**At the Supreme Court** **HCJ 4019/10**
**Sitting as the High Court of Justice**

In the matter of:

1. **HaMoked: Center for the Defence of the Individual**
2. **The Association for Civil Rights in Israel**
3. **Ad-Dameer – Prisoners' Support and Human Rights Association**
4. **Al-Haq**
5. **Al-Dameer Association for Human Rights**
6. **Gisha - Legal Center for Freedom of Movement**
7. **The Public Committee against Torture in Israel**
8. **Yesh Din – Volunteers for Human Rights**
9. **Machsomwatch – Women Against Occupation & For Human Rights**
10. **Al Mezan Center for Human Rights**
11. **Jerusalem Legal Aid and Human Rights Center**
12. **Gaza Community Mental Health Programme**
13. **PCHR - Palestinian Center for Human Rights**
14. **Adalah, Legal Center for Arab Minority Rights in Israel**
15. **Physicians for Human Rights – Israel**
16. **Rabbis for Human Rights**

all represented by counsel, Elad Cahana (Lic. No. 49009) and/or 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 Martin Kiel (Lic. No. 54087)
Of HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
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**The Petitioners**

v.

1. **Military Commander of the West Bank**
2. **Coordinator of Government Activities in the Territories**
3. **Official in Charge of the Population Registry in the Civil Administration**

**The Respondent**

## Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the Respondents to appear and show cause

A. Why they should not refrain from removing Palestinians from the West Bank to the Gaza Strip based on their registered address in the Palestinian population registry held by Israel;

B. Why they should not register in the copy of the Palestinian population registry held by Israel the correct addresses of residents of the Occupied Palestinian Territories, in accordance with the notices and updates transferred to them by the Palestinian Authority in such a manner that the copy of the population registry in their possession conforms both the original registry and reality.

## Motion for Interim Order

The Honorable Court is hereby requested to issue an interim order prohibiting the respondents from removing Palestinian residents of the Occupied Territories from the West Bank to the Gaza Strip based on their erroneously registered address in the Israeli held copy of the Palestinian population registry.

At issue, are Palestinians, protected residents, holding Palestinian Authority identity cards and residing in the West Bank; individuals who have established homes and families in the West Bank, whose source of income and all their loved ones are located therein; young children who were born in the West Bank and have lived there their entire lives; seniors who moved to live with their children in their twilight years.

They are all in danger now: a walk to the grocery store, a visit with a neighbor, a commute to work may all end with their being taken into a military car and deported immediately, sometimes within hours, to the Gaza Strip. All of them can expect military vehicles to arrive at their homes in the middle of the night, and after a quick inspection of their addresses in the copy of the population registry, to be gathered and sent to the Gaza Strip, which is, as known, sealed off, none enter and none leave.

One cannot overstate the severe injury caused to their lives and to the lives of their families. The issue involves plucking a person from his place of residence and sending him to a foreign place, a place he left many years ago and sometimes, never even visited. It is a gross violation of the right of a protected resident to choose his place of residence **within his country, years after he had made his home there**.

One also cannot overstate the fear plaguing thousands of people who have suddenly turned into illegal aliens in their land. Many are now fearful of leaving their homes to go to school, work, the shops or on family visits.

Conceding the request will cause the respondents no damage. The only considerations the respondents may weigh, under international law and the case law of this court, are the benefit of the population and security considerations. Inasmuch as the respondents believe there are individual security considerations which justify administrative measures against a certain person residing in the West Bank, they may avail themselves of the known administrative tools (such as administrative detention, assigned residence, etc.). Issuance of such order will not prejudice their aforesaid power.

It shall be noted that in all individual petitions recently filed on this issue, the Honorable Court issued an interim order – including in cases in which security allegations were made (see for instance the court's decision in HCJ 2786/09 **Salem v. Military Commander** dated March 29, 2009; as well as the court's decision in HCJ 8729/09 **Suali v. Commander of Military Forces in the West Bank** dated October 29, 2010).

## Table of Contents

## Introduction

1. Imagine the following case:

   John Doe, a resident of a community in the center of the country, updates his residential address at the ministry of the interior. Mr. Doe has been living in this address for many years, having moved there from a community which was a part of Gush Katif in the Gaza Strip. To his surprise, the interior ministry refuses to update the address. Not only that, but one day, he is forcibly put into a military vehicle and sent to "his registered place of residence", namely, the Gaza Strip, being a resident of a "hostile entity".

2. This bizarre scenario is a lived reality for thousands of Palestinians, protected residents of the Occupied Territories who have been residing in the West Bank for years, after having moved there from the Gaza Strip years ago. These individuals made their homes in the West Bank, and some were even born and lived there all their lives. At the end of 2000, Israel froze updates to its copy of the Palestinian population registry and over the years (particularly in recent years) has begun relying on the (outdated) addresses appearing therein and deporting people from their homes on the basis thereof.

3. Countless similar cases have accumulated at the offices of the petitioners: people constantly detained at checkpoints; delays and difficulties while attempting to travel to Jordan via the Allenby Bridge border crossing; inability to seek the services of the DCOs (which serve individuals registered in its district); difficulty accessing local authorities, etc. All this, based on an outdated address in the copy of the population registry.

4. Worse still, the petitioners have been made aware of dozens of accounts of deportations of people based on their address: some deportations are carried out sporadically, following routine examinations at a checkpoint; some deportations are carried out in an organized fashion, by gathering residents in the town square in the middle of the night and examining their identity cards – some are ordered to return home, some to the Gaza Strip; accounts of people have found themselves away from their spouses, parents, children, homes and sources of income, in a place which, under Israeli policy, they can no longer leave.

5. This petition seeks two remedies: first and foremost, to instruct the respondents to refrain from deporting protected residents living in the West Bank based on their address.

   Second, the respondents must update their copy of the population registry in accordance with notices transmitted to them, as ruled more than once with respect to the powers of the registration clerk, irrespective of claims they may have regarding a person's presence in the address where he resides.

## The Parties

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

7. Respondent 1 (hereinafter: **the respondent**) is the military commander, responsible for the West Bank Area on behalf of the State of Israel, which has been holding the West Bank under military occupation for over forty years.

8. Respondent 2 is in charge of implementing Israeli policy in the West Bank, *inter alia*, with respect to the population registry in the Occupied Territories.

9. Respondent 3, on behalf of respondent 2, is in charge of administering the copy of the Palestinian population registry held by Israel in accordance with the Interim Agreement between Israel and the Palestinian Authority and the military legislation which incorporates it in the Territories.

## Section A: Factual Background

### *(i) The Palestinian population registry and updating the addresses of Palestinian Authority residents in the Occupied Territories*

10. The legal situation with respect to updating registered addresses in the Palestinian population registry was anchored in Section 13 of the Order regarding Identity Cards and the Population Registry (Judea and Samaria) (No. 297) 5729-1969 (hereinafter: **the Order regarding Identity Cards and the Population Registry**) from the time of the occupation of the Territories until the entry into force of the Oslo Accord. Under this Order, a resident of the Territories has a duty to inform the competent authority of a change in his address within 30 days **following the effective change**:

> Where a change or amendment occurred in one of the particulars detailed in Section 11, a resident who has received an identity card must notify the population registry bureau in the jurisdiction of his place of residency as established by the competent authority, thereof within 30 days.

A copy of the Order regarding Identity Cards and the Population Registry and its updates, is attached and marked **P/1**.

11. It shall be emphasized that this is merely a retroactive duty to notify of a change in the address of a Palestinian resident of the Territories, similarl to the duty incumbent upon Israelis inside Israel. It is not subject to prior or retroactive authorization by the military commander or any other official. This is clearly indicated by the military order.

12. It shall be further noted that the language of this order is almost identical to the provisions of the Population Registry Law 5725-1965, which applies in Israel. This is the place to note that in a long list of rulings, this court addressed the status of the population registry as presumptive evidence and the restricted discretion of the registration official which is limited to technical issues regarding the authenticity of the document submitted for registration. More on this will follow.

13. In the Interim Agreement signed between Israel and the PLO ("the Oslo Accord"), powers in this realm were transferred to the Palestinian Authority and it was determined that the Palestinian Authority would administer the population registry of the residents of the Territories. In the words of Article 28 of Annex III to the Oslo Accord:

> 1. Powers and responsibilities in the sphere of population registry and documentation in the West Bank and the Gaza Strip will be transferred from the military government and its Civil Administration to the Palestinian side.

Article 28 of Annex III to the Oslo Accord is attached and marked **P/2**.

14. Concurrently, Article 28 stipulates updating procedures designed to:

> 10… avoid discrepancies and with a view to enabling Israel to maintain an updated and current registry.

These procedures compelled the Palestinian Authority to transfer updating notices regarding amendments to records in the Palestinian population registry to the Israeli side.

Immediately thereafter, the Accord expressly stipulates that with respect to addresses:

> **The Palestinian side shall inform Israel of every change in its population registry, including, *inter alia*, any change in the place of residence of any resident**.

15. It should be noted that the Oslo Accord and Article 28 of Annex III consistently refer to "residents of the Gaza Strip and the West Bank" with a single breath and to a single population registry rather than two population registries. There is no specific reference to updating addresses from one part of the Territories to the other, which is in keeping with the fundamental principle set forth in the Accord that the Gaza Strip and West Bank constitute a single territorial unit.

16. The Proclamation regarding Implementation of the Interim Agreement (Judea and Samaria) (No. 7) 5756-1995 (hereinafter: **Proclamation No. 7**), incorporated the Oslo Accord into military legislation. Section 5 of the Proclamation stipulates:

> Transfer of powers and responsibilities in accordance with Annex III of the Interim Agreement includes transference of all rights, duties and undertakings relevant thereto and the provision of the Interim Agreement shall apply in this matter.

A copy of Proclamation 7 is attached and marked **P/3**.

17. The matters are clear and explicit: the authority to update the registered address of a resident of the Palestinian Authority was transferred to the Palestinian side. In order to ensure that Israel holds an accurate copy of the Palestinian population registry, it was determined that the Palestinian side must retroactively update the Israeli side of every change it makes to the registry – with the duty to inform of changes made by the Palestinian side to residential addresses specifically highlighted.

18. It should be emphasized that the respondent has previously acknowledged that the authority with respect to updating addresses – including between the Gaza Strip and West Bank – has been entirely transferred to the Palestinian Authority.

Thus for example, on December 4, 1995, MK Naomi Hazan contacted Major General Oren Shachor, then coordinator of government activities in the Territories (COGAT) and raised a number of questions regarding passage between Gaza and the West Bank, including:

> Change of address from the West Bank to the Gaza Strip and vice versa: Is such change of address possible? To which authority is the application submitted? What is the duration of the decision process?

On January 9, 1996 (after the issuance of Proclamation No. 7 which, as stated, incorporated Annex III of the Accord into the Territories' internal military legislation), the response of the assistant to the COGAT, Lieutenant Colonel Shmulik Ozenboy was received. According thereto:

> In response to your query regarding changes of address from the West Bank to the Gaza Strip, I hereby inform you that responsibility for this issue has been transferred to the Palestinian Authority and therefore it should be contacted with respect to this matter.

