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At the Supreme Court
Sitting as the High Court of Justice

271/11

- In the matter of:
1. **H _____, ID _____
Resident of the Palestinian Authority**
 2. **S _____, ID _____
Resident of the Palestinian Authority**
 3. **A _____, ID _____
Resident of the Palestinian Authority**
 4. **A _____, ID _____
Resident of the Palestinian Authority**
 5. **A _____, ID _____
Resident of the Palestinian Authority**
 6. **HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger**

all represented by counsel, Att. Elad Cahana (Lic. No. 49009) and/or Ido Blum (Lic. No. 44538) and/or Hava Matras-Irton (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 Noa Diamond (Lic. No. 54665) and/or Nimrod Avigal (Lic. No. 51583)
Of HaMoked Center for the Defence of the Individual,
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The Petitioners

v.

1. **Military Commander of the West Bank**
2. **Coordinator of Government Activities in the Territories**

The Respondent

Petition for Order Nisi

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

- A. Why they should not respond to communications made by the Petitioners for **approximately 5 months**;
- B. Why they should not permit the passage of the Petitioners – members of a documentary film crew from the “Mayar” Production Company through Israel into the West Bank, as part of the filming and production of the film “Hikayat Masrah”, (“The Story of Theater”), about the history of Palestinian theater in the Occupied Palestinian Territories (OPT) which began filming approximately six months ago.

The Court is requested to order the Respondents to respond to the Petition promptly. The Petitioners have been anticipating the Respondent’s response for an entire five months. The Respondents began filming their documentary, which constitutes a salient expression of the right of freedom of expression and an important component in the development of Palestinian culture and art, approximately six months ago. The longer they wait, the more economic damage they suffer and the vaguer the future of the film becomes. Furthermore, it is entirely possible that the Respondent’s response will obviate the petition.

Introduction

1. This Petition which deals with an occupation that prevents individuals from traveling from one part of their country to another, does not deal with war and death. It deals with life, art and with a human instinct more powerful than any tank, the instinct to create, to develop and to live.
2. The Petitioners, five members of the press, who reside in the Gaza Strip, began a film project which examines the unknown side of life in the OPT – the arts. The film deals with the history of theatre in the OPT and with its development over the years and includes interviews with actors and directors who, as a result of the occupation, are almost unknown outside of their country. In order to complete this project, the Petitioners must continue filming in the West Bank, where many other Palestinian artists are anticipating their arrival.

The Factual Basis

The Parties

3. Petitioners 1 – 5 are members of the press who hold press passes issued by the Palestinian Press Office.

A copy of the press passes belonging to Petitioners 1 – 5 is attached hereto and marked **P/1**.

4. Petitioner 1 is a documentary film director, who majored in communication and completed his academic studies in 2000. He has since directed a number of short films, which deal with the lives of Palestinians in the refugee camps as well as the manner in which children cope with the violence and fighting that surround them.
5. Petitioner 2 is the manager of the “Mayar” Production Company (formerly “Elementar”) which he established in 1998 and where Petitioner 1 is employed. To date, the company has produced hundreds of films that were aired on Palestinian television stations and throughout the Arab world.

Additional information is available on the company’s website:

<http://www.mayarmedia.com/eng/index.php>

6. Petitioners 1 – 2 began working on a new film about the history of Palestinian theatre in the OPT, which is being directed by Petitioner 1 and produced by Petitioner 2. They work with Petitioner 3, who handles logistics for the film, Petitioner 4, the cameraman and Petitioner 5, the soundman.
7. In June 2010 the crew began work on the film “Hikayat Masrah”, (“The Story of Theater”), a 50 minute documentary film about the history of Palestinian theatre in the OPT. This film is of great importance to Palestinian culture, in light of the fact that, unlike the international and local press which usually report on death and war, this film is about life, culture and art, love and beauty. The film presents a different aspect of life in the OPT, an aspect which proves that human hope is stronger than anything. The film is also a tribute to people who have chosen to dedicate their lives to art while living under an occupation which has lasted more than four decades and whose work is virtually unknown to many in the world.
8. To date, the film has been shot in three theatres in the Gaza Strip the Rashad a-Shawa a-Thaqafi Theatre; the Markaz Sa’id al-Mihlal Center Theatre and the al-Hal al-Ahmar al-Falastini Theatre. Filming included interviews with actors, directors and theatre critics in the Gaza Strip including actress Inas al-Saqaa, actor Sa’id al-Bitar and director Mustafa al-Nabih.

