Date: June 8, 2010

In response please cite: 65091

To:

Major Limor Tachnai

The Military Legal Advisor for the West Bank

Via Fax

Dear Ms.,

Re: **Order regarding Prevention of Infiltration (Amendment No. 2) and Order regarding Security Provisions (Amendment No. 112)**
Ref: ours 37230 of March 25 & April 11, 2010; 65091 of April 26, 2010
Yours: 707660 222/20 of May 13, 2010

1. We seek to recall that on March 25, 2010, we appealed in letter to the military commander regarding the Orders in reference, prior to their taking effect. There we raised our concerns regarding the wording of the Orders, in particular the expansive definition of "infiltrator" and the custody and deportation proceedings. We therefore requested to delay their taking effect, to allow for evaluation of our comments.

2. On April 11, 2010, we appealed jointly with nine other human rights organizations to the minister of defense in a similar request. A copy thereof was sent to the military commander. On April 26, 2010, a letter of reminder followed.

3. On May 16, 2010 we received your response of May 13, 2010, on behalf of the military commander. We hereby deliver our response on behalf of all the

organizations signatory to the letter of appeal of April 11, 2010.

4. Firstly, I shall note that your reply implies that many of our concerns were justified. Thus, for example, you letter makes explicit that the definition of "infiltrator" does indeed apply to Palestinians who relocated to the West Bank from the Gaza Strip; that an expulsion order can be executed without any judicial review; that a person can be held in custody for relatively lengthy periods before being brought before a quasi judicial review procedure, preliminary or periodic.

   This stands in stark contrast to the appearance given in article 3 of your letter, that the amended order is intended solely to benefit persons designated for removal. We recall that HCJ 2737/04 **Kafarneh v. The IDF Commander in Gaza**, to which you referred, directly addresses the construction of a mechanism for internal judicial review regarding holding in custody, and makes no indication of a need to amend the definition of "infiltrators".

   Furthermore, it is baffling that while you present the amendments as means to guarantee acceptable judicial review, it is clearly manifest in your reply that a person may be deported without pleading his case in the courts.

5. Regrettably, your reply answers none of our claims that as trustee of the West Bank, the commander exceeds his authority. For instance, in our letter of April 11, 2010, we clearly state that the military commander is obligated to secure the needs of the civilian population, and authorized to balance this concern with military needs in accordance with international law. Your response does not answer what worthy concern warrants the said amendments, which are consistent with neither the interests of the population nor military needs.

   To the matter itself: in your response you seek to provide your own interpretation of the orders, which is meant to appease some of our concerns. With respect, the numerous interpretations, explanations and declarations of intent, of one sort or another, do nothing but demonstrate the fundamental flaw

of the orders: that their extremely loose wording is entirely dependent on shifting interpretations, explanations and interests. Insofar as the commander puts forth an interpretation which is not expressly stipulated by the wording of the orders, their language must be revised.
It is derivative of the principle of legality, according to which any piece of legislation must be clear and unequivocal. The answer as to what is allowed and what is not, should be explicit in the order itself and not in the musings of the person entrusted with its execution (see HCJ 113/52, **Zaks v. Minister of Trade and Industry**, *Piskey Din* 6 696, 702).

It seems that not a single citizen of the State of Israel would have acquiesced to a statutory law allowing, by its language, to view him as an infiltrator in his own land, merely due to an alleged internal interpretation of it by government agencies.

6. We emphasize that our concerns as to the sincerity of the security forces' professed intentions for implementing the orders are increasing, in view of the fact that the military commander prefers to ply on them a profusion of explanations and winding interpretations, and yet insists on maintaining their vague and loose language.

   If, indeed, as you claim, the orders are designed to be implemented in a restrictive, definitive, appropriate and legitimate manner, the insistence of the military commander on maintaining orders which, according to their language allow for massive deportations and severe infringements of international law is puzzling.

7. Before addressing several points issuing from your response, we note that it remains unclarified whether you hold the Order regarding Prevention of Infiltration as a the conclusive arrangement concerning forced removal of persons from the West Bank, or alternately, you regard the military commander as now possessing parallel powers - the Order regarding Prevention of Infiltration and also the Order regarding Closing of Territory.

Following are our comments, specific to some points issuing from your response:

A. The Definition of "Infiltrator"

8. Firstly, we note that your claim that the orders apply to a negligible number of people is unclear, not least as you explicitly state in your response that Palestinians who relocated from Gaza are not exempt from obtaining permits as per the order. Let us recall that in a letter we received from the Coordinator of Government Activities in the Territories, of June 3, 2010, it was stated that in your own estimate, **upwards of thirty thousand Palestinians** who arrived from Gaza, are present in the West Bank.