A copy of MK Hazan's letter dated December 4, 1995 is attached and marked **P/4**.
A copy of the letter of the assistant to the COGAT dated January 9, 1996 is attached and marked **P/5**.

19. Moreover, still today, the respondent acknowledges that the administration of the population registry is under the sole responsibility and authority of the Palestinian Authority. The respondent himself has emphasized the importance of the reliability and correctness of the Israeli held copy of the registry in accordance to the original registry held by the Palestinian side. So for example, on May 14, 2007, petitioner 1 (hereinafter: **HaMoked**) received a letter from the office of the respondent's legal advisor dated May 7, 2007 which explicitly stated that:

> The Palestinian registry is under the direct authority of the Palestinian Authority which administers it. A copy of this registry is also held by the Israeli side, in accordance with Article 28 of the civil annex to the Interim Agreement. The Israeli side, as a proper administrative authority, is obliged to ensure that its records are reliable and correct and meet the requirements of security legislation, case law and good governance.
>
> […]
>
> Unilateral updating of the registry by the Israeli side is not possible seeing as the entire registry is administered and run by the Palestinian side in keeping with the provisions of the Agreement.

A copy of the letter from the office of the respondent's legal advisor dated May 7, 2007, is attached and marked **P/6**.

***(ii) The "freeze" on updating the copy of the population registry***

20. In 2000, the respondent decided to halt all updates of addresses of Palestinians between the Gaza Strip and the West Bank in the copy of registry he possesses. The records appearing in the copy of the population registry at the time were not examined or tested, but "frozen" as they were, with no possibility of changing, amending or challenging it.

21. As stated, the power to update addresses in the population registry was transferred to the Palestinian side and Israel was left with a copy of it only. Therefore, the respondents could only prevent the updating of their copy of the registry, and so they did.

22. Initially, in keeping with the Interim Agreement, the Palestinian side continued to update the addresses of Palestinians in the original registry, notify the Israeli side thereof and indicate the correct address in the identity cards it issued. Yet, the Israeli side ignored the updates and deliberately left its copy of the registry as it was, "frozen".

23. "Freezing" the copy of the registry is a powerful tool, since, as indicated by many complaints filed with HaMoked, the respondent instructed military officials in the West Bank – at checkpoints, border crossings etc. – to rely only on the copy of the registry. Thus, these individuals found themselves being detained again and again at checkpoints, detained and interrogated at border crossings and more. The result was that such severe difficulties were caused to individuals whose addresses had been updated by the Palestinian interior ministry but not in the Israeli held copy of the registry, that the Palestinian side halted all updates to the original registry it administers.

24. According to figures presented to the court by the respondent in April 2009, in the context of HCJ 2786/09 **Salem v. Military Commander**, which is discussed at length below, there are thousands of Palestinians who are in the West Bank and whose registered address in the Israeli held copy of the registry is in the Gaza Strip. Some are not even aware of this as the original and decisive population registry (i.e. the one administered by the Palestinian Authority) and their identity cards list their correct address.

    A copy of the relevant section of the respondent's response in HCJ 2786/09 is attached and marked **P/7**.

25. It should be noted that the respondent concurrently continued to permit the entry of Palestinians from the Gaza Strip to the West Bank, at times in smaller numbers and at times in larger numbers, this without stipulating any conditions or restrictions.

26. The result is naturally utter chaos. Many Palestinians who arrived from the Gaza Strip and established their homes in the West Bank lawfully, found themselves being detained at checkpoints and facing bureaucratic obstacles resulting from the erroneous record of their address in the Israeli held copy of the registry. Prisoners and detainees were released to the Gaza Strip on the basis of this erroneous record and those arriving for a visit in the Gaza Strip have often found themselves stranded with no possibility of returning home.

27. The director of the Palestinian Civilian Committee in the Palestinian interior ministry described the "freeze" policy and its significance in the context of a case involving a Palestinian who had recently moved from Gaza to the West Bank for her wedding, and who, as per an arrangement reached in a petition in her matter (HCJ 2680/07 **'Amer v. Military Commander in the West Bank**) submitted a notification of change of address to the Palestinian interior ministry. The director wrote *inter alia*:

> The Israeli side has refused to accept notifications of change of address transferred by the Palestinian side since 2000, particularly address updates from Gaza to the West Bank. This is why it is imperative that Ms. 'Aisha 'Amer clarify the reason for submission of her notification of change of address and why the comment appears on the notification. This in order to perform an update of address on the Israeli computer system, such as the one updated on the Palestinian computer system…
>
> Thus, we have not updated Ms. 'Aisha 'Amer's address in her identity card attachment, in order to spare her the difficulties she may face when she travels through checkpoints in the West Bank, until the Israeli side signals

that it had updated her address in the Israeli computer system in accordance with the notification transferred thereto.

A copy of the letter from the Palestinian interior ministry and its translation into Hebrew are attached and marked **P/8**.

28. It should be noted that in this case, the petition was deleted by mutual consent after the remedy sought therein – the petitioner's passage from the Gaza Strip to the West Bank – was granted. Currently, an additional petition in the petitioner's matter, concerning the update of her address following its update by the Palestinian interior ministry, is pending before the court (HCJ 660/08 **'Amer v. Military Commander in the West Bank**, hereinafter: **the 'Amer case**, a motion for consolidation of the petition at bar with HCJ 660/08 is filed in conjunction with this petition).

***(iii) Palestinian residency in the West Bank***

29. Over the years of the Israeli occupation, tens of thousands of Palestinians made their homes in communities in the West Bank. They started families and found a livelihood in the place they called home. They weaved their web of social connections and routines around these places. These individuals are all protected residents who lawfully hold status in the Occupied Territories and who were registered in the Palestinian population registry. Some have never been to the Gaza Strip; some arrived from abroad to the West Bank through it; some were born there and relocated to the West Bank.

30. All those residents, whether their registered address in the Israeli held copy of the Palestinian population registry is Jenin or Khan Younis, freely established their homes in their land, according to the recognition that the Occupied Territories are a single territorial unit with a single population registry. At a certain point, this recognition was anchored in the Oslo accords, which were anchored in military legislation.

31. The military commander has obviously also acted in accordance with this recognition (which, as stated, was also anchored in military legislation), and never placed any restrictions on these individuals as they were establishing their homes. Not only have the military commander's orders never required any permit for doing so (a review of military legislation reveals that the only order respecting "change of place of residence" applies only to Israelis as detailed below), but also in practice, he allowed residents of the Occupied Territories, protected residents under international law, to freely establish their homes in their land for decades.

32. One should duly note the various arrangements which have developed over the years in regards to Palestinian travel to the West Bank. These arrangements have changed over time, yet a review thereof reveals that all were aimed at resolving the issue of passage by residents of the Occupied Territories **in Israel**, without any attention to issues regarding their "settlement" in Gaza or the West Bank.

33. We shall briefly detail these arrangements, in the context of which tens of thousands of Palestinians moved in both directions, sometimes while openly carrying many personal belongings, accompanied by their families, with the clear knowledge of the respondent:

- In 1967, the West Bank was declared a closed military zone, however, in practice movement into it was not restricted. In any event, until the outbreak of the first intifada in late 1987, general exit and entry permits granted by the military to all residents of the Occupied Territories were in place. These included no restriction.

- In 1988, after the outbreak of the first intifada, the military commander suspended the general permits in the Order regarding Suspension of the General Entry Permit (Residents of Held Areas) (No. 5) (Temporary Order) (Judea and Samaria) 5748-1988. This Order required persons seeking entry into the West Bank to obtain the military commander's consent thereto. Those who obtained consent freely entered the West Bank, without any restrictions placed on their residency in the West Bank, neither orally and certainly not in a written permit. It should be stressed that the law does not require the procurement of written authorization and indeed, in practice, the aforesaid consent was given orally at the time of entry into the West Bank in the very permission of the passage.

- In the mid-1990s, the interim and subsequent agreements were signed. The Interim Agreement was applied to the Territories through military proclamations and became part of the internal law of the Territories (HCJ 1661/05 HCJ 1661/05 **Hof Aza Regional Council v. Prime Minister**, IsrSC 59(2) 481, 521; HCJ 7957/04 **Marabeh v. Prime Minister of Israel** TakSC 2005(3) 3333, 3344; HCJ 2717/96 **'Ali v. Minister of Defense**, IsrSC 50(2) 848, 855).

  The Interim Agreement, included **"safe passage" arrangements**. These arrangements, which reached full implementation with the signing of the Safe Passage Protocol in 1999, allowed free passage between the West Bank and Gaza Strip, through Israel, using a "safe passage card", without the need to submit an application and have it reviewed. For the purpose of illustration, one may study Article 10 of Annex I of the Interim Agreement which stipulates three routes for travel between the Gaza Strip and West Bank, on which passage is allowed during daylight hours. In general, travel was independent and the passenger was required to arrive at the other geographical part of the Territories within a specified time. As stated, usage of the safe passage was made via a "safe passage card". With respect to persons barred from entering Israel it was determined that they could use the safe passage via shuttles escorted by the Israeli police which operated twice a week.

  The safe passage arrangement placed restrictions on the route travelled between the Gaza Strip and West Bank, on the duration of travel and on the manner of transportation on said route. The arrangement placed no restriction on residing in the West Bank. **The arrangement did not require individuals travelling from the Gaza Strip to the West Bank (or vice versa) to return within a specified timeframe. The arrangement included no mechanism allowing such a restriction on the duration of stay**. The arrangement did not include a restriction respecting the purpose of travel nor required the passenger to declare the purpose of his journey.

  The **Safe Passage Protocol** was signed on October 5, 1999. It implemented the principles set forth in the Interim Agreement, particularly the opening of the shuttle line which would allow persons barred from entering Israel to use the safe passage as well.

  During the time the safe passage was operational an average of 10,000 people travelled between the Gaza Strip and West Bank each month. In total, over 100,000 Palestinians freely travelled between the parts of the Territories during this period.

  A copy of Article 10 of Annex I to the Interim Agreement is attached and marked **P/9**.

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

  It should be noted that other arrangements existed alongside the safe passage. So, for example, Palestinian police officers were allowed to freely move between the parts of the Occupied Territories in the context of police deployment throughout the Territories. These arrangements

were explicitly stipulated in the Interim Agreement (Annex I to the Interim Agreement, Article VI and appendices 2-3). On this issue, the petitioners refer to the state comptroller's report of the time, which examined the manner in which Palestinian police officers travelled for leave from the West Bank to Gaza. The report indicates not only that there was no procedure of issuing "permits" or "licenses", but also that at a certain point Israeli officials forewent the process of checking the police officers' luggage and were satisfied with checking name lists only. Additionally, attached herein is an affidavit by Lieutenant Colonel (reserves) Dr. Koby Michaeli who served as the commander of the south district coordination office in Gaza between 1994 and 1996 and subsequently in other senior positions in the coordination apparatus and who now serves as the prime minister's aid on Palestinian and Arab countries issues as well as a researcher and lecturer at the Ben Gurion University. In his affidavit, Dr. Michaeli declares that those police officers did not require a license or permit in order to enter the West Bank, it follows, *a fortiori*, that they did not require one in order to establish their homes therein.