As the film examines the development of Palestinian theatre and a significant portion of this development occurred in the West Bank, it cannot be completed without shooting in the West Bank.

9. Petitioner 6 (hereinafter: **HaMoked**) is a nonprofit organization whose goal is to promote human rights in the OPT.
10. Respondent 1 is the Military Commander of the West Bank on behalf of the State of Israel which has held the West Bank under military occupation for more than forty years. The Respondent is authorized to permit passage of Palestinians to and from the West Bank.
11. Respondent 2, the Coordinator of Government Activities in the Territories, is responsible for implementing the Israeli policy in the West Bank and the Gaza Strip and is responsible, inter alia, for the District Coordination and Liaison Administration for the Gaza Strip.

Exhaustion of Remedies

12. On July 18 2010, the Petitioners filed a request with the Respondents via the Palestinian Civil Affairs Committee, to travel to the West Bank in order to continue shooting film. On July 28 2010, following an inquiry with a Civil Affairs Committee representative, they were informed that their request had been received by the Respondents.

A copy of the Petitioners’ request to travel to the West Bank is attached hereto and marked **P/2**.

13. On August 5, 2010 HaMoked requested Respondent 2 to allow the Petitioners to travel to the West Bank. HaMoked emphasized that these were journalists who employed by a press agency which produces documentary films and television programs and that they had begun shooting a new film about the history of Palestinian theater. HaMoked added that in order to continue work on the film, the Petitioners had to travel to the West Bank to interview and film Palestinian actors and directors.

HaMoked added that travel to the West Bank was of utmost importance, not only for the Petitioners’ professionally but also for the fulfillment of their right to freedom of expression. It was also important for promoting freedom of the press and documenting Palestinian culture.

A copy of HaMoked's letter to the Respondents dated August 5, 2010 is attached hereto and marked **P/3**.

14. On September 5, 2010 HaMoked contacted the Respondent once again noting that a month had passed since its previous communication and that approximately a month and a half had passed since the Petitioners filed their request. That being the case, HaMoked requested that the Petitioners' transfer be approved urgently.
15. A copy of HaMoked's letter to the Respondent dated September 5, 2010 is attached hereto and marked **P/4**. On November 14 2010 HaMoked contacted the Respondent for a third time and noted that more than three months had passed since its first communication (and 4 months since the Petitioners filed their request!). That being the case, HaMoked requested that the Petitioners' passage be approved urgently.

A copy of HaMoked's letter to the Respondent dated November 14, 2010 is attached hereto and marked **P/5**.

16. Despite the significant period of time the Petitioners have been anticipating the Respondent's response (five months) and despite the importance of the Petitioners' travel to the West Bank – the Respondents have refrained from responding to the Petitioners' requests and approving their travel to the West Bank. Thus, the Petitioners have no choice but to seek legal recourse.

Legal Argument

A. The Respondents' duty to respond to applications they receive in a timely and expedient manner

17. The Respondents, as any administrative authority, are legally required to respond to applications in a timely and expedient manner. It is well known that "The duty to act expediently is one of the basic tenets of good governance" (Y. Zamir **Administrative Authority** (Volume 2, Nevo, 2006), 717).