9. To the matter itself: your proposed interpretation in article 7 of your letter, that the order cannot apply to anyone born in the West Bank, is not evident from the language of the order. As known, the order defines an infiltrator as a person who entered the Area unlawfully; **or** a person who is present in the Area and "does not lawfully hold a permit". Namely, the element of entry is not required according to the language of the second alternative and it is clear that according to its language, the order may apply also to those born in the West Bank.

   As an aside, we note that the language of the definition, which is not restrictive relative to entry to the West Bank, is consistent with your position that, supposedly, even if born in the West Bank, a person may be an "illegal alien" therein (see response of the State representative in HCJ 2786/09 regarding children born in the West Bank).

   As stated, insofar as this is an error and in fact the military commander intends to apply the order solely on those who enter the West Bank, he should amend the order.

10. Secondly, we recall that the wording of article 6 of the order prior to amendment already allowed designating as infiltrator someone who has

entered the West Bank lawfully, if the permit he carried was violated or has expired. It stands to reason, that according to this definition, a person who entered lawfully could be expelled, if the permit he carried was indeed violated or had expired. Apparently this definition was found sufficient; however, six months prior to the amendment of the order, the military commander made attempts to use the order against persons who entered lawfully and with approval without their entry being limited in duration or made conditional – so, it follows, without "expiration of the permit" or "contravention of its terms" (HCJ 2786/09 **Salem**; HCJ 8729/09 **Suali**). I imagine you well remember the criticism of the Supreme Court (HCJ) of this position of yours, and your decisions to revoke the expulsion orders in both cases.

Insofar as the military commander's purpose was to benefit the local population, as you purport, the requirement to prove the expiration or violation of the permit should be kept in place. As stated, this is a substantive change of the prior definition; it is difficult to avoid the impression that the amendment was created to facilitate deportations even in cases where the military commander's approval to residency in the West Bank was never limited or made conditional to any degree.

11. I shall further add, on this issue, that the suspicion is amplified in view of the deletion of the provision which protects "residents of the Area". It is unclear why there was room to delete the definition of "resident of the Area" and the provision that stipulates presumed infiltration only relative to those without a document attesting to their residency in the Area.

12. As to the application of the orders to Israeli settlers, we merely note that according to these selfsame orders to which you referred in your response, any Israeli staying above forty eight hours in the area, must possess a permit issued by the military commander; additionally, any Israeli who relocated to the area must possess an individual permit in writing. It is unclear how Israelis cannot be considered "infiltrators", if not in possession of the required documentation

as stipulated in the said Order. It is obvious that insofar as the implementation of the Orders will be carried out by the national or religious origin of the residents – as your letter seems to indicate– it therefore constitutes excessively wrongful discrimination.

13. Lastly we note that your consent to enter to the Palestinian population registry foreigners who submitted the appropriate application (as detailed in article 9 of your response), did not restrain you from instantly and unilaterally "voiding" the registration of a person as resident of the Occupied Territories – without authority or even a hearing procedure for the said person (see e.g.: HCJ 2074/10 **Hamed v. Military Commander of the West Bank**; HCJ 5201/09 **Abu Zweid v. Military Commander of the West Bank**; HCJ 821/10 **Atwan-Subeih v. Military Commander of the West Bank**; HCJ 1002/10 **Mahmoud v. Military Commander of the West Bank**; HCJ 822/10 **Zeidat v. Military Commander of the West Bank**).

    Therefore, you yourself know that gaining residency in the framework of that gesture guarantees nothing to these individuals. As an aside, we note that we have no knowledge as to whether the applications of all those in this group, were processed in the first place.

B. Criminal Liability

14. As stated, in the past, criminal liability for "infiltration" rose only for whoever unlawfully entered the Area, after being in any of the four countries listed in the section. Any person entering lawfully or unlawfully from other countries (and, obviously, those born in the West Bank) could not be criminally charged. In our letter, we pointed the problems engendered by a sudden criminalization of a vast number of people, some of whom have long since established their lives in the West Bank, residing there with their families for many years. This is opposed to the principle of legality, as it may involve retroactive repercussions.

    Your replies to us made no reference to this issue.

C. Judicial Review

15. You explicitly state in your response that: "presenting the individual order for judicial review is not required in each and every case". Meaning, that despite your claim that the purpose of the amendment was to guarantee judicial review, in point of fact, it assures naught.