A copy of Article VI of Annex I of the Interim Agreement and Appendices 2-3 is attached and marked **P/11**.

A copy of the relevant section of the state comptroller's 48th report is attached and marked **P/12**.

A copy Dr. Michaeli's affidavit, originally attached to HCJ 2786/09 (see below) is attached and marked **P/13**.

- Additionally, passage through Israel was made possible subsequent to obtaining a permit to enter Israel. After the outbreak of the second intifada, the safe passage arrangement was suspended and from that point on, a Palestinian who wished to travel through Israel required a permit to enter Israel. The only restriction marked on the permit related solely to presence in Israel.

  It should, of course, be emphasized that the aforesaid applies only to persons who travelled through Israel and not to those who travelled by another route, for example, via Egypt and Jordan, who then, were not required to hold a permit to enter Israel.

***(iv) Forcible transfers from the West Bank to the Gaza Strip***

34. At a certain point, the respondent's policy respecting individuals whose address was erroneously preserved in the registry took a turn. They suddenly found themselves declared "illegal aliens" in their homes, foreigners in their land, sometimes after having lived in the West Bank for a decade and more, all based on their erroneously registered address in the Israeli held copy of the Palestinian registry, as if this was foreign citizenship no less. In extreme cases, even people who were born in the West Bank were declared "illegal aliens" in danger of deportation, only because the respondent refused to allow their address to be corrected so that it corresponds to their place of residence, and their registered address was erroneously preserved in the copy of the population registry. With time, the respondent began treating them as "illegal aliens" and deporting them to the Gaza Strip based on their registered address in the copy of the registry.

35. Over the years, HaMoked has handled the cases of residents of the Occupied Territories living in the West Bank who were deported to Gaza or found themselves therein and were not allowed to return. In most cases in which petitions were filed, the state decided to allow them to return home, such that the issue was never brought before the court. See for instance, HCJ 5504/03 **Kahlout v. IDF Commander in the West Bank**, HCJ 3555/05 **Nabahin v. Commander of the Military Forces in the West Bank**, HCJ 4465/05 **Jdili v. Commander of the Military Forces in the West**

**Bank**, HCJ 396/06 **Q'ais v. Commander of the Military Forces in the West Bank**, HCJ 5463/06 **Effendi v. Commander of the Military Forces in the West Bank**, HCJ 9951/06 **Abu Btihan v. Commander of the Military Forces in the West Bank**, HCJ 810/07 **Abu Sha'aban v. Military Commander in the West Bank**, HCJ 9386/07 **Firani v. Commander of the Military Forces in the West Bank**, HCJ 111/08 **Jaber v. Commander of the Military Forces in the West Bank**, HCJ 10520/09 **Abu 'Abed v. Commander of the Military Forces in the West Bank**.

36. It should be noted that the state persevered in its objection to allowing passage from the Gaza Strip back to the West Bank only in cases in which it purported there was intelligence information against the petitioners which indicated a risk emanating **from their passage through Israel** which is required for the purpose of their return to the West Bank. In the Ward case (HCJ 3519/05 **Ward v. Commander of the Military Forces in the West Bank**) which involved a Palestinian who was deported to the Gaza Strip as part of his release from administrative detention and sought to return to his home in the West Bank, via Israel, an *order nisi* was issued. However, security officials then notified that the petitioner had been declared wanted and would be arrested on contact, which obviated review of the issue. The petition was rejected without a ruling.

37. HaMoked has accumulated more and more cases such as the aforesaid. In late 2007, in the course of providing assistance in these cases, HaMoked discovered, to its surprise, that the respondent had suddenly begun issuing permits to remain in the West Bank for Palestinians who had moved from the Gaza Strip to the West Bank – for the first time since 1967!

38. As stated, for years no permits whatsoever were required, nor did such exist in theory or in practice, for the entry or presence of Palestinians in the West Bank. There was also no distinction between residents of the Territories whose registered address was in some locality in the West Bank and residents of the Occupied Territories whose registered address was in some locality in the Gaza Strip.

39. Only toward the end of 2007, HaMoked handled some cases, in the context of which, it suddenly came to light that the respondent – without any prior notice, publication or official order – issued permits never before seen: stay permits for Palestinians in the West Bank.

40. HaMoked contacted the COGAT in an application under the Freedom of Information Act in an attempt to understand the sudden change, its substance, its commencement date and the legal authority for it.

41. The COGAT's response of May 18, 2008, indicated that the respondent had made an internal decision, without any formal proceeding, without amendment to the pertinent legislation and without publicizing his decision, that "as of November 2007, a resident of the Gaza Strip who is present in the Judea and Samaria Area is required to hold "a permit 'to remain in Judea and Samaria' and the permit is designed solely for this purpose".

    The response further stated that the first ever stay permit was issued only on December 25, 2007!

    Copies of HaMoked's letter and the COGAT's response dated May 18, 2008 are attached and marked **P/14-P/15**.

42. To complete the picture, one should note that with respect to persons seeking to move from the Gaza Strip to the West Bank now (as opposed to individuals whom this petition concerns, who, as stated, already reside in the West Bank), a "procedure for processing applications by Gaza Strip residents to settle in the Judea and Samaria Area" was published in March 2009. Clearly, the new procedure has no direct impact on our matter, as a procedure published in March 2009 obviously cannot be applied retroactively to those living in the West Bank for many years.

***(v) The position of the court in individual petitions on this issue: harsh criticism of the respondent's position and revocation of deportation decisions accordingly***

43. Having been requested to address questions arising in this petition in individual petitions, the court expressed its opinion regarding the unacceptability of the respondents' policy. So, for example, in HCJ 2387/08 **Sabah v. Military Commander**, a petition was filed in the matter of four children from the West Bank whose registered address in the Israeli held copy of the Palestinian population registry is in Gaza. The Palestinian Authority transferred the notice updating their correct address in the West Bank in accordance with the Interim Agreement, but Israel **refused to update the copy of the registry according thereto**.

    In the response to the petition too, the respondent persisted in his refusal to update their address in his copy of the registry on the claim that transference of a substantive application by the Palestinian Authority and Israeli authorization is a condition for updating the Israeli copy.

    The petitioners stressed that this position lacks any legal basis and that according to the Interim Agreement, as stated above, authority to update the address is not subject to any Israeli authorization and does not require any transference of an application for Israeli authorization – even when the case involves a change of address from the Gaza Strip to the West Bank**.**

    In the course of the hearing, the court rejected the respondent's argument that a "detailed application" must be transferred to him and clarified that even if it is a change of address from the Gaza Strip to the West Bank, indeed, **transference of an updating notification suffices and the respondent is obligated to update the petitioners' address as stated in the notification**. In view of the justices' clear position, the respondent was compelled to retract and notify that he would update the copy of the registry **in accordance with the Palestinian Authority's notification** (although it was agreed that the notification would be transferred once more):

> Following deliberations and as per our recommendation, the respondents have notified that if the **notification of the Palestinian Authority** attached to petition 18/80 [should read P/18, E.C] is transferred to the respondents directly by the Palestinian Authority rather than indirectly via the petitioners, the respondents will amend the registered addresses of petitioners 1-4 in the Israeli held copy of the Palestinian population registry according to their correct address which is in the Ramallah district.

    Indeed, the notification was again transferred to the respondent and the petitioners' addresses were updated in the Israeli held copy of the Palestinian registry.

44. Additionally, the honorable court addressed the issue also in the context of petitions filed in order to prevent the expulsion of residents from their homes, as aforesaid. It should be noted that a person whom it was decided to deport is rarely able to petition the court prior to being deported to Gaza as these are summary deportations, sometimes within hours, without any hearing. Such cases were, in fact, the first occasions since the Ward case which brought the question of deportations before the court.

45. One petition was HCJ 6685/09 **Kahouji et al. v. Military Commander in the West Bank** (hereinafter: **the Kahouji case**), where the matter of a Palestinian who moved to the West Bank in 2006 after having been issued a permit to travel to the West Bank through Israel was heard. The petitioner since married and the couple had children. During routine passage through a checkpoint in the West Bank, the petitioner was apprehended and designated for deportation based on his registered address. This petition is pending before the court and was consolidated with the aforesaid

HCJ 660/08. A motion for consolidation of the petition at bar with HCJ 6685/09 (and, as stated, with HCJ 660/08 is submitted in conjunction with this petition).

46. A second petition was HCJ 2786/09 **Salem v. Commander of Military Forces in the West Bank** (hereinafter: **the Salem case**) which involved the case of a Palestinian police officer who moved to the West Bank in 1995 as part of the deployment of the Palestinian police under the Interim Agreement, with Israeli coordination and under special arrangements established for the movement of Palestinian police officers. He has since married and had children. The petitioner was arrested in his home and designated for deportation based on his registered address.

    On December 15, 2009, there was a hearing in the Salem case. Having heard parties' arguments, a decision was handed down on the same day to issue an *order nisi* as sought. Subsequently, following further review of the matter, the respondent notified on January 20, 2010, that the deportation order would be revoked and the petitioner would be released home.

47. A third petition was HCJ 8729/09 **Suali v. Commander of Military Forces in the West Bank** (hereinafter: **the Suali case**) which involved the case of a Palestinian who moved to the West Bank in 2000 using the safe passage arrangements. This petitioner also married over the years and had children. During routine passage through a West Bank checkpoint, the petitioner was apprehended and designated for deportation based on his registered address. Only after filing the petition, did the respondent make security allegations against him with which he thought to substantiate his original decision.

    In a hearing in the petition held on January 7, 2010, the court criticized the respondent's position and clarified that **there were substantial legal difficulties in the thesis he sought to present**. This, *inter alia*, due to the respondent's difficulty in pointing to a legal authority to substantiate his position (see for example, comments of the justices during the hearing in HCJ 8729/09 dated January 7, 2010). Among other things, the justices later expressed their position that:

> There was free movement in the context of the free passage between Gaza and Judea and Samaria. This is something that was accepted and had become permanent and you don't take action against it. How is it possible to deport in these circumstances, especially after ten years?
>
> At the time this movement was carried out in practice, the settlement was entrenched. What happened [later] has no alleged affect, and the area commander was apparently aware of this mass movement from one area to the other, and no action was taken on it, and the matter had become effectively permanent, so how can you come today with a different moral [ should read institutional, E.C] approach?
>
> The deportation measure is problematic here.

    Moreover, the honorable justices clarified that even in circumstances where there are security allegations; usage of the deportation measure is problematic:

> Indeed, handling security problems is divorced from the question of one measure or another. An authority has the proportionate tools relevant to the circumstances. Deportation is a problematic measure here.