In this regard, see also:

H CJ 6300/93 **The Institute for Female Rabbinical Court Advocates v. Minister of Religious Affairs** IsrSC 48 (4) 441, 451 (1994); H CJ 7198/93 **Mitrael Inc. v. Minister of Industry and Trade** IsrSC 48(2) 844, 853 (1994);

H CJ 5931/04 **Mazurski v. State of Israel –Ministry of Education** IsrSC 59(3) 769, 782 (2004);

H CJ 4212/06 **Avocats Sans Frontieres v. GOC Southern Command** TakSC 2006(2) 4751 (2006)

18. Under ordinary circumstances, the law requires a response within a maximum period of 45 days from the date of application, a period of time which has passed in this matter. Section 2 of the Administrative Procedure Amendment (Statement of Reasons) Law 5719 – 1958, clarifies this duty and defines a clear timetable, stating that it is a public servant's duty to respond to applications in writing **within 45 days**. It has been established that in certain cases, enumerated in the law, there is no duty to respond within 45 days, but **in any case there is a duty to inform the applicant of the grounds thereto in writing within 45 days**. See also Attorney General Guidelines No. 3.1004; the Administrative Procedure Amendment (Statement of Reasons) Law 5719 – 1958 Section C.1; Ministry of Defense Instructions No. 10.06 – Patterns of Public Behavior and Legal Aspects of the Actions of Ministry of Defense Employees, Section 21;

General Staff Order No. 08.0101 Applications by Civilians – The Duty to Respond and to Give Reasons, Sections 4 and 6.A.

19. It has been ruled that in regards to human rights the term “in a timely manner” has special meaning (HCJ 1999/07 **Galon v. Government Committee for Investigating the Events of the Campaign in Lebanon 2006** TakSC 2007(2) 551, 569 (2007))

And that in matters relating to Human Rights –

There is reason to expect a more expedient resolution of the matter [...] continued violation of human rights exacerbates the damage in many cases and may result in the erosion of the right as well as serious continued harm to the individual

(HCJ 8060/03 **Ka’adan v. Israel Land Authority**, TakSC 2006 (2) 775, 780 (2006))

See also: HCJ 10428/05 **‘Aliwa v. Commander of Military Forces in the West Bank** TakSC 2006(3) 1743, 1744 (2006); HCJ 4634/04 **Physicians for Human Rights v. Minister of Public Security**, TakSC 2007(1) 1999, 2009 (2007).

20. In this case, the Petitioners have been anticipating a response in their matter for approximately 5 months, a period of time which, for all intents and purposes, exceeds the reasonable amount of time a person must wait for a response, and also exceeds the maximum amount of time prescribed by law.

B. The importance of traveling to the West Bank – freedom of artistic expression and the right to culture

21. Denying travel means terminating the Petitioners’ film in the midst of its creation. This is a significant violation of the Petitioners’ right to freely express themselves artistically, a right which, on many different occasions, has been ruled to be protected within the realm of the right to freedom of expression (See for example HCJ 4804/94 **Station Film Inc. v. The Review Committee** IsrSC 50 (5) 661). In this case the violation of freedom of artistic expression is many times more severe as the film is about art.
22. Freedom of speech is a basic right which is deeply rooted within the fabric of human rights. This Honorable Court has ruled that it is a basic constitutional right enshrined in Basic Law: Human Dignity and Liberty and furthermore, under certain circumstances the State has a positive duty to promote it. (See for example HCJ 2557/05 **Majority Headquarters v. Israel Police**, 12.12.06).
23. There is no need to elaborate on the prominent status of the right to freedom of expression. In endless cases the courts have emphasized its exalted status, the fact that it is the lifeblood of democracy and the strict balances needed in order to limit it (See for example HCJ 75/53 **Kol Ha’am v. Minister of Interior**, IsrSC 7 871; HCJ 153/83 **Levi v. Commander of the Southern District of the Israel Police Force** IsrSC 38(2) 393, 398). So for example, the Court ruled that:

Indeed, Basic Law: Human Dignity and Liberty does not enumerate freedom of expression and does not specifically define as a basic right. However, that does not mean a thing: even in the absence of a specific provision, freedom of expression is included in the right to human dignity, as defined in sections 2 and 4 of the Basic Law. Indeed, what is the right to human dignity without that basic liberty afforded to man to hear the words of his fellow man and to voice his own

opinions; to develop his personality, to formulate his own world view and to realize his own potential ?!

