenty years, the declaration of the West Bank as a closed zone was, in many respects, a dead letter, as until 1988 there were general permits which allowed free movement between the Territories and Israel (General Entry Permit (Residents of Held Areas) (No. 5) (Judea and Samaria) 5732-1972 and General Entry Permit (No. 5) (Judea and Samaria) 5732-1972).

61. In 1988, after the outbreak of the intifada, the military commander suspended the general permits (Order regarding Suspension of the General Entry Permit (Residents of Held Areas) (No. 5) (Temporary Order) (Judea and Samaria) 5748-1988 (hereinafter: **The Provision regarding Suspension of Permits**), which was carried out pursuant to sec. 90 of the Order regarding Security Provisions (Judea and Samaria) (No. 378) 5730-1970).

62. However, as stated, the declaration of the West Bank as a closed zone did not necessitate receipt of a written permit, neither according to its language nor according the manner in which it was implemented in practice. Thus, a person who arrived from Gaza, and whose passage through

Israel had been permitted was permitted by the military commander to enter the West Bank without need for any sort of permit. (This is not an exceptional matter, as there are a myriad "closed zones" throughout the Territories, entry into and passage through which does not require a written permit).

63. Moreover, like the vast majority of orders declaring "closed zones", this provision too, does not impose any limitation on "settlement" or "transferring a place of residence".

64. **In fact, and as described below, the new provision is the only and first ever written provision – since the Territories were seized in 1967 until now – in which any limitation on "settlement" of Palestinians in the West Bank appears!**

The Interim Agreement and the safe passage arrangement

65. In 1995, a change occurred in the normative infrastructure. The arrangements for the safe passage, which were enshrined in the Interim Agreement and in the agreements that followed, were established. The Interim Agreement was implemented in the Territories via military proclamations and became part of the internal legislation in the Territories. (HCJ 1661/05 Hof Aza Regional Countil v. Prime Minister, *Piskey Din* 59(2) 481, 521; HCJ 7957/04 **Mar'abe v. Prime Minister of Israel**, *Takdin Elyon* 2005(3) 3333, 3344; HCJ 2717 '**Ali v. Minister of Defense**, *Piskey Din* 50(2) 848, 855).

66. The premise for the Interim Agreement, as well as previous agreements (the Declaration of Principles of September 13, 1993, the Gaza-Jericho Agreement and the "Cairo Agreement" of May 4, 1994) was a joint declaration according to which (Article11(1) of the agreement):

> The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity of which will be preserved during the interim period.

67. In accordance thereto, safe passage arrangements were established for allowing movement between the West Bank and Gaza Strip in two ways: using the safe passage card or a permit to enter Israel. **The restrictions on passage related to the duration of stay in Israel, travel route while inside Israel and, for certain people, the manner of travel was also restricted (to secured shuttles only). There was no limitation on the duration of stay in the other part of the Territories.**

68. In Article 1(2) of Annex I of the Interim Agreement, regarding security arrangements, Israel undertook to refrain from placing obstacles in the way of movement between the two parts:

> In order to maintain the territorial integrity of the West Bank and the Gaza Strip as a single territorial unit, and to promote their economic growth and the demographic and geographical links between them, both sides shall implement the provisions of this Annex, while respecting and preserving without obstacles, normal and smooth movement of people, vehicles, and goods within the West Bank, and between the West Bank and the Gaza Strip.

69. Article 10 of the same annex stipulates the rules for the **safe passage arrangement**. This arrangement was meant to regulate movement of Palestinians between the two parts and overcome Israel's concern regarding uncontrolled entry into its sovereign territory.

70. In light of this, three travel routes between the Gaza Strip and West Bank were established. Movement in them was to be carried out during daylight hours. As a general rule, movement was to be carried out independently and the traveler was to arrive at the other geographical segment of

the Territories within a limited time. Usage of the safe passage was carried out via a "safe passage card".

71. Individuals defined as precluded from entering Israel could use the safe passage via shuttles secured by the Israeli police which were to operate twice a week.

72. Subsec. 2(b) stipulates that permits to enter Israel may be used by residents of the Territories instead of a safe passage card.

73. The logic of the arrangements is evidenced by their content: they are to ensure free movement between the two parts without Israeli intervention, while taking precautions to minimize the risk to Israel's security emanating from passage inside Israel itself.

74. The safe passage arrangement stipulated limitations on the route of travel between the Gaza Strip and West Bank, on the duration of travel n said route and on the manner of travel in the route.

75. The arrangement does not stipulate any limitation on the duration of stay of a Palestinian resident in either part of the Occupied Territories after completing passage through Israel.

76. The arrangement does not require anyone travelling from the Gaza Strip to the West Bank (and vice versa) to return within a given timeframe. The arrangement does not include a mechanism allowing such a limitation on the duration of stay. The arrangement does not include a limitation regarding the purpose of the trip and does not require the traveler to declare the purpose of his trip.

77. On October 5, 1999, the **Safe Passage Protocol** was signed. It implemented the rules established in the Interim Agreement, particularly the launch of the shuttles, which allowed the safe passage to be used by persons precluded from entering Israel.

A copy of the Safe Passage Protocol is attached and marked **P/10**.

78. Ultimately, the safe passage was fully operational for one year only. With the outbreak of the second intifada, Israel partially froze the safe passage. It stopped issuing safe passage cards and the secured shuttles were cancelled. Movement was once again based on permits to enter Israel.

79. It shall be emphasized that even after the safe passage was frozen, the respondent did not issue "a permit to remain in the West Bank" for persons who are residents of the Territories. As described below, this was the case for many years, until 2007.

80. Residents of the Territories who wished to arrive from one part of the Territories to the other did so via a "permit to enter Israel" and the limitation was only regarding the stay in Israel. Their return to the other part was carried out via a new permit to enter Israel, or, through the same permit if the same was valid for more than one day. Some made use of these permits for temporary entry to the other part of the Territories and some changed their place of residency from one to the other.

81. It must be stressed, of course, that the aforesaid is only relevant for individuals who travelled through Israel and not those who travelled by another route, such as through Egypt and Jordan, who were not even required to hold a permit to enter Israel.

82. As established in the agreements, and as determined in the **'Ajuri** case (HCJ 7015/02 **'Ajuri v. Commander of IDF Forces in the West Bank**, *Piskey Din* 56(6) 352 (2002) (hereinafter: the **'Ajuri case**), the safe passage arrangement was rooted in the conception, shared by all parties,

that the West Bank and Gaza Strip constitute a single and integral territorial unit. The arrangement reflects the principle which runs through the agreements – safeguarding Israel's interests around the Territories' circumference and restricting its involvement in their internal administration.

The disengagement plan

83. On September 12, 2005, Israeli military ground forces left the territory of Gaza. This was preceded by the evacuation of all settlements and military bases in Gaza. On the same day, GOC Southern Command issued a proclamation regarding the termination of the military administration. Military legislation and military orders in the Gaza Strip were declared null and void.

84. However, legally and practically, the procedures for passage remained almost the same. A person seeking passage from the Gaza Strip to the West Bank was required to obtain a single permit – a permit to enter Israel, which was now issued on behalf of the minister of the interior pursuant to his authority under the Entry into Israel Law, 5712-1952.

85. Moreover: on November 11, 2005, Israel and the Palestinian Authority signed the **Agreement on Movement and Access**, under the auspices of the Quartet and the American secretary of state. The Agreement on Movement and Access mainly referred to two key issues: the opening of the Rafah crossing and the opening of a safe passage via shuttles to the West Bank.

86. Detailed arrangements were stipulated regarding the Rafah crossing. It was determined that the crossing would be operated by the Palestinians and overseen by European observers. **It was determined that Rafah would be a crossing point for anyone carrying a Palestinian identity card (regardless of registered address)**. As a matter of fact, Israel pledged to supply the Palestinians with the necessary information for updating the Palestinian population registry so that Palestinians who are abroad would also be able to use the Rafah crossing:

> Use of the Rafah crossing will be restricted to Palestinian ID card holders and others by exception in agreed categories with prior notification to the GOL and approval of senior PA leadership.
>
> The PA will notify the GOL 48 hours in advance of the crossing of a person in the excepted categories – diplomats, foreign investors, foreign representatives of recognized international organizations and humanitarian cases.

A copy of the Agreement on Movement and Access is attached and marked **P/11**.

87. One can see that the arrangement distinguishes between Palestinian residents of the Palestinian Authority, <u>including those whose registered address is in the West Bank</u>, who are entitled to free passage through the crossing and <u>foreigners</u>, who are required to enter only following coordination with Israel. Namely, the agreement considers all residents of the Palestinian Authority to be subjects of equal and identical status, regardless of their registered address in the registry or where they actually live – whether it is Gaza or the West Bank.

88. The agreement regarding convoys is nothing more than a new version, **<u>based on the principles of the safe passage from the Interim Agreement</u>**: the comments made by Head of the Crossings Administration at the Ministry of Defence, Mr. Betzalel Triber to the Knesset's Internal Affairs Committee on November 16, 2005 (the day the agreement was signed) are relevant to this issue:

> Passage will be undertaken following a complete security screening, in convoys escorted by the security establishment, secured by the security establishment, where, we hope to reach a point where there is no transferring of dangerous substances or explosives, God forbid, from one place to another… **what is at issue is movement of a few busses a day which would leave Erez, undergo inspection, people would arrive at Tarqumiya, most likely, or another place. People will get off the busses there and travel to where they are going in Judea and Samaria. When the time comes, when they want to return, they will board the bus in Tarqumiya and travel to Erez. The busses will be under monitoring and control, including the security issue and including anyone boarding them**. This is true also for goods – a number of trucks will travel between Karny and some other location, and there too, the trucks would be under complete control, before they leave, or when they leave. The goods will also be under complete and total control. They will be escorted by security vehicles operated under the responsibility of the security establishment. There is currently no intention to build an elevated or lowered road. We have a number of alternatives for the access roads, and, according to what we agree on in the next few days, we will operate this too, as agreed.
>
> http://www.knesset.gov.il/protocols/data/html/pnim/2005-11-16.html [in Hebrew]

89. According to the agreement, Israel undertook to allow the operation of secured bus and truck convoys transporting people and goods between Gaza and the West Bank:

> Link between Gaza and the West Bank: Israel will allow the passage of convoys to facilitate the movement of goods and persons.