    A copy of the transcript of the hearing in HCJ 8729/09 dated January 7, 2010 is attached and marked **P/16**.

At the end of the hearing, the court instructed the respondent to reconsider his position and file an updating notice within a few days. On January 18, 2010, the respondent notified that after further review of the matter he decided to revoke the deportation order.

A copy of the court's decision in HCJ 8729/09 dated January 7, 2010 is attached and marked **P/17**.

***(vi). Petitioners' communications with the respondents***

48. Over the years, HaMoked contacted the respondent time and again challenging his decisions to deport individuals from their homes in the West Bank to Gaza and his refusal to update the addresses of those who had moved to the West Bank in the Israeli held copy of the Palestinian population registry. These communications were made in specific cases as well as on a general, theoretical plane.

49. Thus for example, as early as March 24, 2005, HaMoked contacted the state attorney's office in the matter of a decision to deport two residents from the West Bank to the Gaza Strip. This letter was sent following communications on this issue to the legal advisor for the West Bank and after intervention by the state attorney's office led to the cancellation of the decision to deport them. In its letter, HaMoked requested that "the relevant officials be immediately advised of the unlawfulness of their actions, the term 'illegal alien' inasmuch as it refers to Palestinians who are present anywhere within the occupied territory be stricken and relocation be acknowledged including all the ramifications thereof".

HaMoked also noted that "there is room to instruct all relevant law enforcement officials that the fact that an address appears as 'Gaza' in an identity card does not constitute legal cause *per se* for deporting a person from the West Bank to Gaza or for detaining him".

The letter also detailed other ways in which the respondents' decision to recognize an individual as an illegal alien based on his registered address is expressed: releasing detainees and prisoners to the Gaza Strip rather than their homes; preventing persons whose homes are in the West Bank from returning thereto following a visit to Gaza; refusal to process applications in general and applications for travel abroad via the Allenby Bridge.

A copy of HaMoked's letter to the state attorney's office dated March 24, 2005, and its attachments is attached and marked **P/18**.

50. On May 31, 2005, HaMoked contacted the Israel Prison Service Commissioner and stressed that prisoners should be released from prison to their effective residential address, rather than their erroneously registered address in the copy of the population registry.

A copy of HaMoked's letter to the Israel Prison Service Commissioner dated May 31, 2005 is attached and marked **P/19**.

51. On June 20, 2005, HaMoked contacted Att. Osnat Mendel, director of the HCJ department at the state attorney's office, demanding the cessation of deportation of Palestinians residing in the West Bank to Gaza. In its letter, HaMoked stressed that residents of the Territories have a right to change their place of residence within their land.

A copy of HaMoked's letter to the state attorney's office dated June 20, 2005, is attached and marked **P/20**.

52. On March 2, 2008, HaMoked contacted the civil administration requesting a status update on processing of notifications of change of address transferred by the Palestinian Authority to the military authorities; this, in regards to individuals who relocated to the West Bank with the

knowledge and consent of the respondents and regarding whose address the Palestinian Authority sent an update to the respondents as per the Interim Agreements.

A copy of HaMoked's letter to the civil administration dated March 2, 2008 and marked **P/21**.

53. On April 16, 2008, HaMoked received the respondents' response dated April 15, 2008, according to which address updates inside the West Bank are done by the Palestinian Authority with notification to the person in charge of the population registry in the civil administration. However, address updates between the Gaza Strip and West Bank constitute, according to the respondents, no less than authorization regarding change of place of residence which requires authorization by senior officials and only in exceptional and humanitarian cases. This, despite the fact that all the aforesaid updating notifications and the power to register the same are found in the same legal source!

    A copy of the respondents' response dated April 15, 2008 is attached and marked **P/22**.

54. On December 11, 2008, HaMoked contacted the respondent's legal advisor requesting a copy of the procedure for removal of Palestinians from the West Bank to the Gaza Strip, the existence of which was conveyed to HaMoked in a telephone conversation. The respondent's legal advisor was further requested to specify the legal authority for execution of the deportation, the number of Palestinians deported, and the dates of their deportations.

    A copy of HaMoked's letter to the respondent's legal advisor dated December 11, 2008 is attached and marked **P/23**.

55. On February 19, 2009, some two months after the date of the letter, HaMoked contacted the respondent again and requested his response to the letter.

    A copy of HaMoked's letter to the respondent's legal advisor dated February 19, 2009 is attached and marked **P/24**.

56. On October 22, 2009, HaMoked contacted the respondent's legal advisor requesting to halt deportation procedures against a Palestinian who had been living in the West Bank for some ten years (his case is not detailed above). As stated, this is a rare case where the intended deportee and his family managed to contact HaMoked before the deportation was executed. After HaMoked sent two urgent letters and had telephone conversations with representatives of the legal advisor, it was advised that the deportation would be postponed if it had not yet been completed. Despite this, some 20 minutes later, the deportation was completed.

    Consequently, on October 29, 2009, HaMoked sent another letter of complaint regarding this conduct to the legal advisor. On November 11, 2009, HaMoked sent another letter of complaint regarding similar conduct in another case; in that case, the legal advisor's representatives refused to postpone the deportation in the absence of a court order, this despite being informed that an urgent petition (the Suali petition) was filed with the court in conjunction with a request for an *order nisi*. Fortunately, in that case, the order was issued before the deportation was completed, the military vehicle turned back and the petitioner was returned to custody. As stated, on January 7, 2010, a hearing was held in the aforesaid petition, following which and following comments made by the court, the respondent retracted his decision to deport the petitioner (!).

    A copy of the letters of complaint sent to the respondent's legal advisor dated October 19, 2009 and November 11, 2009, and their attachments are attached and marked **P/25-P/26**.

57. On December 12, 2009, HaMoked received the response to the letter of complaint dated October 29, 2009, from the respondent's legal advisor dated on the same day. The letter's language indicates that the response refers, in effect, to both letters of complaint.

Following reference to the individual case, the letter states:

> With respect to your allegation that in view of the petitions filed with regards to the military commander's power to order the removal of Gazans from the Judea and Samaria Area, it is not possible at this point to order removals until an HCJ ruling on the issue of principle; we clarify that submission of the petitions does not of itself deny the powers of the military commander and negate his ability and obligation to make decisions on this issue. This, pending a judicial order instructing otherwise…
>
> As a lesson from the above incident and other past incidents and in order to prevent misunderstandings, it has been decided that in the absence of a court order delaying the removal of Gazans from the Judea and Samaria Area, no intervention will be made on our part and no response will be sent, that we intend to attempt, beyond the requirements of law, to delay the removal.

A copy of the legal advisor's letter dated December 12, 2009 is attached and marked **P/27**.

58. On January 12, 2010, HaMoked contacted Att. Osnat Mendel, director of the HCJ department at the state attorney's office protesting the deportation itself, the nature of the procedure whereby it is undertaken and particularly the legal advisor's position. In its letter, HaMoked detailed the gravity of the deportation and the procedural flaws accompanying it: the absence of a hearing and denial of a right to plead, which result in a summary deportation, in contravention of the military commander's duties as an administrative agency. Specifically, HaMoked protested the legal advisor's position that he does not intend to postpone a deportation even after receiving a communication from counsel for the intended deportee, and even after a petition was filed, in the absence of a court order.

A copy of HaMoked's letter to the state attorney's office dated January 12, 2010, is attached and marked **P/28**.

59. On February 4, 2010, HaMoked received a letter from the state attorney's office dated February 3, 2010, indicating its letter had been transferred for reference by the relevant officials.

A copy of the letter of the state attorney's office dated February 3, 2010 is attached and marked **P/29**.

60. On February 24, 2010, HaMoked again contacted the state attorney's office requesting a response.

A copy of HaMoked's letter to the state attorney's office dated February 24, 2010, is attached and marked **P/30**.

61. Two months after the date of the first letter, HaMoked contacted the state attorney's office on March 16, 2010, requesting a response.

A copy of HaMoked's letter to the state attorney's office dated March 16, 2010, is attached and marked **P/31**.

62. As of the date of submission of this petition, these letters remain unanswered.

## Section B: The Population Registry

### Section B1: The population registry – basic concepts

63. Before the petitioners detail their position, it appears that, unfortunately, one must reiterate basic concepts regarding the essence of the population registry and the powers of the registration clerk. These matters are doubly pertinent in our case which does not involve the original population registry, but a copy thereof held by Israel.

***(i) The population registry – presumptive evidence***

64. This court has ruled, time and again, that the premise with regards to the population registry is that the population registry is a statistical-documentary registry which constitutes, at most, presumptive evidence of the veracity of its content. The following was ruled as many as 45 years ago in the **Funk-Schlesinger** case:

> It is clear and beyond any doubt that the role of a registration clerk… is nothing more than the role of collector of statistical material in order to manage the record of residents.

(HCJ 143/62) **Funk-Schlesinger**, IsrSC 17(1), 225, 243) (1963)).

65. If this were not clear enough, the matter was explicitly anchored in Section 11b of the Order regarding Identity Cards and the Population Registry (originally 11a):

> 11b. The registry presumptive evidence
>
> The specifics in the registry, any copy or summary thereof and any document issued pursuant to this Order shall constitute presumptive evidence of the veracity of the registration specifics detailed in paragraphs… (13)… in this Section.

It follows that the address registered in the registry (paragraph (13) of Section 11) and the copy thereof is a parameter which constitutes no more than presumptive evidence.

66. It also follows that the respondent is meant to take action to adjust the records appearing in the registry and its copies to correspond with reality, rather than adjusting reality to correspond with the records in the registry. This, particularly when he is aware of the fact that these records are erroneous.

67. Incidentally, the position that the registry is merely a statistical tool to be updated according to reality in order to provide statistical data which is as accurate as possible is internationally accepted. See for example:

Philip Redfern, "Population Registries: Some Administrative and Statistical Pros and Cons", **Journal of the Royal Statistical Society. Series A (Statistics in Society)**, Vol. 152, No. 1 (1989), pp. 1-41;

Principles and Recommendations for a **vital statistics system**, Revision 2; United Nations, New York, 2001.

***(ii) The registration's clerk restricted powers***

68. Since the Funk-Schlesinger case, the Supreme Court has ruled, time and again, that the role of the registration clerk is no more than collecting statistical material and he was granted no discretion in the matter. Therefore, the clerk is obliged to record what the citizen tells him, unless "there is visible falsehood, beyond a reasonable doubt, of the registration".