(PPA 4463/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 157).

And:

Today freedom of expression is no longer an un-enumerated right ... it is a protected constitutional right.

(In the words of the Honorable Justice E. Rivlin in LCA 10520/03 **Ben Gvir v. Dankner** (yet to be published) paragraph 10 of his ruling).

24. The exalted stature of the right to freedom of expression has also been established in international law. For example, Article 19 of the International Covenant on Civil and Political Rights, 1966 states that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, **regardless of frontiers**, either orally, in writing or in print, **in the form of art**, or through any other media of his choice.

See also:

Article 19 of the Universal Declaration of Human Rights;

Article 10 of the European Convention on Human Rights.

25. International human rights law has also recognized the importance of the right to culture. Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966, states that:

(1) The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

....

(2) The steps to be taken by the States Parties to the present Covenant **to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.**

(3) The States Parties to the present **Covenant undertake to respect the freedom indispensable for scientific research and creative activity.**

(4) The States Parties to the present **Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.**

26. The Palestinian people have been under military occupation for more than four decades. Despite this, they have succeeded in developing a cultural, theatric and cinematic life. Indeed, before us stand Petitioners who have resolved to dedicate their lives to creativity, liberty and art. And indeed, before us also stand the Respondents who have chosen to continue to ignore their request and to burn into the world's consciousness the barbed wire fences that they have pitched in the heart of the OPT and around it.

C. Infringement upon others of the Petitioners' rights

(i) Freedom of Movement

27. Everyone has a right to move freely within the borders of their country. The right to freedom of movement is the central expression of one's right to autonomy, free will and to the fulfillment of one's abilities and rights. The right to freedom of movement is a customary international legal norm.

See:

H CJ 6358/05 **Vaanunu v. GOC Home Front Command** TakSC 2006(1) 320, Paragraph 10;

H CJ 1890/03 **Bethlehem Municipality et 21 al. v. State of Israel**, TakSC 2005(1) 1114, Paragraph 15;

H CJ 3914/92 **Lev v. District Rabbinical Court**, TakSC 94(1) 1139, 1147.

28. The right to freedom of movement is the engine which sets the fabric of human rights in motion. The engine which enables a person to realize his autonomy, his decisions. When freedom of movement is infringed upon, that very "engine" is harmed and as a result a portion of a person's rights and opportunities cease to exist. His dignity as a human being is infringed upon. This is the reason that a great deal of importance is attributed to the right to freedom of movement.

29. When a person's movement within the territory of the country or entity where he resides is limited, his social life is infringed upon, his cultural life and human rights are infringed upon, his freedom of choice is infringed upon. That person is limited in regards to the most essential questions of his life: where he lives, with whom he shares his life, where his children go to school, where he receives medical treatment, who his friends are, where he works, what profession he chooses and where he prays.

30. The right to freedom of movement is also enshrined in international humanitarian law. The Fourth Geneva Convention establishes freedom of movement as a basic right afforded to protected persons, whether within the occupied territory or the territory of a hostile state. Article 27 of the Convention states that protected persons are entitled to respect for their dignity under all circumstances.

31. It is also important to mention Articles 41 – 43 (which apply to the territory of a state which is party to a conflict) and 78 (which applies to occupied territory). These articles deal with the limitation of liberty by interment or assigned residence. These methods are deliberate and they are implemented in a deliberate manner. This indicates that protected persons' freedom of movement in every other circumstance, was of great importance to the states parties. There need to establish specific and deliberate rules for restricting freedom of movement arises only where there is a general duty to respect this freedom:

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

[\(HCJ 7015/02 Ajuri v. The Military Commander of the West Bank](#), (IsrLR [2002], p. 15)

32. International human rights law is an additional binding source which enshrines freedom of movement as a basic human right. This is stated in Article 12(a) of the International Covenant on Civil and Political Rights which has been signed and ratified by Israel:

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

33. The above mentioned Article 12 is a binding source. As an interpretative source see also Article 13 of the Universal Declaration on Human Rights and Article 2 of the Fourth Protocol to the European Convention on Human Rights from 1963.