90. The detailed arrangements were due to be finalized by the parties by December 15, 2005. However, Israel delayed the arrangement.

91. Israel has never declaratively retreated from the fundamental position which views the Gaza Strip and West Bank as a single territorial unit. In practical terms also, Israel continues to operate in accordance with the Oslo Accords regarding the Gaza Strip (in matters relating to the population registry and the transferring of applications, for example).

92. The aforesaid is also expressed declaratively. Thus, for example, even at the end of 2007, following the Hamas seizure of control over the Gaza Strip, the prime minister of Israel clarified that:

> One and half million Palestinians live in Gaza. Do you think that I believe they can be separated from the rest of the Palestinians? That's a fantasy that someone sold you.
>
> We do not intend to separate Gaza from Judea and Samaria. We will fight Hamas if Hamas continues with terror, but that is unrelated to the people living in Gaza.
>
> (http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2007/PM%20Olmert%20interviewed%20on%20al%20Arabia%2010-Jul-2007)

93. And the minister of foreign affairs has also emphasized:

> The distinction between the moderates and the extremists in the Palestinian side is being translated in terms of territories. So, there is no conspiration [sic] policy of Israel to divide the West Bank and Gaza Strip I can assure you.
>
> (http://www.mfa.gov.il/MFA/Pages/MediaPlayer.aspx?MediaUrl=http://switch3.castup.n

et/cunet/gm.asp?ClipMediaID=1260683!!!!ak=null!!!!st=00:41:43&LANGUAGE_NAME=He)

94. Even after the Gaza war (operation "Cast Lead"), the Minister of Defense declared that the solution for achieving a two-state permanent agreement is creating territorial contiguity between the two parts of the Palestinian Authority, using a tunnel linking the Gaza Strip and Judea and Samaria (Rami Shani,"Barak Suggest: A Tunnel between Gaza and the West Bank", **Walla!**, February 2, 2009 [Hebrew]).

95. In all matters concerning negotiations between Israel and the Palestinian Authority as well, the undisputed premise is that the Gaza Strip and West Bank, together, form the territory of the Palestinian Authority. This fundamental concept has never normatively changed.

The sudden issuing of "temporary permits" for Palestinians, for the West Bank, with no legislative amendment, enshrining or publication

96. As stated, for many years, no permits whatsoever effectively existed for the entry or presence of Palestinians in the West Bank, and no legal distinction was made between residents of the Territories whose registered address was in a community in the West Bank and residents of the Territories whose registered address was in a community in the Gaza Strip.

97. Only toward the end of 2007did HaMoked process a number of cases in which it suddenly became apparent that the respondents – without any prior notice, publication or official order – issued permits which had never been seen before: "a temporary permit to remain" in the West Bank for Palestinians.

98. HaMoked appealed to the coordinator of government activities in the Territories (COGAT) under the Freedom of Information Act in an attempt to understand the sudden change, its essence, its effective date and the legal basis thereof.

99. From the response of the spokesperson for the COGAT it became clear that the respondent had made an internal decision – with no formal process, no change in relevant legislation and without making his decision public – that "as of November 2007, a resident of the Gaza Strip who is present in the Judea and Samaria Area is required to possess a permit 'to remain in the Judea and Samaria Area' and the permit is designated exclusively for this purpose."

    The response further indicated that the **first ever permit to remain was issued only on December 25, 2007!**

    Copies of HaMoked's letter and the response of the spokesperson for the COGAT dated May 18, 2008 are attached and marked **P/12-P13**.

100. It has now become clear, that this internal decision (which to this date has not been officially published and it is still unknown how and by whom it was made), was no more than the beginning of an attempt to turn the legal situation in the Territories around – an attempt which climaxed in the new procedure, where it received its first explicit expression.

Sec. C: The Legal Argument

101. At the outset, it is important to stress that the procedure's unlawfulness stems primarily from its premise, namely, the position according to which family life does not in itself constitute a "humanitarian" issue. This position is not only baseless, but constitutes a distortion of and

disrespect for the concept of "humanitarian", as has been defined extensively and in detail in humanitarian international law.

102. The term "humanitarian" is not an obscure and vague expression which can be "waved about" and infused with different content according to a momentary wish, changing considerations or narrow interests. International law and obligations do not constitute acts of grace or charity undertaken *ex gratia*.

103. The foundation of international law in its entirety is that even during war and conflict, the rights of civilians cannot be abandoned to arbitrary decisions which depend on the parties' good will.

104. Humanitarian law has a clear legal and practical significance. It establishes clear rights and imposes unambiguous duties. The respondents' attempt to redefine this concept, while stripping it of meaning, is nothing short of a blatant breach of the (proper) humanitarian fundamental principles incumbent upon the respondents.

105. It seems that there is no other way but to return to the basic principles in this matter and recall that:

> A basic and central principle of international humanitarian law is that one must not harm people who are hors de combat… the rationale underlying this principle is that one must minimize, to the extent possible, the suffering and harm to humanitarian interests which are bound in war. It is by virtue of this rationale that the central covenants bestow their defense on individuals who are hors de combat – who are also referred to as protected persons and impose negative and positive obligations on the parties to an armed conflict regarding their protection […]
>
> The third part of the Geneva Convention includes most of the substantive provisions which provide protection for protected persons…one must respect them **and avoid harming their bodies, dignity, family lives and religion and customs**.
>
> (Orna Ben Naftali and Yuval Shani, **International Law: Between War and Peace** 159-177 (2006)).

106. Clearly, a procedure or policy which expressly stem from the opposite determination – according to which refraining from harming the bodies, integrity, <u>family lives</u>, religion or customs of protected persons <u>is not</u> a humanitarian matter – is fundamentally unacceptable.

<u>Sec. C1: The Norms Incumbent on the Military Commander</u>

107. The military commander is bound by three normative systems.

First, the military commander is obliged to act in accordance with international humanitarian law and the laws of occupation included therein.

Second, the respondent is also obliged to act in accordance with international human rights law, primarily the UN conventions on civil and political rights and social and economic rights. This was ruled in the advisory opinion of the International Court of Justice regarding the separation wall. This honorable court has also examined the actions of the military commander with respect to these norms. (For example: HCJ 9132/07 **Al-Bassiouni v. Prime Minister**, *Takdin Elyon* 2008(1) 1213; HCJ 2150/07 **Abu Safiya v. Minister of Defense** (not yet published, December 29, 2009); **HCJ 7957/04 Mar'abe v. Prime Minister of Israel**, *Takdin Elyon* 2005(3) 3333 sec. 24). Sometimes, the conventions were applied without reservations (for example: **HCJ 3239/02**

Mar'ab v. Commander of IDF Forces, **HCJ 3278 HaMoked: Center for the Defence of the Individual v. Commander of Military Forces in the West Bank**, *Piskey Din* 57(1) 385).

Additionally, as an Israeli public authority, the military commander carries in his backpack the norms of Israeli public law, including the commitment to human rights and the prohibition on disproportionately violating them.

See for example: **HCJ 393/82 Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya v. Commander of the IDF Forces in the Area of Judea and Samaria**, *Piskey Din* 37(4) 785; HCJ 10356/02 **Hess v. Commander of IDF Forces in the West Bank**, *Piskey Din* 58(3) 443; **HCJ 2056/04 Beit Surik Village Council v. Government of Israel**, *Piskey Din* 58(5) 807.

108. As a representative of the occupying power, the respondent is bound by duty to ensure orderly public life in the territories under his control (Regulation 43 of the Hague Regulations, 1903).

> The Regulation does not limit itself to a certain aspect of public order and life. It spans all aspects of public order and life. Therefore, this authority – alongside matters of security and military – applies also to circumstances related to economy, society, education, welfare, hygiene, health, traffic and other such matters to which human life in modern society is connected.
> (Remarks of Justice Barak (as he was then) in HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya v. Commander of the IDF Forces in the Area of Judea and Samaria**, *Piskey Din* 37(4) 785, 798. (Hereinafter: **the Jam'iat Iscan case**.)

109. A military administration must be responsive to the changing needs of the residents of the territories with which he has been entrusted and serve these changing needs and the life altering events of individuals and the public:

> The life of a population, as the life of an individual, does not stand still but is rather in constant motion which includes development, growth and change. A military government cannot ignore all these. **<u>It may not freeze life</u>**.
> (The Jam'iat Iscan case, p. 804, emphasis added.)

110. Among the respondent's duties, he must respect –

> Family honour and rights…
> (Regulation 46 of the Hague Regulations).

This fundamental principle is repeated in Article 27 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) (Hereinafter: **the Geneva Convention**):

> Protected persons are entitled, in all circumstances, to respect for … their family rights…

The military commander's duty in light of the legal status of the Gaza Strip

111. The petitioners are of the opinion that there is no need to address the issue of the legal status of the Gaza Strip in order to rule on this petition; namely whether the Gaza Strip in under occupation or not.

112. **First**, there is no dispute that the West Bank remains under prolonged occupation and that the respondents bear all the duties vis-à-vis residents of the West Bank under the laws of occupation

and international humanitarian law and are obligated to protect their rights, including the right to family life.

113. **Second**, as stated above, the respondents bear duties vis-à-vis Palestinians living in the Gaza Strip under **international human rights law**. (see also Yuval Shany, The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. Prime Minster of Israel*, Hebrew University International Law Research Paper No. 13-09, pp.11-12)2009.)

114. **Third**, the Supreme Court too, in its rulings, has emphasized that the State of Israel still bears duties vis-à-vis Palestinians living in the Gaza Strip, *inter alia*, **in all matters relating to movement through crossing points** and as a result of the dependency and reliance which have been created over four decades:

> [T]he main duties of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; **these duties also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip**, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory.
>
> (HCJ 9132/07 Al-Bassiouni v. Prime Minister, http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.htm).