69. These dictums were reiterated time and again in many judgments handed down over the years. In all these cases, the court ordered the administrative authorities to perform their duties and record what the citizen tells them in the registry. See for example:

HCJ 58/68 **Shalit v. Minister of Interior**, IsrSC 23(2) 477 (1970);
HCJ 264/87 **The Association of Sephardic Torah Observers – The Shas Movement v. Director of the Population Administration in the Ministry of Interior**, IsrSC 43(2) 723 (1989);
HCJ 2888/92 **Goldstein v. Minister of Interior**, IsrSC50(5) 89, 93-94 (1994);
HCJ 1779/99 **A v. Minister of Interior**, IsrSC 54(2) 368, 375-376 (2000);
HCJ 5070/95 **Na'amat – Movement of Working Women and Volunteers v. Minister of Interior**, IsrSC 56(2) 21 (2002);
HCJ 2901/97 **Na'amat v. Minister of Interior**, TakSC 2002(1) 634, 60 (2002);
HCJ 3045/05 **Ben Ari v. Director of the Population Administration**, TakSC 2006(4) 1725, 1731 (2006).

70. Case law stresses that the discretion given to the registration clerk at the time he registers a person's information in the population registry is technical and limited:

> The margin for action of the registration clerk, be it even the head registration clerk, as far as initial registration and changes to the registration are concerned, is not unlimited, as the legislature noted the matters which must be registered, the limits of the registration clerk's discretion, the duty to notify of changes and other such provisions. The registration clerk, or the head registration clerk, or the Minister of the Interior, has no powers beyond the classifications and the means of registration set forth in the law or in regulations regulated pursuant to explicit empowerment set forth in the law.
>
> (HCJ 230/86 **Miller v. Minister of the Interior** IsrSC 40(4) 436, 444-445 (1986)).

And in the Funk-Schlesinger case, Justice Sussman stressed that:

> There is fault in terms of administration when a citizen who arrives to notify of his information for statistical needs… faces a suspicious clerk who delves into his past.
> (The Funk-Schlesinger case, *ibid*, p. 252).

71. Clearly, for the purpose of updating an address in the population registry, an individual is not required to present "clarifications", "explanations" or detailed "reasons". Notification of his address is sufficient.

72. It should be noted that in the case at bar, not only is there no visible falsehood, but **the respondent unequivocally knows without a shadow of a doubt the details to be correct and accurate**.

73. This is all the more relevant where the matter concerns not the original registry, but a copy thereof. As indicated by the express language of the Interim Agreement, all the respondent is required to do is enter an update regarding the particulars recorded in the Palestinian population registry. Clearly,

if the registry clerk is granted no discretion with regards to records in the original registry, it is all the more so with regards to the copy of the registry.

**Section B2: The Copy of the Population Registry**

***(i) The Oslo Accord – transference of updating powers to the Palestinian Authority***

74. The respondent's responses to the aforesaid petitions indicate that it is his position that in order to update or amend an individual's registered address in the copy of the population registry, said individual is required to transfer to the Israeli side a "detailed application" via the Palestinian side, whilst the Israeli side has broad discretion to decide whether to allow the Palestinian side to update or amend the registered address, or rather to instruct it to maintain the erroneous address in the registry. This position and requirement were presented, as detailed below, retroactively.

75. The respondent's thesis is doubly flawed:

First, in so doing, the Israeli side seeks to regain a power explicitly transferred to the Palestinian side pursuant to the Interim Agreement and Protocol No. 7, which are a part of the legislation of the Area. He is effectively seeking to acquire a power which contravenes the law applicable in the Area, all without explicit legislation, without an order so establishing and, it follows, without publication.

Second, from the outset, the power to update or amend the registry includes only very limited discretion, mostly technical, and does not involve broad discretion on various substantive considerations.

76. Thus, the respondent has not only taken a technical power explicitly transferred out of his hands without any legal basis – but he also greatly "expanded" this power out of nothing and turned it into a substantive and substantial power allowing broad substantive discretion.

77. The respondent has previously alleged that his power to do so stems from Article 6(b) of Protocol No. 7 which stipulates:

> The determination of the IDF commander in the Area that powers and responsibilities continue to be in his hands shall be decisive for these purposes.

78. First, this provision clearly does not allow the respondent to create a power through mere words uttered by the commander even when it contradicts express statutory provisions in the legislation of the Area legislation and even when it was never anchored in an order. Clearly, the provision concerns the decisive factor on the question of who holds a certain power already anchored in law and not the creation of powers.

Second, the notion that this provision allows the respondent to transfer powers back and forth between the sides at will is absurd and voids Protocol No. 7 and the Interim Agreement in its entirety of any content.

79. The claim such that there was no intention in the Interim Agreement to transfer this power to the Palestinian side is particularly absurd, in view of the concrete and extra emphasis given in the Interim Agreement to the issue of the Palestinian side's duty to inform the Israeli side of changes made to **the registered address of residents** (see above paragraph 14).

80. As stated above, the respondent himself has previously acknowledged that powers with respect to updating a given address is at the hands of the Palestinian Authority according to the Oslo Accord.

Thus for example, we refer to the letter of the assistant to the COGAT dated January 1, 1996 (P/5), where, as stated, it was explicitly written that "[i]n response to your query regarding changes of address from the West Bank to the Gaza Strip, I hereby inform you that responsibility for this issue has been transferred to the Palestinian Authority and therefore it should be contacted with respect to this matter".

We further recall the letter of the respondent's legal advisor dated May 14, 2007 (P/6) in which it was explicitly written that "[t]he Palestinian registry is under the direct authority of the Palestinian Authority which administers it…Unilateral updating of the registry by the Israeli side is not possible seeing as the entire registry is administered and run by the Palestinian side in keeping with the provisions of the agreement".

We finally recall that in his letter dated April 15, 2008 (P/22), the respondent conceded that with respect to changes of address inside the West Bank – in the same population registry, in accordance with the very same legislation and the very same agreements – the power is at the hands of the Palestinian Authority and all the Israeli side receives is an updating notification.

***(ii) A "secret agreement" with the Palestinian Authority?***

81. The respondent has previously alleged that there is a purported "agreement" between him and the Palestinian Authority which was not published, is not anchored in an order and it is unknown where it is written, if at all. Itpurportedly stipulates "special rules" for updating a registered address following relocation from one part of the Territories to the other.

82. If such an agreement does exist, indeed, it is an international agreement which replaces the rules which were agreed upon in the Interim Agreement and validated pursuant to military legislation. Note: we are not dealing with technical understandings regarding the implementation of the rules established in the Interim Agreement, but rather a complete, substantive change of explicit articles which directly impact the human rights of thousands of individuals.

83. **The respondent has not pointed to any written source in which this arrangement (if it exists) appears and has not disclosed, even by implication, when and where the procedure would be made public and where it was explicitly anchored or received final approval**. It is, thus – according to this claim – a secret international agreement pursuant to which the respondent seeks to change explicit articles, impose conditions, restrictions and even various sanctions on residents of the Territories – to the point of deporting them from their homes!

84. There is clearly no value in the respondent's attempt to rely on clandestine agreements (supposing such really do exist), confidential arrangements (if they exist) and never published procedures (supposing these were even written). A basic precept of governance is that the norms deciding the rights of citizens and regulating the conduct of the government must be clear, explicit, and, most importantly **public**.

85. As known, political arrangements and agreements, like international covenants and treaties, do not become part of Israeli law or military legislation if they are not incorporated through explicit legislation. Just as case law establishes that the validity of the Interim Agreement stems solely from the explicit legislation which anchors it, so too "understandings" which alter or replace what is stipulated therein require explicit anchoring in legislation. Thus, the "understandings" between the military commander and the Palestinian Authority, inasmuch as such exist, have no validity of themselves, all the more so when these are secret "understandings". It has already been ruled that:

> A treaty between the State of Israel and another country is not, in and of itself, law, either in Israel or in Judea and Samaria. So stated President Shamgar in the Abu 'Eita case (above) on page 234:
>
> "[T]he rules of conventional international law are not adopted automatically and do not become part of the law as applicable in Israel, so long as they have not been adopted or incorporated by way of statutory enactment or subsidiary legislation"…
>
> Such is the case with regards to international treaties in general, and such is the case with regards to the Interim Agreement. The Interim Agreement does not have a superior status from a legal perspective, nor stronger validity than that of a treaty between the State of Israel and another country. Namely, the Interim Agreement, in and of itself, does not constitute part of the law applicable in Israel or part of the law applicable in Judea and Samaria. A Knesset law is required in order to validate it as part of the law applicable in Israel… similarly, an order by the military commander in the Area is required in order to validate the Interim Agreement as part of the law applicable to Judea and Samaria Area.
>
> (HCJ 2717/96 '**Ali v. Minister of Defense**, IsrSC 50(2), 848, 852-853 (1996)).

### Section B3: Amendment of particulars in the copy of the registry

86. All that has been stated thus far indicates that first, it is clearly impossible to rely on the particulars recorded in the population registry, and all the more so in the copy of the population registry, as a substantive matter which generates actual obligations for persons registered therein with regards to their place of residence. It is presumptive evidence which cannot be relied upon in order to deport a person from his or her home. As stated, the population registry is designed, by nature, to reflect reality and certainly not to determine it.

87. Second, it appears that the registration clerk has no authority not to amend the registry save for technical reasons relating a falsehood of the particulars, in order for the registry to indeed reflect reality properly. Whatever the respondents' position regarding the presence of an individual in the area, it is entirely divorced from their duty to update the details in their copy of the registry in accordance with the notifications transferred to them by the Palestinian Authority as per the Interim Agreement.

## Section C: The baseless argument regarding the need for a "permit" for "settlement"

### Section C1: Failures in the respondent's past arguments

88. A basic tenant of good governance, particularly in matters relating to individual rights, is that where an authority wishes to restrict a fundamental right, it must do so explicitly, through clear legislation which is made public. The burden of proving the existence of a legal restriction is placed on the authority.

    In our case, anyone who reviews military legislation even if he reads through it time and time again, will not find, not even in one place, any reference to "settlement" or "change of place of residence" with respect to Palestinians. All the reader would find is a proclamation of a closed zone and various arrangements allowing access thereto with the respondent's consent.

89. We stress that these consents have never been made subject to any conditions. None of the tens of thousands of residents who moved between the two parts of the occupied territory have ever been presented with a document imposing restrictions, conditions or timeframes with respect to their presence in that territory. The respondent himself acknowledges that no such approvals or permits have ever been granted. Not only does the respondent's conduct over the years testify to the manner in which he himself interpreted military legislation, but thousands of Palestinians have relied on this conduct over the years when lawfully making their homes.

90. We further recall that according to the respondent, the first requirement that a person hold a permit to remain in the West Bank originates in an internal decision from November 2007 which was not officially anchored and has not been publicized to this day. We also recall that the respondent's demand for a "permit" for "settlement" was first mentioned in March 2009 in a procedure which began to be formalized after a petition was submitted in 2008.

91. In response to previous petitions and communications from HaMoked detailed above, the respondent has attempted to argue that his demands have always been in place. He alleges that notifications regarding update of address are "applications" for "settlement" and that the printing of the updated address in the identity card annex is, in fact, a "permit". The petitioners hereinafter address this claim – both on the legal aspect and the factual aspect.

