**At the Military Court**
**Judea (Ofer)**

**4735/13**

**4737/13**

In the matter of: **Dr. _____ Sarawi, ID No. _____**
**_____ Hur, ID No. _____**

both represented by counsel, Adv. Tal Steiner et al.

Of HaMoked Center for the Defence of the Individual,
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**The Appellants**

v.

**Military Commander of the West Bank Area**

represented by counsel, Major Oren Liber et al.
West Bank legal advisor's office
Tel.: 02-9977071 Fax: 02-9977326

**The Respondent**

# Appellants' Summations concerning Subject Matter Jurisdiction

According to the decision of the honorable court received on January 7, 2014, and following respondent's summations dated January 14, 2014, the appellants hereby respectfully submit their summations concerning the subject matter jurisdiction of the honorable court to hear their appeals.

The appellants will argue that the Order on Security Provisions (Judea and Samaria) (amendment No. 36), 5774-2013 (hereinafter: the **Major General Order** or the **Order**) which revoked the jurisdiction of the military courts to hear cases involving money confiscation made pursuant to the Defence (Emergency) Regulations, is contrary to the rules of public international law and the principles of Israeli administrative and constitutional law, and therefore – the court should declare that it is null and void, according to the rule established in Appeal (Judea and Samaria) 5/06 **Schwartz v. Commander of IDF Forces in the Area** (hereinafter: **Schwartz**).

Alternatively, and should the honorable court decide not to accept appellants' position on this issue, the appellants will request the honorable court to transfer the hearing to the competent instance, according to its authority under section 10 of the Order Regarding Security Provisions, 5730-1970, and pursuant to the provisions of section 79(a) of the Courts Law [Consolidated Version], 5744-1984.

For convenience purposes, these summations are submitted jointly in both files.

**The legal situation prior to the issuance of the Order**

1. Prior to the issuance of the Major General Order, the right to appeal a confiscation which was made pursuant to the Defence (Emergency) Regulations (pursuant to regulation 84 as well as pursuant to regulation 120) was drawn from the wording of regulation 147A (amendment No. 15), 1947. According to this regulation, an "appeal" may be filed with the court regarding confiscations which were made within the framework of an administrative proceeding, within three months from the date on which the confiscation was made known to the property owner, or from the date of its publication in the official gazette. This jurisdiction has been affirmed by the military courts time and again, and first and foremost in the judgment of the military court of appeals in Sole Judge Case (Judea and Samaria) 2169/12 **Ahmad Fadel Ahmad Hassin v. Commander if IDF Forces in the Judea and Samaria Area,** where it was held:

> Therefore, in view of the language of regulation 147A, the interpretive presumption that the purpose of a statutory provision is to grant access to the court, for practical reasons and in view of our previous judgment in the matter of **Karashan** and in the matter of **Abu 'Allan,** the inevitable conclusion is that the military court has jurisdiction to hear appeals on the exercise of the confiscation power conferred upon the military commander.

(and see also: Appeal (Judea and Samaria) 3443/09 **Military Prosecution v. Ghaleb Farid Salim Abu 'Allan**; Sole Judge Case (Judea and Samaria) 2768/09 **Ahmad Mussa Karashan v. Military Prosecution**; Appeal (Judea and Samaria) 84/10 **Tagrid Shibli v. Legal Advisor for the Judea and Samaria Area).**

2. It should be noted that in Hassin, the court referred to the judgment of the Nazareth District Court in MApp 3301/02 **Raed Bader v. State of Israel** mentioned by the respondent in his summations - but held that it was problematic and in any event, it did not bind the military courts:

> Firstly, it is totally unclear whether the decision of the district court in that matter was made in view of regulation 147A. Secondly, this ruling, with all due respect, has no binding effect in the Area. The military court of appeals is the body having the authority to interpret the law in the Area, and in matters concerning interpretation of the law it is subordinate solely to the

> Supreme Court, and it is not subordinate to district court in Israel. Moreover, even if the conclusion reached in said judgment complies with Israeli law, it does not comply with the law of the Area. When the property of a protected resident is concerned, his rights must be more strictly adhered to. We are so ordered by international law (and compare the Alajouli case). Furthermore, the practical reasons which pertain to the accessibility of a resident of the Area to judicial instances in Israel are not relevant to an Israeli citizen and resident, as specified in **Bader**. Therefore, even if we agree that the Bader ruling is correct, its underlying reasons are not fully applicable to the Area, and therefore a different interpretation of the law in the Area is required, based on the need to protect the rights of a protected resident according to international law.