115. The rule which emerges from the above is clear: Israel's control of the borders of the Gaza Strip, including exclusive control of all crossings between the Gaza Strip and the West Bank imposes upon it duties vis-à-vis the civilian population, duties which intensify in view of the dependency and reliance on Israel created since 1967.

116. It must be recalled that the State of Israel has extensive control over many aspects of life in the Gaza Strip. *Inter alia*, in addition to Israel's control over the crossings and aerial and sea space of Gaza, it also controls the Palestinian population registry (including the registered addresses of all residents of the Territories, whether in Gaza or the West Bank).

117. Hence, the key to the family lives of residents of the Territories is exclusively in the hands of the respondents. As known, power also means responsibility:

> There is a rule before us that the power vested in an administrative authority also carries with it a responsibility upon it to act in the matters in which it has been vested with power.
>
> (HCJ 7120/07 **Assif Yanuv Crops LTD. v. Chief Rabbinate of Israel Council**, *Takdin Elyon* 2007(4) 5065, 5094 (2007)).

118. The remarks of Justice Cheshin are relevant to this issue:

> Power was not given to the public authority in order to adorn itself and power – any power – is interwoven with responsibility which is imposed on the public authority to properly regulate that aspect of life over which power is bestowed. Responsibility effectively means a duty to exercise the power given to the authority whenever such circumstances require the exercise of power.
>
> (CrimAR 7861/03 **State of Israel v. Lower Galilee Regional Council** *Takdin Elyon* 2006(2) 1437, 1443 (2006)).

119. The respondents are the ones holding the power to permit – or deny – passage between the Gaza Strip and the West Bank for the purpose of maintaining a family life, and therefore, also bear the responsibilities deriving thereof.

Sec. C2: The Sweeping Violation of Fundamental Rights

(i) The right to family life and the Adalah Rule

120. The subject matter of this petition can be easily delineated in accordance to the rules set forth in the **Adalah case**.

121. That case concerned the legal provision which placed a flat ban on the granting of status in Israel to residents of the Occupied Territories who are spouses of the country's citizens and residents.

The court was requested to determine the scope of the right to family life; whether it includes a person's right to establish his family unit specifically in his place of citizenship when he has the possibility of uniting with his relative in another country.

The court was further requested to rule whether the blanket limitation of this right, as stipulated in the law under review in that case, was proportionate.

122. First, one must spell out the differences between the current case and the Adalah case. We shall then analyze the rules set forth in the Adalah case and apply them to our case.

The Adalah case and the prohibition on movement from the Gaza Strip to the West Bank - the differences

123. There are a number of stark differences between our matter and the Adalah case:

A. First and foremost, the Adalah case concerned receipt of permanent status in Israel – including all the implications thereof. That matter concerned spouses who have **different** citizenships, one is a citizen and the other a foreigner. Therefore, the remedy sought in the case was **the granting of status** to the foreign spouse.

Our case concerns family members who all share the same status, all possess the same identity cards, **all are residents of the Palestinian Authority who wish to live together, in their country**.

B. The premise in the Adalah case was that the Israeli spouse is permitted, in any case, to **visit** his Palestinian spouse, child or parent – naturally with no limitation on his right to return to Israel and live therein (and indeed, for years, there has been a procedure allowing Israelis who are married to Palestinians living in Gaza to enter the Gaza Strip in order to visit or remain there with them). **In our matter, there is a sweeping and strict prohibition on visits**.

C. In the Adalah case, the petitioners challenged a **legal provision**, which has solid status and regarding intervention in which the court exercises utmost caution. Our matter concerns an **administrative procedure** which has not been enshrined in a proper order, **which does not conform to existing legal provisions or humanitarian law** and which is subject to much broader judicial review.

D. In the Adalah case, the policy was determined by the Knesset, namely, by the **sovereign**, which has extensive discretion in determining social and legal arrangements. Our case

concerns a decision by a **military commander**, who does not hold a shred of sovereignty. The military commander acts solely as a trustee who has temporary control of the area and is limited to a very narrow range of considerations located in the expanse of tension between security needs and the benefit of the population – and nothing more.

The Adalah case – the right to family life in the place of residence

124. The most important rule set forth in the Adalah case, by a majority of the justices of this honorable court, is that a person has the right to family life, including the right to establish the family unit **in his place of residence**. A person is not to face a choice between living in his home or with his spouse, child or parent. It was further ruled that this right, in this scope, is a fundamental constitutional right.

125. That is, the right to family life is so strong such that the duty to allow its realization may amount to an imposition of a duty to grant citizenship to a foreign citizen.

126. Eight justices held this view.

Thus President Barak in sec. 27 of his opinion:

> The right to family life is not exhausted by the right to marry and to have children. The right to family life means the right to joint family life. This is the right of the Israeli spouse to lead his family life in Israel. This right is violated if the Israeli spouse is not allowed to lead his family life in Israel with the foreign spouse. He is thereby forced to choose whether to emigrate from Israel or to sever his relationship with his spouse. This was discussed by Justice M. Cheshin in HCJ 3648/97 *Stamka v. Minister of Interior* [...]. In that case, the court considered the policy of the Minister of the Interior with regard to granting citizenship to a foreign spouse in Israel. Justice M. Cheshin recognized the 'basic right of an individual — every individual — to marry and establish a family' (at p. 782 [...]). In his opinion, Justice M. Cheshin says:
>
> > 'The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel. Israel is committed to protect the family unit in accordance with international conventions… and although these conventions do not stipulate one policy or another with regard to family reunifications, Israel has recognized — and continues to recognize — its duty to provide protection to the family unit also by giving permits for family reunifications. Thus Israel has joined the most enlightened nations that recognize — subject to qualifications of national security, public safety and public welfare — the right of family members to live together in the place of their choice' (*Stamka v. Minister of Interior* [24], at p. 787)

And the president reiterates in sec. 34 of his opinion:

> Indeed, the constitutional right of the Israeli spouse — a right that derives from the nucleus of human dignity as a constitutional right — is 'to live together in the place of their choice.'

This right stems also from the parents' right to raise their children and from children's right to develop under the care of both parents. In this respect:

> Respect for the family unit has, therefore, two aspects. The first aspect is the right of the Israeli parent to raise his child in his country. This is the right of the Israeli parent to

> realize his parenthood in its entirety, the right to enjoy his relationship with his child and not be severed from him. This is the right to raise his child in his home, in his country. This is the right of the parent not to be compelled to emigrate from Israel, as a condition for realizing his parenthood. It is based on the autonomy and privacy of the family unit. This right is violated if we do not allow the minor child of the Israeli parent to live with him in Israel. The second aspect is the right of the child to family life. It is based on the independent recognition of the human rights of children. These rights are given in essence to every human being in as much as he is a human being, whether adult or minor. The child 'is a human being with rights and needs of his own' (LFA 377/05 A v. Biological Parents [21]). The child has the right to grow up in a complete and stable family unit. His welfare demands that he is not separated from his parents and that he grows up with both of them. Indeed, it is difficult to exaggerate the importance of the relationship between the child and each of his parents. The continuity and permanence of the relationship with his parents are an important element in the proper development of children. From the viewpoint of the child, separating him from one of his parents may even be regarded as abandonment and affects his emotional development. Indeed, 'the welfare of children requires that they grow up with their father and mother within the framework of a stable and loving family unit, whereas the separation of parents involves a degree of separation between one of the parents and his children' (LCA 4575/00 A v. B [26], at p. 331)
>
> (sec. 28 of the opinion)

And thus Justice (as was her title then) Dorit Beinisch in sec. 7 of her opinion:

> The basic human right to choose a spouse and to establish a family unit with that spouse in our country is a part of his dignity and the essence of his personality

Justice Joubran, in sec. 7 of his opinion explains that:

> It would appear that in our time there are few choices in which a person realizes his free will as much as his choice of the person with whom he will share his life, establish his family and raise his children. In choosing a spouse, in entering into a bond of marriage with that spouse, a person expresses his personality and realizes one of the main elements of his personal autonomy. In establishing his family, a person shapes the way in which he lives his life and builds his private world. Therefore, in protecting the right to family life, the law protects the most basic freedom of the citizen to live his life as an autonomous person, who is free to make his choices.

And in sec. 10 of his opinion, Justice Joubran concludes:

> [L]iving together is not merely a characteristic that lies on the periphery of the right to family life but one of the most significant elements of this right, if not the most significant. Consequently, the violation of a person's ability to live together with his spouse is in fact a violation of the essence of family life; depriving a person of his ability to have a family life in Israel with his spouse is equivalent to denying his right to family life in Israel. This violation goes to the heart of the essence of a human being as a free citizen. Note that we are not speaking of a violation of one of the meanings of the constitutional right to have a family life, but the denial of the entirety of this right, and it should be considered as such.

Justice Hayut finds in sec. 4 of her opinion that:

> The right of a person to choose the spouse with whom he wishes to establish a family and also his right to have his home in the country where he lives are in my opinion human rights of the first order. They incorporate the essence of human existence and dignity as a human being and his freedom as an individual in the deepest sense.

And justice Procaccia concurs (sec. 1 of her opinion) that the right to family life is an element of human dignity and that this right is violated when an Israeli is prevented from realizing it in the country. So writes the justice in sec. 6 of her opinion:

> Alongside the human right to the protection of life and the sanctity of life, constitutional protection is given to the human right to realize the meaning of life and its *raison d'être*. The right to family is a *raison d'être* without which the ability of man to achieve self-fulfilment and self-realization is impaired. Without protection for the right to family, human dignity is violated, the right to personal autonomy is diminished and a person is prevented from sharing his fate with his spouse and children and having a life together with them. Among human rights, the human right to family stands on the highest level. It takes precedence over the right to property, to freedom of occupation and even to privacy and intimacy. It reflects the essence of the human experience and the concretization of realizing one's identity.