(ii) Infringement upon Petitioners' freedom of occupation

34. Within the framework of their profession, the Petitioners must travel to the West Bank in order to complete the film. There is no need to elaborate on the consequences impeding the Petitioners' ability to complete their work and carry out their tasks within the framework of their profession. This is an infringement on their right to make a living and their right to freedom of occupation:

The right to freedom of occupation allows a person to decide where he wishes to invest his human capital. This choice is influenced by a variety of considerations... an infringement upon freedom of occupation occurs not only when a worker is completely denied the right to choose his employer, but also when his freedom of choice is infringed upon, even if indirectly. In this spirit the following was held in HCJ 5936/97 **Dr. Lam v. Ministry of Education Culture and Sport**. PD 43(4) 673:

"... Indeed, freedom of occupation is the individual's liberty to realize his personality and to contribute to society by investing his efforts in his employment, craft or occupation. This liberty is infringed upon if arrangements (normative or physical) prevent him - directly or indirectly - from acting in accordance with his wishes and abilities."

HCJ 8111/96 **The New Israeli Labor Union v. Israel Aerospace Industries Inc.** IsrSC 48(6) 540- 541 (2004)).

35. This right existed in Israeli law even before the Basic Laws were enacted and is also enshrined in a variety of sources in comparative law to which the courts refer in order define its scope:

Long before Basic Law: Freedom of Occupation was enacted, at the very beginning of this Court's existence, our legal system recognized freedom of occupation as a "natural" basic right, and in consequence our case law has recognized a variety of additional "un-enumerated" basic rights. (See: HCJ 1/49 Bejerano et al. v. Minister of Police et al., IsrSC 2 80, 82 - 83).

[...]

It appears appropriate to adopt the approach whereby an infringement deprives one of his occupation or prevents one's entrance into a profession should be considered more serious and harmful than an infringement on the manner in

which the occupation is realized. This is so in light of the more serious infringement upon one's freedom of choice and right to personal autonomy.

(HCJ 4769/95 **Ron Menahem et al. v. Minister of Transportation and 2 al.**,
IsrSC 57(1) 235, pp. 259 – 260).

36. The right to realize one's freedom of occupation is derived from the recognition of the fact that a person's labor is not only a source of income for fulfilling his basic needs. A person's labor fulfills his social, intellectual and personal needs as well, and is therefore and inherent part of the conditions necessary for realizing a life of human dignity and liberty. The right to earn a living is especially important as it allows a person to realize other rights; Of these other rights it is important to mention the right to housing, the right to education, the right to a life of culture, the right to a suitable standard of living, the right to associate etc.

See also:

Articles 6 through 8 of the International Covenant on Economic Social, and Cultural Rights (1966);

Article 8(3)(a) of the International Covenant on Civil and Political Rights (1966);

Articles 20, 23 and 25 of the Universal Declaration of Human Rights (1948);

Article 11 of the Convention on the Elimination of all Forms of Discrimination against Women (1979);

Article 5(e) (i) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965);

Articles 15 and 27 of the Convention on the Rights of the Child (1989);

Articles 2 and 3 of the Discrimination (Employment and Occupation) Convention of the International Labor Organization (No. 111) (1960);

The International Labor Organization's Employment Promotion and Protection against Unemployment Convention (No. 168) (1991);

The International Labor Organization Declaration of Philadelphia (1944);

The Copenhagen Declaration and Programme of Action adopted by the World Summit for Social Development (1995).

On the application of human rights law and the occupying power's active duty in this regard see:

Mottershaw E. "Economic, Social and Cultural rights in Armed Conflict: International Human Rights law and International Humanitarian law." *International Journal of Human Rights*, Vol 12, No 3, June 2008. pp. 449-470; and

Lubell N. "Challenges in Applying Human Rights law to Armed Conflict." *International Review of the Red Cross*, Vol 87, No 860, December 2005. pp. 761-763.