***(i) Military legislation***

92. As stated, the respondent attempted to claim that the procedure respecting an "application" for "settlement" has been pursuant to **the Order regarding Identity Cards and the Population Registry** (the procedures relating thereto have been transferred to the responsibility of the Palestinian Authority in the framework of the Oslo Accord).

93. Yet, anyone reading the Order regarding Identity Cards and the Population Registry will find no trace of a procedure for filing an application to receive a "permit". The reader of the Order will find it contains a single provision regarding changes in particulars in the registry – Section 13 of the Order – and the only thing stated therein is that if a change has already occurred in one of the particulars, it must be retroactively reported. In the language of the Section:

> Where a change occurred in one of the details listed in Section 11, a resident who has received an identity card must inform the population registry bureau in the jurisdiction where his residence is located, as determined by the competent authority, of the change within 30 days.

94. This and nothing more. A person reading the Section would never be able to understand that according to the respondent, he is in fact now submitting an application to receive the respondent's approval to set up a home and reside in it – 30 days after he has already done so!

    In fact, the Order's simple language reveals that this is merely a retroactive obligation to report the change of address of a Palestinian resident of the Territories. It is akin to the obligation that applies to Israelis inside Israel, and was not subject to prior or retroactive authorization by the military commander or any other official.

95. Yet, this does not bring the absurdity to an end. According to the respondent, he holds a power, which is not as much as mentioned in the Order to exercise broad discretion whether to approve the change, approval which, he purports, expresses discretionary consent to an existing situation which is the very presence of the resident in his home!

Obviously, there is no trace of this "power" and the "discretion" behind it in the Order. Moreover: this interpretation absolutely contradicts the language of the Order which establishes that the registry is presumptive evidence; and it contradicts the age old case law regarding the status of the population registry and the powers and discretion of the registration clerk.

96. However, the absurdity does not end here either, as beyond the fact that the Order does not stipulate any procedure for submitting an "application" or authority to approve it subject to discretion, but the Order also does not include a requirement to submit an "application for a permit" or any restriction on those whose "applications" have been refused.

At this point, the respondent surpasses himself and claims that, in fact, the requirement for a "permit for a change of place of residence" is regulated by the **Order regarding Closed Zones** (Order regarding Closed Zones (West Bank Area) (No. 34) 5727-196)7 – an entirely separate order. That is, the respondent claims that the requirement for a "permit" is found in the Order regarding Closed Zones while simultaneously claiming that the manner by which it is obtained and approved is found in an altogether different order – **the Order regarding Identity Cards and the Population Registry**!

This is likened to a claim that a person who submits a notification of update of address with the Israeli ministry of interior under the Population Registry Law is effectively seeking the approval of the border police to enter his country under the Entry into Israel Law.

97. To this one must add that in the proclamation of the West Bank as a closed zone there is no provision which requires a person to hold a written permit regarding "a change of place of residence". The legal premise is that the very proclamation of a "closed zone" does not, of itself, establish a particular list of set principles and provisions. Rather, the military commander must officially set forth the rules and requirements that apply to any particular closed zone. This is clearly indicated by Section 90(b) of the Order regarding Defense Regulations (Judea and Samaria) (No. 378) 5730-1970, pursuant to which the Order regarding Closed Zones was issued:

> Where an area or a locality has been closed as stated in subsection (a), the military commander **may** determine that one of the following provisions shall apply thereto:… No person shall enter the closed zone nor remain in it;

This logic corresponds to the reality in the Territories where proclamations of closed zones occur in various contexts and situations.

A copy of Section 90 of the Order regarding Defense Regulations is attached and marked **P/32**.

A copy of the Order regarding Closed Zones is attached and marked **P/33**.

98. As known, **there are dozens (if not hundreds) of closed zones throughout the Territories**: some are permanent and some are temporary; some apply to the entire population and some to certain groups only; some require a written permit while others require oral permission from the military official on the ground; some are diligently implemented and some have long since turned into a dead letter. Each closed zone and its circumstances, each order and its provisions. **The proclamation of a "closed zone" *per se* does not necessarily dictate any particular requirement.**

99. Therefore, in cases where the military commander sought to establish individual provisions pertaining to the manner of obtaining a permit or its nature, or to explicitly restrict the possibility of "settling" and "changing a place of residence", he did so using an explicit order, separate and additional to the proclamation of the area as a closed zone.

100. For instance, in this manner, when issuing the Order regarding Closed Zones (Zone 11) (Judea and Samaria) (No. 382) 5730-1970, the military commander saw fit to explicitly set forth, with regards to a particular area marked on a map attached to the Order that "a person **entering** zone 11, which has been closed according to this order or **leaving** it without a **written permit**, so long as this Order is in effect, will be charged with an offence under the Order regarding Defense Regulations". In this order, the military commander further added that "the power to grant entry and exit permits shall be vested in the military commander of the Hebron district or a person acting on his behalf".

This Order is naturally presented merely as an example of many other orders in which the military commander explicitly established that entry into and exit out of the zone are subject to a written permit.

As can be seen, unlike the order proclaiming the entire West Bank as a closed zone, indeed, with respect to that "zone 11", the military commander decided to order a restriction both on **entry** and on **exit**, and demand possession of a **written permit**.

A copy of the Order regarding Closed Zones (Zone 11) (Judea and Samaria) (No. 382) 5730-1970 is attached and marked **P/34**.

101. As stated, restrictions on "settlement" or "change of place of residence" have also been explicitly made in the appropriate cases. For instance, in the context of the "disengagement" plan, the West Bank areas designated for evacuation were declared closed zones (despite already being inside the West Bank, itself a "closed zone"), **and additionally**, the military commander saw fit to issue a separate order regarding "prohibition of change of place of residence" to these areas.

A copy of the Order regarding Prohibition on Changing Place of Residence (Judea and Samaria) (No.1556), 5365-2005 is attached and marked **P/35**.

102. In fact, even pursuant to the proclamation of the West Bank as a "closed zone" in 1967, the military commander established that a single, particular group of people is indeed expressly required to obtain a "personal permit" in order to "change a place of residence to the Area permanently": **Israelis**.

The order which regulates the movement of Israelis into the West Bank (General Entry Permit (No. 5) Israeli Residents and Foreign Residents (Judea and Samaria) 5730-1970) establishes, in Section 2(6) that one of the conditions for the entry of **Israelis** into the Area is:

> A residence shall not be permanently or temporarily changed to the Area unless by a personal permit certificate 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/36**.

103. The military commander did not to establish, and lawfully so, a similar provision with respect to residents of the Territories, and, as stated, indeed, "settlement permits" never existed for residents of the Territories.

104. Thus, as demonstrated, when the military commander issues a specific "closed zone" order, he **may** establish therein that there is a specific requirement to obtain a written permit for entering or exiting said zone. Clearly, where the military commander's consent was all that was granted for a person's entry and presence in the West Bank, and this consent was not time-limited, nor made subject to a written permit under certain conditions, no allegations can be made against those who acted lawfully and with the military commander's consent.

105. We recall that under the law applicable in the Territories, a permit or license do not necessarily have to be written. The Order regarding Interpretation (West Bank Area) (No. 130) 5727-1967, broadly stipulates in Section 1(33) that:

> A "license" – license, permit, power, authorization, consent or exemption granted pursuant to security legislation.

As stated, in accordance thereto, the proclamation of the West Bank as a closed zone did not require procurement of a written permit, neither in its language, nor in the manner in which it was implemented in practice, since, those who arrived from Gaza and were allowed to travel through Israel, were allowed by the military commander to enter the West Bank and reside therein with no need for any sort of permit.

106. As well, the Order regarding Defense Regulations, pursuant to which the aforesaid provision was issued does not stipulate individual rules regarding closed zones and does not require any specific permit. The Order generally stipulates that the "[t]he military commander may proclaim any area or locality closed" and that he may, thereafter, stipulate restrictions applicable to said closed zone (prohibition on entry, exit, entry and presence or entry and exit).

Clearly, inasmuch as the military commander did not do so, and did not stipulate these specific provisions in the relevant order, indeed, he may not, decades after the order was issued, begin to retroactively "interpret" it as including individual provisions which were never included therein; a fortiori he cannot make allegations against individuals who have acted in accordance with the language of the order!

107. In conclusion, it can be seen that the respondent is now attempting to manufacture entire formations with respect to submitting applications, requirements for submission thereof and the power to approve or deny them, and about separate legislative arrangements, neither of which provide anchoring for these claims; claims, which in turn, contradict the case law of this court and the Interim Agreement.

***(ii)The respondent's conduct over the years***

108. Over the years, the respondent himself has also made his opinion known that a protected resident who entered the West Bank with his consent has never been required to obtain the military commander's consent for "settling" and that his presence in the West Bank was never time limited and was never made subject to any conditions. Suffice it to recall the following facts:

a. For decades, the respondent allowed tens of thousands of Palestinians to move to the West Bank and establish their homes therein. Making a home is not a trivial matter. It is done openly, under the watchful eye of the military commander. Until very recently, the respondent has never made claims against any of these individuals.

b. Not only has the respondent allowed these individuals to make their homes in the West Bank, but rather, at times, he even prevented them from travelling back to the Gaza Strip. This was the situation of the petitioner in the above mentioned Salem case, when the respondent denied two applications by the petitioner to visit the Gaza Strip in the early 2000s.

109. Note well: in all these cases, the individuals were never told that their presence in the West Bank was limited. Once the respondent allowed all these individuals to travel to the West Bank without placing restrictions on them, they entered the West Bank and made or returned to their homes therein, fully relying on existing legislation and on the respondent's conduct.

It follows that not only does the respondent's conduct testify to his interpretation of the existing legislation over the years, but also thousands of people relied on this conduct, as well as existing law, and built their lives accordingly.

110. It should be noted that on March 19, 2006, HaMoked contacted the state attorney's office in the matter of the aforesaid Ward case after an *order nisi* was granted therein. In its letter, HaMoked requested further details pertaining to the petition. The respondent was requested, *inter alia*, to present examples of permits granted and applications submitted for change of place of residence (Section 3.7(d)-(e) of the letter).

A copy of HaMoked's letter to the state attorney's office dated March 19, 2006 is attached and marked **P/37**.

111. On May 24, 2006, HaMoked received the state attorney's office response dated May 23, 2006 to the aforesaid letter. Section 15 of the letter clarified that no examples of the aforesaid document can be found since they do not exist. It later became clear that according to the state, a "permit" for "change of place of residence" is no more than an amendment of the address in the resident's identity card!

A copy of the response of the state attorney's office dated May 23, 2006 is attached and marked **P/38B**.

112. Similar statements were made in the hearing in the Kahouji case where the respondent attempted to claim that the permit for temporary entry **into Israel**, with which the petitioner traveled through Israel to the West Bank, was, in fact, a "a temporary stay permit for the West Bank".

This is clearly absurd: a permit to enter Israel is, as its name indicates, a permit to enter Israel. In fact, permits to enter Israel from the Gaza Strip are issued pursuant to the powers of the Minister of Interior and the military commander in the West Bank has no power with respect to their issuance. Additionally, these permits were issued only to persons who travelled using such a permit – those who travelled via the safe passage, for instance, never required such a permit!