Justice Adiel finds in sec. 3 of his opinion:

> With regard to the right to family [life], in view of the proximity of this right to the nucleus of the right to dignity, its centrality in the realization of the autonomy of the individual to shape his life and the case law of this court which is mentioned in the opinion of the president, I accept that the right of the Israeli spouse to family life in Israel together with his foreign spouse is indeed included within the framework of the right to human dignity within the meaning thereof in the Basic Law: Human Dignity and Liberty.

Justice Rivlin finds, in sec. 8 of his opinion:

> The right to realize family life is a basic right. Denying it violates human dignity. Denying it infringes the autonomy of the individual to marry whom he wants and to establish a family; it certainly infringes his liberty. This violation of liberty is no less serious than the violation of human dignity (on the restriction of the right to marry as a violation of liberty, see Justice Warren in the leading case of *Loving v. Virginia* [188]). It deals a mortal blow to a person's fundamental ability to dictate his life story. Israeli law recognizes the right of the Israeli citizen to family life. The right to family life also means the right to family life together under one roof. The right to family life is not merely the right of the parents. It is also the right of the child born to those parents. The right to family life is therefore protected in the provisions of the Basic Law as a part of the basic right to liberty and as a part of the basic right to dignity.

Justice Rivlin proceeds to reject the attempt to separate the right to family life into a "nucleus" and a "periphery", with the right to fulfill family life without emigrating being on the "periphery" of the right.

Whereas Justice Levy finds (in sec. 7 of his opinion):

> Two constitutional rights of the *Israeli spouse* who wishes to be reunited here with his Palestinian spouse are violated by the legislative arrangement that is the subject of the petitions before us, and both of them are derived from the right to human dignity, which is enshrined in the Basic Law: Human Dignity and Liberty. One is the right of a person to

> *family life*, which incorporates two secondary rights, without which it would appear they are meaningless — the basic right of a person to marry whom he chooses, as he sees fit and in accordance with his outlook on life, and the right that he and the members of this family will be allowed to live together also from the viewpoint of the geographic location of the family unit, which they have chosen for themselves.

127. As known, the petition in the **Adalah case** was ultimately rejected since some of the justices who maintained (like the majority) that every person has a fundamental and constitutional right to family life thought that despite the importance and centrality of this right, serious security considerations, may, in some circumstances, legitimize impeding it if such impediment is enshrined in primary legislation.

128. And if it has been so clearly ruled that a foreign spouse has a right to family life in the place of residence of his spouse – and even to receive citizenship for this purpose – this is all the more the case when the issue concerns two local citizens who wish to live with their families in their country.

(ii) The obligation to care for the wellbeing of the vulnerable: children, the elderly and the infirm

129. It seems that there is no choice but to recall, in our matter, the basic duty to protect the vulnerable, to advance their best interest and care for them – whether they are children, the elderly or the infirm. This is a supreme fundamental principle which is almost to be taken for granted. Yet, the respondents trample it underfoot.

130. The issue of the vulnerable is possibly one of the most sensitive and delicate issues in the operation of the authorities. Courts too, take care to approach them carefully with utmost caution while reiterating, time and again, the immense importance of sincere care for the wellbeing of children, the elderly and the infirm.

131. It is for good reason that there is a special duty to care for and protect the elderly and the infirm under international law. This customary principle was formulated as follows:

> The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.
>
> (J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Vol. 1, 2005) p. 489)

132. As known, the existence of the International Convention on the Rights of the Child (1989), which was ratified by the State of Israel in 1991 and the enactment of Basic Law: Human Dignity and Liberty have fortified the status of children as independent bearers of rights and as independent legal persons.

The remarks of the Honorable Justice Silberg are relevant to our case:

> The test of the best interest of the child is supreme… it is indivisible and cannot be blended and mixed with any other consideration. As once the legislature has risen to the level of modern conception – and the sages of Israel have held this modern conception for eons – that the child is not an "object" for keeping and holding for the enjoyment or benefit of one of the parents, but rather is himself a "subject", himself a "litigant", in this essential question, indeed it is impossible to ignore his interest in any kind of circumstance.
> (CivA 209/54, **Steiner v. Attorney General**, *Piskey Din* 9(1) 241, 251 (1955)).

Regarding the principle of the best interest of the child, see also:
HCJ 40/63, **Lorenz v. Head of Execution Office**, *Piskey Din* 16(3) 1709, 1717 (1963);
CivA 549/75 **John Does v. Attorney General**, *Piskey Din* 30(6) 459, 465 (1975);
CivA 2266/93 **John Does v. John Doe**, *Piskey Din* 49(1) 221, 271-272 (1995).

133. The court has also emphasized the basic duty to care for and assist the elderly – a duty incumbent on society in general and close relatives in particular:

> If in the past everyone looked to the tribe elders and they received recognition and appreciation for their experience and contribution to society, indeed today, some seniors are pushed to the side and sometimes, even persons close to them, their flesh and blood, do not offer assistance, of all things, in the years when their bodies are frail and their general functioning is not as it once was. In this state, then as now, society is obliged to care for its elderly out of respect, compassion, grace and gratitude for the good they contributed to society when they were strong.
>
> (CivA 4377/04 **Goren-Holtzberg v. Miraz**, *Takdin Elyon* 2007(3) 848, 871).

134. The remarks of Vice President Menachem Alon on the duty to honor one's mother and father:

> The connection between a child and his parent and the commandment to honor one's parents have been a fundamental principle and sacred edict in the tradition of the people of Israel for ages past, and so in every cultured human society; it is the fifth of the Ten Commandments: "Honour thy father and they mother" (Exodus 20, 12; Deuteronomy 5, 17). And why is this so? It is so since "There are three partners in man, the Holy One, blessed be He, the father, and the mother." (Kiddushin 30, 2).
>
> Go and learn how far the duty to honor one's father and mother reaches in the eyes and deeds of the sages. This is recounted of Rabbi Tarfon (one of the greatest rabbinical scholars of the first century):
>
> "Rabbi Tarfon had an elderly mother. Whenever she wished to mount into bed, he bent down and she mounted. Whenever she descended from her bed, he bent down over and she stepped down upon him. One day, he boasted his deeds at the school. Said they to him: You have not reached half the honour: Has she then thrown a purse before you into the sea without your shaming her?" (Kiddushin, 31, 2).

135. Time and again, the court emphasized in its rulings the complexity and sensitivity involved in rulings regarding children, noting that it was a task as difficult as extracting water from stone, which "necessitates an examination of delicate and complex matters relating to the human soul" and, therefore, the court itself would find it hard to rule on such matters without the involvement and opinion of experts and professionals:

> The concept of "the best interest of the minor" is a general and broad concept and the courts are occasionally required to infuse it with content and design criteria for its implementation in the concrete case under review […]
>
> Each time, the court is faced with a task which is as difficult as extracting water from stone (compare: BAAM 377/05 A. and B. v. Parent Candidates for Adoption of the Minor (unpublished), at sec. 37). Indeed, each and every case unfolds its own life story and in each and every case the court is presented with a relationship which is unique to the litigants who stand before it as a family in dispute. The decision on what is "the best

interest of the minor" in the concrete case necessitates an examination of delicate and complex matters relating to the human soul, including, as aforesaid, the connection between children and their parents and the mental ability of each of the family members to handle the situations life places in their paths…

In order to make these crucial decisions, the court routinely requires the assistance of experts to help with collecting data, conducting examinations and providing professional opinions. The importance of this tool for ruling on the question of the best interest of the minor whose case is at bar has previously been imbedded in the remarks of this court in HCJ 5227/97 David v. The Great Rabbinical Court, *Piskey Din* 55(1) 453, 462 (hereinafter the David case) which ruled:

As a general rule – and in the vast majority of the cases – the court will not decide what the best interest of the child is until it is presented with the opinions of experts – experts on physical health and mostly experts on mental health, namely: physicians, psychologists, psychiatrists – on the question of what is in the best interest of the child and what is in his worst interest, what would benefit him and what would harm him. The best interest of the child is not a theoretical concept. The court is required, for this matter, to find factual findings. The court cannot generally find these findings unless it is presented with evidence; and evidence, in our case, means mostly expert opinions…

Diagnosing a person's mental and physical condition – including the effect of his close environment on his mental and physical condition is a matter for professionals to answer; and I find it difficult to see how the court could rule on the question of the best interest of the child without the assistance of expert opinions. The experts will collect the data on the case, analyze and process it and present the court, or the tribunal, with all of these, including their professional opinion.

(FamAR 9358/04 **A v. B**, *Takdin Elyon*, 2005(2) 2893, 2897).

136. Thus, that in which the court fears to intervene and leaves to professionals, while stressing the caution, sensitivity and difficulty involved therein – the respondents seek to trust to military officers with a procedure which **clearly ignores considerations of the best interest of the child, elderly or infirm.**

137. **Is it conceivable that security officials and military officers will be the ones to decide the fate of the vulnerable? Is it conceivable that a security–bureaucratic procedure will determine which parent a child will live with; who will care for the elderly matron of the family; who will care for an ailing brother?**

It is nothing short of the absolute revocation of the concept of the best interest of the child and care for the vulnerable and a crude intervention in the family autonomy of residents of the Territories.

Is it necessary to remind the respondents that the residents of the Territories (whose rights the respondents are entrusted with upholding) are human beings, with families, parents, children and spouses?

(iii) The right to freedom of movement and the right of transit between the Gaza Strip and the West Bank

138. The judicial, legal and practical premise is that the Gaza Strip and West Bank are a single territorial unit.

Regarding Israel's recognition of the Gaza Strip and West Bank as a single territorial unit see:

Article VI, Declaration of Principles, September 13, 1993, signed by Israel and the PLO;
Article XXIII(6), Agreement on the Gaza Strip and the Jericho Area, the "Cairo Agreement", signed by Israel on May 4, 1994;
Article XI(1), Interim Agreement, signed by Israel at the White House, September 28, 1995;
Article I(2), Annex I of the Interim Agreement, Protocol Concerning Redeployment and Security Arrangements;
Proclamation regarding Implementation of the Interim Agreement (Proclamation No. 7);
Agreement on Movement and Access between Israel and the Palestinian Authority, November 15, 2005;
HCJ 7015/02 **'Ajuri v. Commander of IDF Forces in the West Bank**, *Takdin Elyon* 2002(3), 1021 (2002);
HCJ 7052/03 **Adalah v. Minister of the Interior**, *Takdin Elyon* 2006(2), 1754 (2006).