37. In addition, the Respondent, as an administrative authority is subject to the basic principles of Israeli law in all of his actions, including the basic principle of freedom of occupation:

Additional grounds ... are found in the basic right to freedom of occupation, which was recognized in this Court's case law even before Basic Law: Freedom of Occupation was enacted...

Israeli law may not be directly applicable in the Area, but this Court applies its basic principles to the military commander of the Area and his subordinates by virtue of their personal powers as members of state authorities acting in the Area on behalf of the State... in the same manner in which it applies the principles of administrative law to them.

(HCJ 3940/92 Jarar v. **The Commander of the Judea and Samaria Area**, PD 47(3) 298, 304 -305 (1993)).

D. Travel from the Gaza Strip to the West Bank

38. The Gaza Strip and West Bank are a single legal entity. This principle is articulated in military legislation: The Proclamation on the Implementation of the Interim Agreement (Judea and Samaria) , (No. 7), 5756-1995 which incorporated the Interim Agreement between Israel and the PLO ("the Oslo Accord"). The Oslo Accord asserts - as a basic principle - that the West Bank and Gaza Strip are two parts of a single territorial unit. This was also asserted in this Honorable Court's ruling in the case of ([HCJ 7015/02 Ajuri v. The Military Commander of the West Bank](#), (IsrLR [2002], p. 15).

Changes in the scope of Israel's control over the Gaza Strip as a result of the implementation of the disengagement plan have not changed this recognition. Indeed, these are two different questions - the question of the scope of the Respondents' duties towards the civilian population and the question of these geographical entities being part of one political entity (and indeed, there have been other cases throughout history of countries that were divided between different occupying powers, without ceasing to be a single country).

39. The scope of Israel's control over the Gaza Strip and West Bank is the element that obligates the Petitioners to approve the Respondents' request. Consequently, the Respondents have concrete obligations towards the Petitioners. These obligations have been recognized in the case law generated by this Court and it has been determined that Israel has special obligations pertaining to the residents of Gaza. As ruled by this Court:

In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these obligations also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel..

(HCJ 9132/07 **Al Bassiouni v. Prime Minister**, January 30,2008, paragraph 12 of the ruling).

40. As mentioned above, the Respondents' control of the ability to travel from the Gaza Strip to the West Bank inherently entails obligations towards the Petitioners. This has been recognized by this Court. Passage through Israel from the West Bank to the Gaza Strip is the only option available to the Petitioners for realizing their right to freedom of expression and freedom of movement.
41. Note: the Petitioners do not wish to remain in Israel, but only to pass through it, as a result of the circumstances forced on them by the Respondents.
42. It should be noted that **the right of transfer/transit** is recognized in international law and is significantly different than the right of entry.
43. The principle whereby persons are entitled to legitimately demand a country to allow them to pass through it was first mentioned in the bible:

Let me pass through thy land: we will not turn into the fields, or into the vineyards; we will not drink of the waters of the well: but we will go along by the king's high way, until we be past thy borders. (Numbers 21:22)

Refusal of the demand was considered arbitrary behavior that could justify war.

44. **International Law recognizes the existence of a right of transfer which constitutes a restriction of the principle of sovereignty.** A State is obligated to permit travel through its territory to foreign nationals wishing to reach another country. The right of transfer exists where transfer is necessary (even if alternatives exist), and where it is of no harm to the State being traversed. The transfer may be completed under conditions which protect the legitimate interests of the State being traversed.
45. The scholar Uprety notes in his book that:

Jurists over the past six decades have definitely favored the view that States whose economic life and development depend on transit can legitimately claim it.

(K. Uprety, *The Transit Regime for Landlocked States: International Law and Development Perspectives* (The World Bank, 2006), p. 29).

46. In relation to an enclave, the right of transfer is customary and naturally stems from the very existence of the enclave. The scholar Farran bases this, inter alia, on the legal principle whereby whoever grants a thing must also grant that without which the grant is of no use (*cuicumque aliquis auid concedit concedere videtur et id sine quo res ipsa non potuit*).