Moreover, this permit was granted only to persons travelling through Israel and was never granted to those who entered the West Bank from Jordan. In the words of counsel for the state regarding persons who entered from Jordan: "**they didn't receive a paper**" (p. 3 of the transcript of the hearing dated December 14, 2009).

A copy of the transcripts of the hearing in the Kahouji case is attached and marked **P.39**.

If this were not enough, we refer to petitioners who sought to return from the Gaza Strip to the West Bank after having been deported thereto or after the respondent prevented their return thereof, and after a petition was filed, the respondent consented to allow them to return to their homes in the West Bank. In all these cases, the petitioners were still issued an entry permit for Israel, limited to one day. Since the respondent clearly did not set out to breach the rulings in those petitions and allow the petitioners to return home for one day, the only conclusion is that the time restriction was relevant to passage through Israel, also in the eyes of the respondent.

See for instance the travel permits granted in HCJ 4465/05 **Jdili v. Commander of the Military Forces in the West Bank**; HCJ 5436/06 **Effendi v. Commander of the Military Forces in the West Bank**; HCJ 9951/06 **Abu Btihan v. Commander of the Military Forces in the West Bank**.

Copies of the permits are attached and marked **P/40-P/42**.

113. In light of the above, it seems that there is no need to elaborate on the extreme absurdity of the respondent's thesis: not only did military legislation not allow him to restrict the presence of those residents in their homes, but he himself acted accordingly and did not restrict their presence.

114. **There is much cynicism, to the point of bad faith and even deliberate entrapment of innocent civilians, when the military commander effectively allows innumerable individuals to reside in a certain area, with no need for any sort of written permit and without restrictions and, years later, makes allegations against these individuals, whose residency he himself allowed in such a manner, for not having an "appropriate permit".**

**Section C2: Substantive flaws in the argument regarding a requirement for a "permit" for "settlement"**

***(i) Retroactivity and the principle of lawfulness***

115. Let it be explicitly stated: the respondent's position is a position which is **retroactively applied to thousands of people who acted lawfully**.

116. This conduct is unlawful and contravenes the most fundamental tenants of administrative law which are designed to protect persons relying on the decisions of an authority. On this issue, it has been written that:

> Among others, there is a need for stability. This is a salient need in judicial decisions, but it exists also in administrative decisions. People should be able to rely on administrative decisions, such as a permit for running a business or building a home and plan their actions according thereto. There is normally a legitimate expectation on the part of an individual to whom an administrative decision applies, that the decisions shall stand.
> (Yitzhak Zmir, **Administrative Power** B, 1996, 983-984).

117. This conduct also contravenes international humanitarian law (Articles 64 and 65 of the 4th Geneva Convention and Pictet's interpretation – Pictet, Jean S. ed., **Commentary: The Geneva Conventions of 12 August 1949**, ICRC, 1958 pp. 338-339).

See regarding the prohibition on retroactive application:

Article 75(4)(c) of the First Additional Protocol to the Geneva Conventions (1977);
Article 6(2)(c) of the Second Additional Protocol to the Geneva Conventions (1977);
Rule 101 in the ICRC study on customary international humanitarian Law (Henckaerts J.M. Doswald-Beck L. **Customary International Humanitarian law, Vol I: Rules**. ICRC, 2005, pp. 308-310).
Article 22(1) of the Statute of the International Criminal Court (the Rome Statute) (1998) and the most fundamental principle of criminal law – *noella poena sine lege*;
Article 15 of the International Convention on Civil and Political Rights, (1966);
Article 40(2)(a) of the International Convention on the Rights of the Child (1989);
Article 11 of the Universal Declaration of Human Rights (1948);
and Article 7(1) of the European Convention on Human Rights (1950).

118. When a person sets out to do something, he must be objectively aware of the penalty stipulated in the law, which he faces as a result of these or other actions. A person has a right to be aware of the specific circumstances which may lead to his incrimination. These fundamental rules are the building blocks of any rule of law and fair system of enforcement. The scholar Popelier stresses the importance of these basic principles:

> The notion of "legitimate expectations"… is part of the requirement of calculability and reliability. **A subject of law should know when he is bound by a legal rule and the time within which he must establish certain facts in order to attain or avoid certain legal consequences.**
>
> (Popelier P., *Legitimate expectations and the law maker in the case law of the European Court of Human Rights*, **Human Rights Law Review**, 2006, pp. 10-11) (emphasis added)

119. The scholar Benvenisti adds, in reference to the circumstances of the occupation in the West Bank and Gaza Strip specifically that:

> There were also issues of substance, which determined, inter alia, that the enactments could not be inconsistent with international law… and that they could not be retroactive.
>
> (Benvenisti E., **The International law of Occupation**, Princeton University Press, 1993, pp. 115-116).

120. Alternatively, even according to the respondent, there is a substantive flaw in his position, since if this does not constitute retroactive application of a new requirement, then this is a requirement which is not anchored in existing legislation. Imposing duties, restrictions and sanctions on citizens pursuant to secret provisions and hidden directives is diametrically opposed to the supreme legal principle that **there is no secret legislation** and that "secret legislation strikes at the foundation of the rule of law and at the heart and soul of democracy" (as stated by Justice Barak (as was his title then) in HCJ 4950/90 **Parnas v. Minister of Defense**, IsrSC 47(3) 36, 42 (1993)).

121. The statements made more than 50 years ago by Justice Sharshevsky are relevant to our case:

> There is no law unless it was made public in the manner the law itself determined, otherwise, a state of chaos will be created where no one is able to know what is permitted and what is prohibited, and hence, it will not be possible to demand a person to abide by the law and not perform an illegal act.
> (HCJ 220/51 **Aslan v. The Military Governor of the Galilee**, IsrSC 5(2) 148).

Justice H. Cohen similarly stated that:

> Any legislation, and for this matter it is irrelevant whether it is law or secondary legislation, requires to be made public… and even if the law contains an explicit provision which exempts such legislation from publication in the Official Gazette. There are no secret laws in the State of Israel. Where there is a provision in the law which exempts that legislative act from publication in the Official Gazette it is permitted not to publish the same in the Official Gazette, but this does not mean that it is permitted not to publish it at all. Legislation which is secretly enacted and kept in concealed archives is one of the hallmarks of totalitarian regimes and it is inconsistent with the rule of law.
> (CA 421/61 **The State of Israel v. Haz**, IsrSC 15 2193, 2204 (1961)).

122. The military commander must, as an administrative authority, prove that there is an explicit source of authority pointing to his power with respect to restricting a person's right to live in the West Bank. **Anyone reading the military legislation published by the respondent will find no trace of a restriction of his right to live in his home which is in his land**. This is particularly pertinent, as **the respondent himself did not restrict the right of all those individuals to live in their land**.

***(ii) Wrongful discrimination***

123. If this were not enough, the aforesaid flaw is joined by another. As detailed herein, the only mention of a permit for a change of place of residence in military legislation **refers to Israelis**. In fact, in their case, there is an explicit requirement to hold a personal permit certificate.

124. It is superfluous to note that to the best knowledge of the petitioners, not one of the hundreds of thousands of Israelis residing in the West Bank holds such a certificate. It is also superfluous to note that to the best knowledge of the petitioners, not one of those Israelis has ever been deported from his home for this reason.

125. The result is that there is a single group which requires a "permit" for "settlement" in the West Bank: Palestinians: Protected residents who live in their land, where they are entitled to live and whose residency in the West Bank does not depend on any sort of permit – it is they who are deported from their homes and who live under the constant threat of deportation.

126. Thus, what is at issue is extreme wrongful discrimination: Israelis (and as they are defined in the relevant legislation, these are all Jews, whatever their nationality), freely settle in the West Bank without being issued any sort of certificate, whereas Palestinian residents of the West Bank are put into military vehicles and sent to the Gaza Strip.

127. This reality, in which residents of a particular national origin are deported from their homes, whereas residents of another national origin freely live in the area, is reminiscent of dark regimes. The term "wrongful discrimination" seems insufficient to describe the gravity of the respondent's demand.

## Section D: The Unlawfulness of Forcible Transfers from the West Bank to the Gaza Strip

### Section D1: The obligations of the military commander

128. The military commander's duties and powers stem directly from international law (HCJ 2150/07 **Abu Safiya v. Minister of Defense** (December 29, 2009). International law is, therefore, the source for the military commander's power and it delineates the limits of the power and the considerations the commander may consider.

129. The military commander has a duty to uphold public order and safety in the Occupied Territories. This is explicitly stated in Article 43 of the Regulations concerning the Laws and Customs of War on Land of 1907 which are annexed to the 4th Hague Convention of 1907:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power, and ensure, as far as possible, public order and safety…

130. In so doing, the military commander's discretion is limited to two poles – military necessity on one hand, and the good of the protected population on the other:

> The Hague Convention authorizes the commander of the Area to operate in two main spheres: one – ensuring the legitimate security interest of the

> occupier, and the other – ensuring the needs of the local population in an area under belligerent occupation... The first focuses on concern for the security of the military force occupying the area, and the other – on the responsibility for maintaining the inhabitants' welfare. Within the latter the commander of Area is responsible not only for maintaining the inhabitants' order and safety but also for protecting their rights, particularly the constitutional human rights conferred to them. The concern for human rights lies at the heart of the humanitarian considerations which the commander must consider. According to Article 43 of the Hague Convention, the force in control of an occupied area is responsible for taking all measures available to it in order to restore and maintain, to the extent possible, public order and safety in the area, while respecting the law prevailing in the area insofar as possible. In carrying out his duty of maintaining order and safety, the commander of the Area must, therefore, ensure the legitimate security interest on the one hand, and protect the interests of the civilian population on the other.
> (HCJ 10356/02 **Haas v. GOC Central Command**, IsrSC 58(3) 443, 455-456 (2004)).

131. A military government must be attuned to the changing needs of the residents of the territories of which it is in charge, and serve the population with attention to these changing needs and the life events of the individual 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. **It may not freeze life**.
> (HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces in the Area of Judea and Samaria**, IsrSC 37(4) 785, 804 (1983), emphasis added).

132. This indicates that the military commander has a positive duty to maintain an up-to-date population registry which reflects the reality of individuals' lives and allows individuals to have a normal life. Refraining from meeting this obligation leads to disruption of the residents' lives – both in matters relating to passage through checkpoints, travel abroad etc. and in simple every day matters such as receiving official mail and contacting the municipal government.

133. In this context, it is irrelevant whether the authority to administer the population registry is no longer in the hands of the military commander, since suffice it that the military commander acts in accordance to the copy of the registry he holds and ignores the decisive Palestinian population registry and in so doing fatally injures many of the rights of the residents whose address was not updated in the military commander's records due it his own omission.