139. The disengagement plan has not changed this basic legal reality. As stated, in the Oslo Accords, Israel pledged to view the Gaza Strip and West Bank as a single territorial unit and it was determined that until the termination of the process, nothing will change this status. Israel has never officially retracted this position and continues to operate effectively in accordance with the Oslo Accords with regards to the Gaza Strip (in matters relating to the population registry and transferring of applications, for example).

140. In light of the aforesaid, the fundamental principle by which the Gaza Strip and West Bank constitute a single territorial unit still stands in its judicial, legal and even practical sense – in the sense that every policy and every decision must be examined in light of this principle while making sure that any deviation from it is to the necessary, most focused and most restricted extent and only when it comes to narrow, focused security considerations, in order not to irreversibly impede this fundamental principle.

141. It is clear that even if passage between the Gaza Strip and West Bank may be somewhat restricted in light of concrete circumstances and in accordance with individual, focused, security considerations, indeed, it is a far cry from an extreme, systematic and blanket abuse of fundamental rights and a policy which has far reaching ramifications for the residents of the Territories (from an individual private perspective, but also from a general demographic and social perspective) which strips the perception of the Gaza Strip and West Bank as a single territorial unit of meaning – both in the short and in the long term.

The right to freedom of movement

142. The right to freedom of movement is a central and substantial human right which stems from the recognition of human dignity and liberty. Freedom of movement is the central expression of a person's autonomy, his free choice and the realization of his capacities and rights.

> Constitutional protection of freedom of movement embodies the power of the right for the autonomy of personal will and is interwoven with the recognition of human dignity, which constitutes the source of the individual's rights to freedom of spirit and body… Although the individual's right to freedom of movement within state borders has not found statutory expression in the Basic Law, unlike the freedom to leave and enter Israel, it is recognized in case law as a constitutional right pursuant to the general recognition of the individual's personal liberty and as a derivative of his dignity as a human being… In

> the hierarchy of a human's basic rights, the individual's right to movement has a great constitutional power… it stands at the utmost importance in the hierarchy of human rights in Israel… freedom of movement enjoys constitutional status similar in its power to freedom of expression.
>
> (HCJ 6358/05 **Vanunu v. GOC Home Front Command**, *Takdin Elyon* 2006(1) Sec. 10).

143. The right to freedom of movement is the engine that drives the fabric of a person's rights, the engine which allows a person to fulfill his autonomy and choices. When freedom of movement is restricted, that "engine" is damaged, and as a result, some of a person's rights and opportunities cease to exist. His dignity as a human being is breached. Hence the great importance attributed to the right to freedom of movement.

144. When one permanently restricts a person in his travels to extensive integral parts inside the territory of the state or entity in which he lives, one harms his social life, his cultural life and his freedom of choice. Such a person is limited in the most substantive issues of his life: where he will live, with whom he will share his life, where his children will study, where he will receive medical treatment, who his friends will be, where he will work, what his occupation will be and where he will pray.

145. It is for a good reason that the right to freedom of movement is considered a human right which is included in the norms of customary international law:

> Freedom of movement is also recognized as a fundamental right in international law. Freedom of movement inside the state is enshrined in a long list of international conventions and declarations regarding human rights… it appears also to be enshrined in customary international law.
>
> (HCJ 1890/03 **Bethlehem Municipality v. State of Israel**, *Takdin Elyon* 2005(1) 1114, sec. 15).
> See also HCJ 3914/92 **Lev v. District Rabbinical Court**, *Takdin Elyon* 94(1) 1139, 1147.

146. The right to freedom of movement is also enshrined in international humanitarian law The Fourth Geneva Convention entrenches freedom of movement as a fundamental right of protected persons, whether in an occupied territory or a conflict zone. Article 27 of the Convention stipulates that protected persons are entitled, under all circumstance to respect of their honor.

147. It is important to note also Articles 41-43 (which apply to the territory of a power which is involved in conflict) and 78 (which applies to an occupied territory). These articles address the restriction of freedom by means of interment or assigned residence. The measures are literal and their use is literal. This indicates that the freedom of movement of protected persons under all other circumstances was particularly important to the state parties. Only where there is a general duty to respect freedom of movement is there a need to establish express, literal rules for the restriction thereof:

> Indeed, Art. 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, *inter alia*, in the provisions of Art. 78 of the Fourth Geneva Convention that determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may "at

most" carry out.

(HCJ 7015/02 **'Ajuri v. Commander of IDF Forces in the West Bank**, *Piskey Din* 56(6) 352, 367)

148. International human rights law is also a binding source which enshrines freedom of movement as a fundamental human right. So stipulates Article 12(a) of the International Covenant on Civil and Political Rights which Israel signed and ratified:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

The aforesaid Article 12 is a binding source. As a source for interpretation see also Article 13 of the Universal Declaration on Human Rights and Article 2 of the Fourth Protocol to the European Convention on Human Rights 1963.

The right of transit in international law

149. Naturally, the persons concerned do not seek to enter Israel in order to remain therein. On the contrary: the persons concerned have no interest or desire to remain in Israel. All they seek is to transit between the two parts of their land, which are geographically separated, with Israel located in between, in order to live with their families. **The right at issue is not, therefore, the right to enter Israel, but the right of transit.**

150. At the outset, one must stress that the procedure's impediment to the fulfillment of the right of transit is particularly extensive and extreme – as the respondents do not limit the right of transit between the parts of the Territories only when it involves passage through Israel – but also when it does not involve passage through Israel at all, for instance, when it comes to persons who travel from the Gaza Strip through Egypt and Jordan to the West Bank.

151. **The right of transfer/transit** is recognized in international law and is intrinsically different from the right to enter.

We shall elaborate on this right.

152. The approach that people are entitled to present a state with a legitimate demand to travel through it can be found in the bible:

> Let me pass through thy land: we will not turn into the fields, or into the vineyards; we will not drink of the waters of the well: but we will go along by the king's high way, until we be past thy borders. (Numbers 21, 21 [sic])

Denial of such a demand is considered as arbitrary and as justifying war.

153. **International law recognizes the existence of a right of transfer which places a degree of limitation on the principle of sovereignty**. A state is obliged to allow passage through its territory to foreign subjects wishing to arrive at a different country. The right of transfer exists where passage is necessary (even if there are alternatives) and when it does not harm the state in whose territory it takes place. Transit may be subject to conditions whose purpose is to protect the legitimate interests of the country being traversed.

154. The scholar Uprety notes in his book that:

> Jurists over the past six decades have definitely favored the view that States whose economic life and development depend on transit can legitimately claim it.
>
> (K. Uprety, The Transit Regime for Landlocked States: International Law and Development Perspectives (The World Bank, 2006), p. 29).

In cases of enclaves, the right of transit is of a customary nature and naturally stems from the very existence of the enclave. The scholar Farran bases this, *inter alia*, on the legal principle according to which when someone grants something, he is deemed to also grant that without which the granting is meaningless (*cuicunque aliquis auid concedit concedere videtur et id sine quo res ipsa non potuit*).

In the words of Farran:

> The law would not recognize the right of state A to a detached piece of its territory enclaved in state B's unless it was possible for state A to use that right. The existence of a right implies its exercise: without a right of free communication the rights of a state to its exclaves would be incapable of exercise and therefore nugatory. Hence there is no need for an express treaty between the two states concerned to give such a right: it is implicit in the very existence of the enclave. If a treaty is made, it may well regulate the exercise of this international way of necessity: but in its absence the right of way will still exists, for the necessity is still in being.
>
> (d'Olivier Farran, C., International Enclaves and the Question of State Servitudes, *The International and Comparative Law Quarterly*, Vol.4, No. 2. (Apr. 1955) 294, pp. 304).

155. The right of transit also exists where there is no proximity. Classic cases, in the context of which the right of transit developed are cases of **land locked states** (such as Switzerland and the Caucasus), **enclaves** surrounded by another state (such as West Berlin prior to the unification of Germany and Mount Scopus between 1948 and 1967) and **geographically split states** (such as the Palestinian Territories).

156. In an extensive essay by Lauterpacht on the right of transit, the scholar describes it as follows:

> On that view, there exists in customary international law a right to free or innocent passage for purposes of trade, travel and commerce over the territory of all States – a right which derives from the fact of the existence of international community and which is a direct consequence of the interdependence of States.
>
> (E. Lauterpacht, Freedom of Transit in International Law, **Transactions of the Grotius Society**, Vol. 44 (1958), pp. 313-356, p. 320).

Lauterpacht bases the customary nature of the right of transit on manuscripts by scholars from the days of Grotius to the modern age as well as state practice. He proves that the fundamental principle of the right of transit is uniformly repeated in countless bi-lateral and multi-lateral treaties (the earliest treaties he mentions are from the eleventh century), which regulated the concrete implementation thereof in different contexts: passage on rivers, waterways and land passage through the territories of various countries. He demonstrates how the same logic was applied to sea routes.

Among the more modern and extensive treaties, as for as the number of parties, one may note the Convention on the High Seas (1958) (Article 3 regarding the right of access to the sea of states with no sea coast); the Convention on the Territorial Sea and Contiguous Zone (1958) Arts. 14-24

regarding innocent passage through territorial waters); the UN Convention on the Law of the Sea (1982) (Article 125 regarding the right of access to the sea and freedom of passage and the GATT (Art. V regarding the right of passage).