In Farran's words:

The law would not recognize the right of state A to a detached piece of its territory enclaved in state B's unless it was possible for state A to use that right. The existence of a right implies its exercise: without a right of free communication the rights of a state to its exclaves would be incapable of exercise and therefore nugatory. Hence there is no need for an express treaty between the two states concerned to give such a right: it is implicit in the very existence of the enclave. If a treaty is made, it may well regulate the exercise of this international way of necessity: but in its absence the right of way will still exist, for the necessity is still in being.

(d'Olivier Farran, C., *International Enclaves and the Question of State Servitudes*, International and Comparative Law Quarterly, Vol.4, No. 2. (Apr. 1955) 294, pp. 304).

47. The right of transfer also exists where there are no proximate relations. The classic cases which led to the development of the principle of the right of transfer, are those of landlocked States (such as Switzerland or countries in the Caucasus), enclaves surrounded by a different State (such as West Berlin prior to the unification of Germany and the Mount Scopus enclave between 1948 and 1967) as well as countries which are geographically divided (such as the OPT).
48. In his comprehensive article, the scholar Lauterpacht describes the right of transfer in the following manner:

On that view, there exists in customary international law a right to free or innocent passage for purposes of trade, travel and commerce over the territory of all States – a right which derives from the fact of the existence of international community and which is a direct consequence of the interdependence of States.

(E. Lauterpacht, *Freedom of Transit in International Law*, Transactions of the Grotius Society, Vol. 44 (1958), pp. 313-356, p. 320).

Lauterpacht bases the customary nature of the right of transfer on the writings of scholars from Grotius to the present day, as well as on state practice. He proves that the basic principle of freedom of transfer is uniformly repeated in countless two party and multi party treaties (the earliest treaties he mentions are from the eleventh century). These treaties regulated the concrete application of this right in different contexts: transfer through rivers and waterways or transfer on land within the territory of different states. He exhibits how the same logic is implemented in relation to the seas.

Amongst the modern treaties which are broader in terms of the number parties thereto, one may mention the Convention on the High Seas (1958) (Article 3, dealing with landlocked states' right of access to the sea) ; The Convention on the Territorial Sea and the Contiguous Zone (1958) (Articles 14 - 24 dealing with innocent passage in territorial waters); The United Nations Convention on the Law of the Sea (1982) (Article 125 relating to the right of access to the sea and the right of transfer) and the GATT agreement (Article V relating to the right of transfer).

49. As stated above, the right of transfer can be exercised on condition no harm is done to the traversed state. For this purpose, the right may be subject to payment of expenses related to the transit itself, demands such as quarantine for the prevention of disease and so on. In regards to security considerations, Lauterpacht states that:

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

(supra, p. 340)

50. This approach is evident in treaties which articulated the general principle of the right of transfer in concrete circumstances. The right of transfer does not cease to exist in times of emergency, nor

does it cease to exist in times of war, but it may be restricted according to the circumstances. The restriction must be as minimal as possible –in terms of both scope and duration.

51. One can see that the scope of the right of transit is broader than the scope of the right of entry for the purpose of remaining in a country, and that therefore any violation thereof requires more considerable grounds.

Summary

52. The Petitioners wish is to travel from one part of their homeland to another, in order to develop the culture of their nation which has been subject to military occupation for more than four decades. In delaying their response to the application, the Respondents are not only infringing upon the Petitioners' basic rights, but also upon their right to freedom of expression and creativity, and upon Palestinian culture and art, which is already forced to overcome the many difficulties posed by life under occupation, in order to flourish.

This petition is supported by an affidavit signed before an attorney in the Gaza Strip and faxed to the undersigned after telephone coordination. The Honorable Court is requested to accept this affidavit as well as the powers of attorney which were also submitted by fax, in light of the objective difficulties regarding the Petitioners' ability to meet their counsel.

In light of the aforesaid, the Honorable Court is requested to grant an order nisi as sought, and to render it absolute after hearing the Respondents. Furthermore, the Honorable Court is requested to impose the Petitioners' expenses and legal fees upon the Respondents.

10 January 2011

Elad Cahana, Attn.

Counsel for the Petitioners

[File 66125]