134. We recall that the military commander may not make national, political and other considerations and is confined to security considerations in the narrow sense of the term. Any other consideration made by the military commander would constitute an extraneous consideration:

> [T]he 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 Al-Ma'almoun** case, pp. 793-794).

135. Yet, clearly, forcible transfers of Palestinians to the Gaza Strip utterly contradict the military commander's duty to ensure the welfare of the population. Additionally, transferring protected residents to the Gaza Strip based solely on their address lacks any security justification. There is no justification for the forcible transfer of individuals whose only "sin" is that they acted lawfully and made their homes in their land.

136. In fact, even in those cases where the respondent believes that concrete security reasons justify placing personal restrictions on a specific resident, he must act in accordance with the powers and limitations stipulated by international law in this regard, which refer, for instance, to use of measures such as assigned residence in the Gaza Strip or administrative detention.

    In some of the above detailed cases, the respondent himself chose to revoke the deportation order and take other measures – administrative detention (the Suali case) or criminal arrest (the Salem case).

137. **This is, in fact an act which is entirely *ultra vires*. The military commander's authorities stem from international law which, in no way empowers the respondent to remove protected residents on the basis of their address. As detailed below, not only is this act *ultra vires*, but it is a breach of an express prohibition**.

138. We recall that the duties of the military commander are *vis-à-vis* **every protected resident in the occupied territory**. A person's status as a "protected resident" is granted pursuant to international law and the military commander has no power to define who he considers as entitled to enjoy the protection of international law and who is not.

139. A person's status as a "protected resident" is not subject to the granting of any sort of certificate, permit or license, nor in being registered in any registry. The definition of a "protected person" was set forth in the 4th Geneva Convention and applies to every person who is present in an occupied territory and who is not part of the occupying power. As stipulated in Article 4 of the Convention:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

The broad application of the definition is discerned from the commentary of the ICRC:

> The definition has been put in a negative form; as it is intended to cover anyone who is 'not' a national of the Party to the conflict or Occupying Power in whose hands he is…
>
> The words "at a given moment and in any manner whatsoever", were intended to ensure that all situations and cases were covered. The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travelers, tourists, people who have been

> shipwrecked and even, it may be, spies or saboteurs…
>
> The expression "in the hand of" is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or "hands" of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organization. In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.
>
> A copy of the relevant segment of the ICRC commentary is attached and marked **P/43**.

**Section D2: Forcible transfers in contravention of international humanitarian law**

140. On the concrete level, the respondent's decision to deport Palestinians who have been living in the West Bank for many years breaches the strict prohibition placed in international humanitarian law on forcible transfers. There is no need to reach a decision in the dispute between the petitioners and the respondent on the issue of the current legal status of the Gaza Strip as an occupied territory, in which the petitioners maintain that it is still such. This is not necessary, as in any respect, the prohibition on forcible transfers applies both to transfers outside the occupied territory and within it.

141. **It shall be clarified: the respondent's position, according to which an outdated address forms a basis for forcibly removing an individual is nothing more than bureaucratization of the prohibition on forcible transfers. This prohibition is explicit and clear and its purpose is specifically to prohibit these unlawful acts.**

142. Article 49 of the Geneva Convention (1949) strictly forbids forcible transfers of protected civilians:

> Individual or mass **forcible transfers**, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or **to that of any other country, occupied or not, are prohibited, regardless of their motive**.

According to the standard interpretation accepted in the language of Article 17(1) of the Second Protocol Additional to the Geneva Convention, this Article also refers to transfers within the occupied territory, from one part of the territory to another:

> The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

143. The prohibition on forcible transfers is one of the strictest in the Convention. **Violation thereof is considered a grave breach** (under Article 147 of the Convention and Article 85 of the First Additional Protocol). The significance of this is that whoever perpetrated or ordered the forcible

transfer of protected persons bears personal criminal liability for his actions, liability which is subject to universal jurisdiction (Article 146 of the 4th Geneva Convention).

144. This supreme principle has special status in international criminal law (Article 6(b) of the Charter of the International Military Tribunal (Nuremberg) and Article 23 of the Lieber Code. The statute of the International Criminal Court stipulates deportation and forcible transfer as war crimes which come under the jurisdiction of the court (Section 8(2)(a)(vii)). Forcible transfer also constitutes a crime against humanity under the court's statute, if perpetrated as part of a systematic policy. In this context it was defined (in Article 7(2)(d) as:

> Forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

145. The International Criminal Tribunal for the former Yugoslavia ruled, in a number of judgments, that the strict prohibition on forcible transfers refers also to cases of transfers within the same occupied territory or within one country (see: ICTY, **Prosecutor v. Krstic,** Judgment of Trial Chamber, 31 March 2003, Case No. IT-98-33-T, paras. 521; ICTY, **Naletilic and Martinovic,** Judgment of Trial Chamber, 31 March 2003, Case No. IT-98-34-T, paras. 516-521, 670; and ICTY, **Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric**, Judgment of Trial Chamber, 17 October 2003, IT-95-9-T, paras. 122).

**Section D3: Human rights violations**

146. Forcible transfer is not just a general term from the realm of humanitarian law. Forcible transfers are real injuries of real people, of their lives, of many of the rights vested in them as part of international human rights and which the respondent is obliged to respect also pursuant to his function as an administrative authority acting under the rules of Israeli administrative law (HCJ 9132/07 **Al-Basyuni v. The Prime Minister**, TakSC 2008(1) 1213; HCJ 2150/07 **Abu Safiya v. Minister of Defense** (not yet published, December 29, 2009); HCJ 7957 **Mara'abe v. The Prime Minister of Israel** TakSC 2005(3) 3333 §24; HCJ 3239/02 **Marab v. IDF Commander in the West Bank** TakSC 2003(1) 937; HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. Military Commander in the West Bank**, IsrSC 57(1) 385; HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya, Cooperative Association v. Commander of the IDF Forces in the Area of Judea and Samaria** IsrSC 37(4) 785; HCJ 10356/02 **Haas v. IDF Commander in the West Bank**, IsrSC 58(3) 443; HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel** IsrSC 58(5) 807).

147. This honorable court has long since noted the elevated status of a person's right to live in his home (HCJ 7015/02 **'Ajuri v. Commander of IDF Forces in the West Bank**, IsrSC 56(6) 352 (2002)); HCJ 1661/05 **Hof Aza Regional Council v. Prime Minister**, IsrSC 59(2) 481 (2005)). In these rulings the court acknowledged the central role of the individual's home in designing his life and the grave injury caused to him as a result of his expulsion thereof.

148. A person's home is a central crossroads of his life. It is where his personal liberty and family life meet as do his property and livelihood and his social cultural life and religious practices. A person's home is a source for the fulfillment of many of his rights, and if one harms it one harms them all.

149. These matters are also anchored in international law. The scholar Stavropoulou emphasized the severe gravity of forcibly removing a person from his home:

> Some have observed that an individual's forced deprivation of his home violates a basic human right. "Home" constitutes not only a means of

> "shelter", but also a means of placing a person in a social and physical space and of circumscribing a person's private life and social interaction… Observers have never disputed the tragedy involved in one's separation from him home…
>
> (Maria Stavropoulou, *The Right Not To Be Displaced*, 9 **AM. U. J. INT'L L. & POL'Y** 689, 717 (1993-1994)).

150. Stavropoulou goes on to note that a person's forcible removal from his home necessarily violates a long list of fundamental rights under international law and amounts to a breach of the strict prohibition on "cruel, inhuman or degrading" treatment:

> Displacement threatens the life, liberty, and security of the displaced – rights which are guaranteed, *inter alia*, in article 3 of the Universal Declaration and 6 of the International Convention on Civil and Political Rights. In such cases, **there can be little doubt that displacement will amount to cruel, inhuman or degrading** treatment as illustrated in Article 5 of the Universal Declaration and article 7 of the International Convention on Civil and Political Rights.
>
> Article 12 of the Universal Declaration and article 17 of the International Convention on Civil and Political Rights prohibit arbitrary interference with an individual's home and privacy. Article 17(2) of the Universal Declaration provides that "no one shall be arbitrarily deprived of his property". Article 25(1) also provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family…" similar provisions are found in the International Convention on Economic, Social and Cultural Rights. It provides for the protection of the family (article 10); the right to an adequate standard of living, shelter and food (article 11); the right to physical and mental health (article 12); the right to work (article 6); the right to education (article 13); and the right to pursue freely one's own economic, social and cultural development (article 1); the right to participate in cultural life (article 15). All of the above rights are inevitably violated to a greater or lesser degree when forced displacement occurs.
>
> Displacement may also infringe on a number of other provisions of the International Convention on Civil and Political Rights…
>
> The freedom of movement is inherently breached when displacement occurs, not only because the displaced are restricted invariably in their movement... but also because they cannot exercise their right to return to their home country or principal area.
>
> (*Ibid.*, pp. 736-737)

151. According to international law, a person's right not to be removed from his home and area of residence is a central and essential fundamental right. This pivotal main principle was formulated by the UN Commission on Human Rights as follows:

> Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
>
> […]
>
> Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence.
>
> (UN Commission on Human Rights – Economic and Social Council, **Guiding Principles on Internal Displacement,** E/CN.4/1998/53/Add.2 (1998)).

## Conclusion

152. In light of the aforesaid, indeed, the respondent is not empowered to order the forcible removal of a protected resident who resides in the West Bank to the Gaza Strip on the basis of his address – either pursuant to international law or military legislation. In fact, not only does he lack power to do so – it is explicitly prohibited in international law and constitutes a fatal injury to the human rights of thousands of individuals and their families, in breach of Israeli and international law.

153. Additionally, whatever the respondent's allegations with respect to the presence of such individuals in the area, they are clearly unrelated to the updating of their particulars in his copy of the population registry. A person is entitled by law – as clearly indicated by the language of the Order regarding Identity Cards and the Population Registry, as well as from clear and consistent rulings by this court – to have his particulars in the population registry updated; all the more so, when the issue is a copy of the registry and updating notices regarding the records therein are transferred from the Palestinian Authority which runs the original registry. Refusal to do so is not only a violation of the Interim Agreement, the military order which incorporated it into military legislation and legislation regarding the population registry – but is truly *ultra vires*.

154. The respondents' policy which begins with refusing to update the registered addresses of residents of the Occupied Territories; continues with the retroactive demand these individuals hold "permits" for "settlement" to live in their homes and culminates in their deportation in military vehicles to the Gaza Strip – is fundamentally unacceptable. This policy is unlawful in the most basic sense of the term. This policy contravenes the clear rules of good governance: clear and transparent legislation and the prohibition on retroactive application. This policy is implemented in an extremely discriminatory manner, to the point of resembling dark regimes. This policy severely violates human rights and constitutes a grave breach of international humanitarian law.

In light of all the above, the Honorable Court is requested to issue an *order nisi* as sought, and after hearing the response of the respondent, render it absolute. The court is also requested to order the respondent to pay for petitioners' costs and legal fees.

May 25, 1010

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Elad Cahana, Att.
Counsel for the petitioners

[65425]