157. The right of transit is subject, as stated, to the absence of harm to the state being crossed. For this purpose, the right may be subject to payment for expenses involved in passage itself; requirements such as quarantine in order to prevent the spread of disease etc. As for security considerations, Lauterpacht writes:

> In terms of the problem of transit, there is room for the view that States are not entitled arbitrarily to determine that the enjoyment of a right of transit is excluded by considerations of security. What they may do is, by reference to the factor of security, to indicate one route of transit in preference to another or, possibly, to allow the use of the route subject only to certain conditions. But it must be doubted whether the discretion of the State stretches beyond this.
>
> (ibid. p. 340)

158. This approach is also reflected in treaties which enshrined the general principle of the right of transit in concrete circumstances. The right of transit does not cease to exist in states of emergency, nor in a time of war, but it may be proscribed in accordance with circumstances. The proscription has to be as minimal as possible – in terms of both scope and duration.

159. In a historic review the scholar Farran conducts in his aforementioned essay, he describes the occupation of Llivia (the German enclave in France) and Baarle-Hertog (the Belgian enclave in the Netherlands) during World War II and stresses the **duties of the occupying power** to actively allow the realization of the right to contact and passage between the enclave and the rest of that and other states:

> The continued recognition of the special position of Llivia and Baarle-Hertog by such invaders as Napoleon and Hitler demonstrates clearly that **even a military occupying Power feels that it must respect the rights implied in the existence of such enclaves**. The most important of these implied rights we believe to be that of free transit and communication with the main territory of the state or, in the case of the full state enclave, with other states.
>
> (Page 304, emphasis added).

160. In our case, as stated, the right of transit is expressed also in explicit and detailed agreements (the Interim Agreement, the Safe Passage Protocol, the Agreement on Movement and Access). Even if these full and detailed arrangements have been delayed, indeed this does not completely negate the right of transit – **particularly since fundamental rights of utmost weight, such as the right to family life are at stake.**

161. Moreover, the severity of denying the right of transit is most poignantly expressed in the fact that the procedure does not just relate to passage through Israel, but limits the right of transit between the Gaza Strip and West Bank <u>in any way</u>, even if transit does not involve travelling through Israel's territory but rather through Jordan.

<u>Sec. C3: Violation of the Military Commander's Duties and Extreme *Ultra Vires*</u>

Paralysis of normal life

162. Normal social life in the modern world requires the movement of people. A society cannot exist without the movement of people: couples seeking each other's company; husbands and wives moving to live together; parents arriving to visit their sons and daughters, their grandsons and granddaughters; acquaintances arriving to visit those close to them and more.

The almost complete ban on movement from Gaza to the West Bank has not been restricted to a short period of time, nor any time-limited period. On the contrary: the prohibition is forward-looking for many years to come. It is, in effect, the tearing of Palestinian society between the West Bank and Gaza Strip.

Violation of the right to family life

163. The ramifications of the respondent's policy are destructive, particularly when it comes to the family life of residents of the Territories.

164. As we have observed, the right to family life is one of the rights the respondent is obliged to respect under international humanitarian law. Simultaneously, he is bound by duty to respect the family rights of residents of the Territories and assist the family unit, under Israeli law and under international human rights law. A substantial part of the nucleus of the right to family life is a person's right to maintain his family unit in his place of residence.

In the words of the Honorable Justice Levy in the Adalah case; **The right to family life is meaningless if it does not include a person's right that he and his family members be allowed to live together also from the viewpoint of the geographic location of the family unit, which they have chosen for themselves.**

165. Rather than assisting the family, being the fundamental unit of society, the respondent rips and tears families apart.

Palestinians living in the West Bank, whose betrothed are in Gaza cannot get married and establish a family unit in the West Bank.

Residents of the Territories from the West Bank who are married to residents of the Territories from Gaza cannot live in the West Bank with their spouses. They face the choice of leaving their homes or living apart.

Children of such families will suffer and their development will be hampered whatever decision their parents make. In many cases they will live with one parent only and contact with the other parent will come down to telephone conversations.

166. The family rights of protected residents is one of the matters whose weight and importance increase in long term occupation.

The life stories of people under occupation are woven as the occupation carries on. The story of a person's life is also the story of his family life. This life goes on. It does not freeze: people marry and divorce, they are born, they mature and they die, they bear children and raise them, they face family traumas together and apart and wish to share their joyous occasions with their relatives, they feud with their families and then reconcile. Movement from place to place is part and parcel to these chapters in the story of a person's life.

The respondent is ignoring this dynamic of human life. He freezes the possibility of moving between the parts of the Territories. He attempts to freeze life. He breaches his duties.

The scope of the commander's discretion and the purpose of the new procedure

167. The respondent's discretion is not equal to the discretion of a sovereign. He is subject to two "magnetic poles" only – the benefit of the population pole and the security considerations of the occupying power pole:

> We have seen that the considerations of the military commander are ensuring his security interests in the Area on one hand and safeguarding the interests of the civilian population in the Area on the other. Both are directed toward the Area. The military commander may not weigh the national, economic and social interests of his own country, insofar as they do not affect his security interest in the Area or the interest of the local population. Military necessities are his military needs and not the needs of national security in the broader sense. (the Jam'iat Iscan case, pp. 794-795).

The reasons for the new procedure are not located between these two magnetic poles. It shall be recalled that the absence of a security preclusion is a precondition for the entire procedure – namely, the procedure from the outset concerns cases **where there are no security claims against the applicants**.

168. It shall be emphasized that in proceedings and applications filed in this matter to date, **the respondents have not presented any explanation as to how and why this procedure is necessary for security reasons and no factual foundation was presented for the same.**

169. The absence of a real security rationale for the new procedure clearly emerges from the respondents' position in the petitions in which the procedure was presented. As recalled, in those petitions no security allegations were made against any of the petitioners. Moreover, in the **'Amer** case, the respondents consented to the petitioner's travel to the West Bank and even to the issuance of an interim injunction which would allow her continued residence in her home in the West Bank, and in the **Abu Shnar** and **Hamidat** cases, the respondents agreed to the actual return travel of the petitioners between the West Bank and Gaza Strip – and objected only to their continued residency in the West Bank.

Deliberate harm to the civilian population due to extraneous and unacceptable considerations

170. **The procedure** thus **concerns nothing more than the political relationship among the respondent, the Palestinian Authority and the Fatah and Hamas movements, with families – parents and children – constituting a bargain chip in this relationship**.

171. The respondents' policy is intended, at face value, to punish the population for electing Hamas; damage the residents' quality of life; make their lives intolerable; exert pressure on relatives who live in the West Bank to leave their homes and permanently relocate to the Gaza Strip as a condition for seeing their loved ones – all in order to exert political pressure on the Hamas government in Gaza.

It is, in effect, a strategy which the state describes (in another context) as a strategy of "limited conflict". Thus, for example a document by the Training and Theory Unit in the IDF's Operations Division states:

> A situation of limited conflict has a **political purpose** and it is resolved through change of consciousness in the society and among its combatants, through prolonged "fatiguing" rather through victory and deterrence by the party with military power (as is the case at war).

And elsewhere:

> The strategy employed in a limited conflict is "fatiguing" (physical and mental attrition). Fatiguing gradually erodes the determination of the society and its combatants through a prolonged process of inflicting physical, economic and mental harm.
>
> (Model for Proclaiming Conflict Zones in the Judea and Samaria Area and the Gaza Strip Area, February 2006, pp. 15-16. Appended to the state's response in HCJ 8276/05 **Adalah v. Minister of Defense**).

172. In effect, Israel has openly admitted that it is using the issue of travel as "civilian leverage" to exert pressure on the Hamas government. See for example a media report on the cabinet decision of September 18, 2007:

> The cabinet has unanimously approved economic sanctions designed to **harm the Palestinian civilian population in the Gaza Strip and utilize "civilian leverage" against the Hamas regime**…
>
> The operation of crossing points between Israel and the Gaza Strip, which now operate only partially and used primarily for the transport of food and medicine will be further restricted… in addition, Israel will completely block passage of people to and from the Gaza Strip.
>
> (Barak Ravid, "Response to Kassam: Impeding Electricity Supply", **Haaretz** September 19, 2007; Barak Ravid, Shlomo Shamir, Mazal Mualem and Agencies "Punitive Measures against Civilians in Gaza – UN Secretary General: Withholding services in Gaza violates international law and punishes those already suffering", **Haaretz** September 19, 2007; emphasis added).

173. Similar comments have been made on other occasions by various officials in the security establishment, as reported in the media on January17, 2008, for example:

> Today (Thursday) Defense Minister Ehud Barak ordered the IDF and the coordinator of government activities in the Territories to close the border crossings from Israel to the Gaza Strip … thus creating pressure on the Hamas government […]
>
> Officials in the security establishment claim that this action is a direct continuation of IDF activities in recent days. **The purpose is the exertion of massive pressure by residents of the Gaza Strip on the Hamas government**…
>
> (Yehoshua Breiner "Barak Ordered a Siege on Gaza", **Walla!** January 17, 2008; emphasis added).

174. Minister of Public Security Avi Dicther openly repeated this on March 18, 2009, following the end of the war in Gaza and the failure of negotiations regarding Gilad Shalit:

> It is clear to me that Operation Cast Lead was leverage which should have been made greater use of … we should have used it better and we didn't use it enough. Now we will need other leverages. **The crossing points are one leverage in a number of leverages which we, who are in this business, know how to utilize**.

(Roni Sofer "Dichter: It's the Scum of the Scum of Terrorists", **YNET** March 18, 2009; emphasis added).

175. **This is a patently illegal strategy. The essence of the laws of war is to create a distinction between the combating forces and the civilian population and to protect civilians from the devastating effects of war.** Civilians are not a legitimate target for military forces. Indirect harm to civilians is sometimes unavoidable, however, intentionally harming civilians is prohibited.

176. Moreover, the respondents' policy and the new procedure breach the fundamental and basic duty of the military commander of an occupied territory to safeguard the fabric of normal life in the Territories.