16. The issue is even more flagrant due to the absence of a provision allowing a person to initiate a plea to the courts or to the committee, to avert the deportation. The "interpretation" by which one may appeal to the committee, is not stipulated at all in the Orders as worded– this in contradiction, for example, to the current situation in Israeli law (section 13-17 of the Entry into Israel Law, 5712-1952.) that expressly guarantees that any person, **at any given time**, can challenge both an expulsion order (in the courts) and being in custody (in the Custody Court).

17. As said, insofar as an error is at issue, and the military commander intends to allow a person to appeal at any time to the court or the military committee, against both the expulsion order and custody, he should amend the order.

18. We add that in light of past experience of cases of swift expulsions to Gaza, at times despite the military commander's cognizance of an objection petition filed against it, therefore, the Order should, minimally, include an expressed stipulation to the effect that a person shall not be deported prior to his having the opportunity to bring his matter before the court and the court review it.

19. Finally we note that a reading of the Order regarding Security Provisions reveals that the committee does not hold the power to issue an interim order to delay the deportation.

D. Holding in Custody

20. Your response makes no reference to our claims regarding lengthy periods of holding in custody – twice the period under Israeli law (eight days for preliminary review before the committee versus four days within Israel; sixty days for periodic review versus thirty days within Israel). Although Israeli case-law recognized the disparity between Israeli law and military legislation, evidently, this has no bearing on the issue of a person's procedural rights. Also, even if not all of the disparities between Israeli legislation and military legislation are prima facie unacceptable, you supplied no substantive justification for the disparity in the issue at hand.

21. Secondly, only recently the court ordered the revocation of a demand made of a detainee to assist his own expulsion to any country, including those he has never visited, as a condition to his release on bail (HCJ 1268/10 **'Omar Mahmoud v. Military Commander of the West Bank Area**). Nonetheless, section 87.14(c) (1) of the Order regarding Security Provisions, incorporates a similar requirement under which a person **will not** be released from custody on bail if "the removal of the person held in custody from the Area is prevented or delayed due to … unjustified refusal to return to the country from whence he arrived to the Area or another country, if his return to the country from whence he arrived to the Area is not possible".

22. In your response you state – yet again as a matter of interpretation – that at issue is a "broadening circumstance whose purpose is to provide examples of considerations in this regard…". With respect, the order is worded as a clear and binding instruction that shackles judicial discretion, and absolutely prevents to order release on bail if the person held refuses to arrange his own expulsion, including to countries he has no contact with.

    Incidentally, the committee's discretion is similarly shackled in cases where a security risk is associated to the person in custody – this despite the fact that the selfsame risk does not necessarily prevent release pending other

procedures (such as, if, in criminal proceedings, the risk can be otherwise nullified).

E. Various Provisions

23. Finally, we are puzzled by section 29 of your reply regarding persons ordered for release by the committee. In Israel, the status of a person ordered for release by the Custody Court, is expressly regulated in law by way of a permit. The reason for abstaining from holding in custody, or otherwise limit the rights of the said person, seems obvious. We are not concerned here whether the said permit for a person released, is issued by the committee or the military commander; But evidently, a person who is permitted to move freely, is entitled to receive a similar permit from either entity, and this should be expressly stipulated in the order.

F. Conclusion

24. Despite the claim put forth, that the said amendments serve merely to benefit those in custody, in point of fact, the amendments address entirely different issues, such as the definition of "infiltrator", and they exacerbate – in both substance and procedure – the condition of a vast number of people.

25. Your response reveals that this exacerbation shall befall Palestinians and their families, and not Israelis, despite, on the one hand, the express obligations regarding protected persons, and on the other, the express instructions obligating the possession of permits, directed precisely at Israelis.

26. Your responses portray your internal interpretations as, allegedly, seeking to diminish the harm we feared. Yet your refusal to in fact amend the orders in accordance with the statements and explications you wish to put forth, only serves to increase our concerns. As said, insofar as hasty wording is at issue, it should merely be corrected. In any event, we are of the opinion that something other than nuances or cosmetic alterations is at stake. The flaw is at the root of the Amendment to the Order regarding Prevention of Infiltration, and should

therefore be abolished. Detailed explications and convoluted interpretations do not diminish the severity of the flawed order, stemming from its purport to invest with authority acts which fall under the terms of grave violations of international law.

27. As to the Order regarding Security Provisions, we request it be examined in view of our comments, and that the required amendments be made to it. As stated, at least as regards some of our comments, this will appear to accord with your proposed internal interpretation.

28. We request your prompt reply,

Respectfully,

[signature]
Elad Kahana, Att.

[65091]

Copies:
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