Not only do the respondents not allow the preservation of the fabric of life in the Territories – but rather, they seek to deliberately and radically harm the social, familial and demographic structure of the Territories while causing prolonged and irreparable damage both to individual residents thereof and to the fabric of life of the Territories' population in general.

177. It shall be further noted that in light of the new procedure's extreme and arbitrary nature, despite being concerned with cases which *ab initio* and as a precondition pose no security risk, there is an emerging concern that **demographic considerations** are included among the military commander's considerations – these are not legitimate demographic considerations regarding the capacity of the Occupied Territories given the available resources therein, but rather unacceptable demographic considerations relating to the "demographic balance" between Jews and Palestinians in the territories of the West Bank – as if Israel had "given up" its demographic aspirations regarding the Gaza Strip **but vehemently insists on them when it comes to the West Bank**.

This concern is intensified in view of the respondents' general policy which creates immense pressure on residents of the Territories living in the West Bank to leave their homes and permanently relocate to Gaza as a condition for fulfilling their right to family life.

One might wonder how such considerations continue to constitute such a powerful motivator at a time when Israel's official policy is one of separation between Israel and the Territories and it seemingly should not have any interest in the size of the Palestinian population in the West Bank. To judge by comments and statements made by state leaders, it appears to be agreed and known that the major part of the Occupied Territories will become, not in the distant future, an independent Palestinian state – which will include both the West Bank and the Gaza Strip. Why then this insistence by the respondents on blocking any move from the Gaza Strip to the West Bank while severely harming the lives of families?

Violation of the prohibition on collective punishment

178. Thus indeed, the procedure which is applied indiscriminately to any Palestinian living in the Gaza Strip and injures every Palestinian family which found itself split between Gaza and the West Bank constitutes a violation of the fundamental principle which prohibits the imposition of collective sanctions.

179. Regulation 50 of the Hague Regulations stipulates that:

> 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.

180. Similarly, Article 33 of the Fourth Geneva Convention stipulates that:

> Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

181. Article 75(2) of the First Protocol to the Geneva Conventions also stipulates:

> The following acts are and shall remain prohibited at anytime and in any place whatsoever, whether committed by civilian or by military agents…
>
> (d) collective punishments.

The interpretation of the Protocol clarifies that the term "collective punishment" means any sanction or harassment of any kind: criminal, administrative, policy etc. (*Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12* August *1949,* Y Sandoz et al. eds., Geneva, 1987, 874).

Wrongful discrimination

182. While the Palestinian population of the West Bank and Gaza Strip are subject to the procedure, which radically, sweepingly and almost completely restricts the right of Palestinians living in the West Bank to live there with their closest relatives - indeed, this procedure is not applied to Israeli settlers who, at the very same time, are permitted to live all over the West Bank and bring all their relatives and friends there without impediment or restriction: with no connection to the nature of the family relationship, with no need for permits or licenses, without "criteria".

183. The irony of this conduct is particularly blatant in view of the fact that unlike residents of the Occupied Territories whose dwelling and presence in the West Bank (whether they arrived from Gaza or the West Bank and whatever their registered address) is not limited by any legal provision, indeed, pursuant to the 1967 declaration of the West Bank as a "closed zone", the military commander stipulated, in an explicit order, that one specific group of people is expressly required to receive a "personal permit document" in order to "change a place of residency to the Area permanently": **Israelis**.

184. Sec. 2(6) of the order regulating movement of Israelis into the West Bank (General Entry Permit (No. 5) (Israeli Residents and Foreign Residents) (Judea and Samaria), 5730-1970) stipulates that one of the conditions for Israelis' entry into the region is:

> A place of residence may not be changed to the Area permanently or temporarily except by a personal permit document granted by the military commander.

A copy of General Entry Permit (No. 5) (Israeli Residents and Foreign Residents) (Judea and Samaria), 5730-1970 is attached and marked **P/14**.

185. It is superfluous to note that as far as the petitioners know, there is not one Israeli settler in the Territories who has held or holds a "personal permit document" for the purpose of changing his place of residency to the Territories.

The new procedure imposes extreme restrictions on presence and dwelling in the Territories by Palestinians – the original residents of the Territories who are also protected residents under international law and in whose matter there is no legal provision limiting the same. It does not apply to settlers whose presence and dwelling in the West Bank are in complete contravention of international law and who are required, under military legislation, to hold permits to remain [in the West Bank] and receive personal, written permits to settle therein.

Extreme deviation from the principle of proportionality

186. Beyond all the aforesaid, indeed, the respondents are required to act **in accordance with the principle of proportionality**. However, in the procedure they established, the respondents blatantly and severely breach their duty to act proportionately.

> The proportionality principle has become a general principle of human rights law in international law…The extensive use of the principle of proportionality in practice indicates that there is a necessary connection between the purpose of human rights conventions as a tool for advancing fundamental human rights and the need to make sure that the restriction of human rights will always be proportionate, i.e. will properly balance all the interests and rights of the parties concerned.
>
> Thus, **the principle of proportionality must be read into every framework which restricts human rights as an overarching principle which sets out the limits of the restriction.**
>
> (Yuval Shai, **The Use of the Principal of Proportionality in International Law** (2009); emphasis added)

187. The court has addressed the principle of proportionality and its implementation extensively in a judgment recently rendered in HCJ 2150/07 **Abu Safiya v. Minister of Defense** (not yet published, December 29, 2009) (hereinafter: **the Road 443 case**):

> According to the principle of proportionality, an individual's liberty may be restricted in order to realize proper purposes as long as the restriction is proportional (the Beit Surik case, p. 837). The principle of proportionality draws its power from international law as well as the fundamental principles of Israeli public law (the Mar'abe case, p. 507). In order to meet the proportionality condition, the onus is on the military commander to demonstrate that the measure employed by him is compatible with the purpose (the first subtest of proportionality); that the measure being employed is the least harmful to the individual of the possible alternatives (the second subtest of proportionality); and that there is an appropriate proportion between the impingement on personal freedoms stemming from the use of the measure and the benefit its use yields (the third subtest of proportionality, also known as "the proportionality test in the narrow sense") the Murar case, sec.18; see also the Beit Surik case, p.840).
>
> […]
>
> In terms of the first subtest, we shall examine, as stated, whether there is a rational connection between the means employed – the closure of the road for movement of Palestinian vehicles, and, as a result, the restriction of the freedom of movement of residents of an area under belligerent occupation and the purpose – protecting the security of the state and its citizen and the security of the Area […]
>
> In terms of the second test, it is required that the measure employed is the one least harmful to the individual of the spectrum of suitable measures […]
>
> In terms of the third subtest, one must demonstrate that employing the measure under review is proportional to the benefit stemming thereof. In the words of President Barak:
>
> > This subtest weighs the costs against the benefits… According to this subtest, a decision of an administrative authority must reach a reasonable balance between

> communal needs and the damage done to the individual. The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made against the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves "family honour and rights"… All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. (the Beit Surik case, p. 850)

And as has been ruled in the Adalah case:

> This subtest therefore provides a value test that is based on a balance between conflicting values and interests (see Alexy, *A Theory of Constitutional Law*, at p. 66). It reflects the approach that there are violations of human rights that are so serious that a law cannot be allowed to commit them, even if the purpose of the law is a proper one, its provisions are rational and there is no reasonable alternative that violates them to a lesser degree. The assessment of the balance between the extent of the violation of the human right and the strength of the public interest that violates the right is made against a background of all the values of the legal system. (*ibid*. sec.75).

(sec. 29-32 of the Honorable Justice Fogleman's opinion).

188. Our matter concerns a procedure **which radically deviates from the principle of proportionality:**

The purpose of the procedure and the first test of proportionality

189. As stated above, *prima facie*, it seems that the procedure **is intended solely for realizing improper purposes – infected and driven by extraneous political and perhaps even demographic considerations**.

190. All that has been argued regarding the procedure in this case is that it has been established "against the background of the security situation". Yet, the respondents have not clarified to date what are those alleged "security" grounds, i.e. what is the purpose underlying the procedure and what is the connection between said purpose and the means – sweeping injury to families and residents of the Occupied Territories who are not suspect and do not pose a risk to anyone's security.

191. The first subtest of proportionality demands a rational connection between the measure employed and the purpose being pursued.

192. It has already been ruled that:

> The rational connection test is not merely a technical causal connection test between means and end. Even when use of a certain measure is likely to lead to realization of the desired purpose, this does not mean that there is a rational connection between the means and the end and that the means is *suited* to achieving the end. The emphasis in the rational connection test is whether the connection is *rational*. The meaning of this is, *inter alia*, that an arbitrary, unfair or illogical measure should not be adopted.

(HCJ 9593/04 **Head of Yanun Village Council v. Commander of IDF Forces in Judea and Samaria**, *Takdin Elyon* 2006(2) 4362, 4375).

193. Ours is a case of a sweeping, arbitrary prohibition which almost entirely blocks the possibility of moving from the Gaza Strip to the West Bank and fatally injures the family lives of residents of the Occupied Territories – **a prohibition which is entirely unrelated to the degree of security risk emanating from one person or another, but is rather related to a list of completely arbitrary "criteria"**.

The second test of proportionality

194. The second subtest of proportionality demands that the measure to be chosen is the one which is least harmful. In the context of this test, one must recall that every case warrants an educated and balanced decision regarding the risks to be taken, even those required for the purpose of protecting human rights. Justice (as her title was then) Beinisch addressed this in noting:

> Regrettably, it appears that the conflict between the value of security and the extent of the violation of human rights in order to maintain security will be with us for many years to come. It is precisely for this reason that we must be careful to balance violations of rights against security needs properly and proportionately. A system of government that is based on democratic values cannot allow itself to adopt measures that will give the citizens of the state absolute security. A reality of absolute security does not exist in Israel or in any other country. Therefore an enlightened and balanced decision is required with regard to the ability of the state to take upon itself certain risks in order to protect human rights.
>
> (the Adalah case, *ibid.*, sec. 9 of Justice Beinisch's opinion).

195. The question is, therefore, not whether the purpose can be fully achieved by an alternative measures, but – whether the alternative measures at the disposal of the respondents, which do not include the injurious measure of a blanket denial of freedom of movement, achieve the majority of the goals the respondents had set for themselves (and which to this date remain a mystery), (see: M. Cohen-Alia, "The Separation of Powers and Proportionality", **Law and Governance** 9, (766) 297, 317-318). The burden of proof in this matter, as stated, lies with the respondents.

The third test of proportionality and a sweeping violation of rights

196. Our case concerns severe violations of fundamental rights of the highest stature and force. These are sweeping, extensive violations which fatally injure the family lives of many people. The procedure separates between spouses, parents and children, tears apart families and in a broader aspect, harms the social and demographic fabric of the residents of the Occupied Territories.

197. It is a well known rule that a sweeping violation of rights, which is not based on an individual examination of each and every case is (at least allegedly) unacceptable and suspect of disproportionality.

198. The opinion of President Barak in the Adalah case includes an extensive and exhaustive review of blanket prohibitions. In sec.s 69-73 , President Barak notes, *inter alia*,:

> The need to adopt the least harmful measure often prevents the use of a blanket prohibition. The reason for this is that in many cases the use of an individual examination achieves the proper purpose by employing a measure that violates the human right to a lesser degree. This principle is accepted in the case law of the Supreme Court (see *Ben-Atiya v. Minister of Education, Culture and Sport* [91], at p. 15; *Stamka v. Minister of Interior* [24], at p. 779). In one case we considered a blanket prohibition against

candidates over the age of thirty-five joining the ranks of the police. It was held that this arrangement did not satisfy the requirement of adopting the least harmful measure in the proportionality test. In my opinion I said that:

> '…the employer will find it difficult to satisfy the "least possible harm test" if he does not have substantial reasons to show why an individual examination will prevent the attainment of the proper purpose that he wishes to achieve' (HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [94], at p. 367 {11}).

In another case, a provision that press cards would not be given to Palestinian journalists was disqualified. In her opinion, Justice D. Dorner said:

> 'A refusal to give a press badge without any examination of the individual case, because of the danger inherent in all Palestinian journalists who are residents of Judaea and Samaria — including those entitled to enter and work in Israel — is the most prejudicial measure possible. This measure is strongly prejudicial to the interest of a free press, and could be prevented by individual security checks that are justified in order to mitigate the individual security risk presented by the residents of Judaea and Samaria, in so far as such a risk exists with regard to residents who have successfully undergone the checks required in order to receive permits to enter and work in Israel' (*Saif v. Government Press Office* [86], at p. 77 {198}).

199. The President proceeds and presents comparative law:

> A blanket prohibition of a right, which is not based on an individual check, is a measure that raises a suspicion of being disproportionate. This is the case in our law. It is also the case in comparative law (see N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, 1996, at pp. 30, 99). This is the accepted approach in the European Court of Human Rights. Thus, for example, in *Campbell v. United Kingdom* [234], it was held that a Scottish regulation that provided a sweeping authority to examine the mail received by prisoners from their lawyers violated the right to privacy set out in art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was held that, for the purpose of realizing the security purpose underlying the regulation, it was sufficient to carry out inspections based on individual concerns. This is also the case in the law of the European Union. The European directive that enshrines the right of citizens of the member states to family reunification (Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) allows, in certain circumstances, a departure from its provisions, but this is only on the condition that the violation of the right is proportionate and is based on a real and tangible individual threat (art. 27(2)):
>
> > 'Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned… The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.'

And so too in American constitutional law:

> United States constitutional law recognizes the requirement of proportionality in the sense of the least harmful measure as a condition for the constitutionality of a violation of a human right. Violations of constitutional human rights (such as freedom of expression, freedom of religion, freedom of movement and the prohibition of discrimination) may be constitutional, provided that they satisfy the requirements of 'strict scrutiny.' One of the components of this scrutiny is the requirement that, of the possible ways of achieving the public purpose, the state should choose the measure that leads to the least restrictive violation of the right (see L. Tribe, *American Constitutional Law*, second edition, 1988, at pp. 1037-1038, 1451-1482; E. Chemerinsky, *Constitutional Law*, 1997, at p. 532). In interpreting this requirement, the Supreme Court of the United States has held that a condition for satisfying the requirement of the least restrictive measure is that the violation of the human right is based on individualized considerations, and is not based on a blanket prohibition.

200. Similar findings were made, with the consent of nine justices, in the case of the amendment to the Civil Torts Law (Liability of the State) (HCJ 8276 **Adalah v. Minister of Defense**, in sec. 37 of the judgment). In this case too, these matters were undisputed by the justices of the court.

Thus for example, Vice President (ret) Cheshin found that:

> Collective injury has a serious and injurious result, and a democracy ought to refrain from adopting it. (sec. 115 of his opinion).

Whereas Justice Naor writes in sec. 20 of her opinion:

> I do not dispute the remarks of my colleague the president that 'a blanket prohibition of a right, which is not based on an individual check, is a measure that raises a suspicion of being disproportionate' (para. 70 of the president's opinion). As a rule I accept that a violation of a basic right will be suspected of being disproportionate if it is made on a sweeping basis rather than on the basis of an individual check.

201. Blanket measures which are not based on individual examination are inherently tainted by a facet of de-humanization. The Honorable Justice Procaccia alludes to this in the Adalah case, when referring to the matter of American citizens of Japanese descent being placed in camps:

> The ruling of the majority of justices of the United States Supreme Court in the case of *Korematsu v. United States* [185] is considered by many to be one of the darkest episodes in the constitutional history of western countries ...
>
> The circumstances in that case are completely different from those in our case, but the wind that blows in the background of the constitutional approach that was applied there by the majority opinion is not foreign to the arguments that were heard from the state in the case before us. We must take care not to make similar mistakes. We must refrain from a sweeping injury to a whole sector of the public that lives among us; it is entitled to constitutional protection of its rights; we must protect our security by means of individual scrutiny measures even if this imposes on us an additional burden, and even if this means leaving certain margins of a probability of risk. We will thereby protect not only our lives but also the values by which we live (*Saif v. Government Press Office* [86], at p. 77 {198}). (sec. 21 of her judgment).

202. Moreover: this is not a temporary-momentary procedure motivated by focused security considerations but rather, a **sweeping, extensive, long term procedure** designed to apply for many years (it sets a procedure of seven years) and whose application in the short term too may cause irreparable damage to the residents of the Territories and their family lives; bring about demographic, social, cultural and economic changes in the Territories in general and irreparably undermine the fundamental principle according to which Gaza and the West Bank have been and still are – both theoretically and legally – an integral territorial unit.

203. As stated, it is a procedure which gives the impression of being just part of a broad policy driven by **political** considerations intended to deliberately use the civilian population and the injury to its rights, including the right to family life and the separation of spouses and parents and children, **as leverage for exerting political pressure** on the Hamas government. As stated, it is hard to avoid the concern that the matter also involves inappropriate demographic considerations.

204. The remarks of Justice Levy in the **Road 443 case** are relevant in this context:

> Work the purpose of which is an effort of forestalling and which may, therefore, justify strong action, even if temporary, might be construed as having exaggerated applicability once it appears to have become permanent. Though it is never possible to know in advance, before all the circumstances are examined, what the application of the proportionality tests might yield, indeed, it is possible to say that generally, the implementation of a blanket measure is constitutionally "suspect".
>
> Absolute measures require, even more than usual, grounded reasoning strong enough to convince of the justification for taking them. This is due to the inherent contradiction between blanket measures and the protection of rights (HCJ 7052/03 **Adalah – Legal Center for Arab Minority Rights v. Minister of the Interior**, sec. 21 of the opinion of Justice A. Procaccia (not yet published, May 14, 2006)).

Conclusion

205. The respondent is not merely in charge of the adequate performance of the administration in the Territories – he also constitutes an administrative authority unto himself.

206. In his role as an administrative authority, the respondent's discretion is limited to relevant considerations only. He must consider the fundamental right to family life. He must hold the rulings of this honorable court, according to which the right to family life includes a person's right to conduct a shared family life in his country with the person of his choosing, as a guiding principle. He is entitled to balance risks that a certain person may pose to the security of the Area should he enter it against these considerations. He may not impose flat bans.

207. And why does the respondent refuse to process applications which are not forwarded by a certain political official? And what is the reason for the respondent's refusal to exercise discretion – with the exception of cases which are extremely exceptional and rare to begin with? This reason is unacceptable. It is a reason from which the stench of collective punishment rises. It is a reason of turning a person's family life into a bargaining chip in political negotiations. It is a reason which stands in contradiction to the respondent's obligations under international humanitarian law and under human rights law – both Israeli and international.

208. This we shall recall: human rights must not be captured as hostages at the hands of political maneuvers.

> [T]here is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights.
>
> (HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel**, par. 50)

This too we shall recall:

> [T]here is no possibility of making a clear distinction between the status of human rights in times of war and their status in times of peace. The dividing line between terror and calm is a fine one. This is the case everywhere. It is certainly the case in Israel. There is no possibility of maintaining it over time. We must treat human rights seriously both in times of war and in times of calm. We must free ourselves from the naïve belief that when terror ends we will be able to put the clock back.
>
> (The **Adalah case**, sec. 21 of President Barak's opinion).

209. The respondents bear a responsibility toward the residents of the Territories – toward the men and women, parents and children. These people, flesh and blood, must not be treated as pawns on an imaginary chess board played by diplomats in the wooden halls of Washington or Oslo.

The respondents must treat the family life of residents of the Territories not as a military stronghold or a bomb workshop, legitimate objects of attack. They must look into the eyes of the applicants not through the sights of a gun, but through the eyes of law and consciousness.

For all the aforementioned reasons, the honorable court is requested to issue and *order nisi* as sought, render it absolute after receiving the respondents' response, and order the respondents to bear the petitioners' costs and legal fees.

Jerusalem, 15 March 2010

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Counsel for the Petitioners

[T.S. 37230]

210.