3. In conclusion, prior to the enactment of the Order, the military courts were vested with the authority to hear appeals of residents of the Area involving the confiscation of their funds according to the Defence (Emergency) Regulations. This jurisdiction is drawn from the Defence Regulations themselves, as well as from the judgments of the courts on this issue. Respondent's position on this issue is known, but it has been rejected time and again by the courts of appeal, in their judgments.

4. Against this backdrop, HaMoked for the Defence of the Individual filed the appeals at hand, in August 2013. Several proceedings took place in these files: on September 12, 2013 a preliminary hearing was held before the court; according to the court's decision, on September 29, 2013 and on October 8, 2013 the respondent transferred paraphrases concerning the privileged information attributed to the appellants; and the appellants responded to these paraphrases and presented before the court additional preliminary arguments, in their response dated October 10, 2013.

**The new order and the difficulties arising there-from**

5. On December 25, 2013 the Major General Order was published, which stated that "**The decision of the military commander pursuant to section 61, or the decision of the military commander to seize, forfeit or confiscate property, pursuant to the Defence (Emergency) Regulations 1945, may not be appealed to the military court, and it is final and conclusive.**" The Order "commenced" on the date of its signature, whereas it was "applied" retroactively, to any confiscation of property made as of the effective date, namely, June 7, 1967 (according to section 1(10) of the Interpretation Order (Judea and Samaria)(Number 130) 5727-1967).

6. In so doing the military commander cut the ground from under the proceedings which were pending before this court for four months, and with the stroke of a pen revoked the jurisdiction of the military courts to judicially review his decisions for the confiscation of property of Palestinians pursuant to the Defence (Emergency) Regulations.

7. The appellants will argue that the new order severely and disproportionately violates the right to have access to judicial instances of OPT residents whose property has been confiscated by the military commander, and that it does not comply with the rules of public international law, from which the military commander's authority is drawn. The Major General Order also deviates from the principles of the constitutional and administrative law applicable in Israel. Therefore, the appellants will argue that the honorable court should determine that the Order is null and void, according to the rule established in **Schwartz**.

A. The Order contradicts the rules of international law

8. The respondent, who is the commander of an occupied territory, has an active obligation to protect the rights of the residents, to secure public order, and to maintain their rights. Article 43 of the Hague Regulations provides:

> 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** to restore, and ensure, as far as possible, public order and safety…

9. The obligation to secure public order and safety and to act in the furtherance of the needs of the society, applies to all areas of civil life:

> The first clause of Article 43 of the Hague Regulations vests in the military government the power and imposes upon it the duty to restore and ensure public order and safety… The Article does not limit itself to a certain aspect of public order and safety. It spans over all aspects of public order and safety. **Therefore, this authority – alongside security and military matters – applies also to a variety of "civilian" issues** such as, the economy, society, education, welfare, hygiene, health, transportation and other similar matters to which concern human life in modern society.
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> (HCJ 393/82 **Jam'iat Iscan v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 37(4) 785, 797 (1983); emphasis added).

10. When the court is required to examine whether a law enacted by the military commander complies with the provisions of the international law, it must examine whether the best interests of the population were considered by the legislator:

> When we examine whether legislation of an occupying power complies with the provisions of Article 43 of the covenant, crucial importance is attributed to the question of the legislator's motivation.
>
> […] **There is a consensus that legislation which disregards the welfare of the residents is inappropriate and exceeds the authority of the occupant**.
>
> (HCJ 337/71 **Al-jamaya Al-masihiye L'alararchi Elmakdasa v. Minister of Defense,** IsrSC 26(1) 574; emphasis added).

11. In the case at hand, there is no doubt that a law which deprives the local population of the right to exercise judicial review over the decisions of the military commander in matters which concern it, is not designed to protect the interests of said population.

12. The right for an equal protection before the law and for due legal process, which clearly consists of the right to access judicial instances, is recognized as a fundamental principle of international law (see Articles 7-10 of the Universal Declaration of Human Rights; Articles 66-75 of the Fourth Geneva Convention; Article 75 of the First Additional Protocol of the Fourth Geneva Convention; Article 6 of the Second Additional Protocol of the Fourth Geneva Convention; Articles 3, 14 and 26 of the International Covenant on Civil and Political Rights; Articles 5-7 and 13 of the European Convention of Human Rights; etc.)

13. In its judgment in **Golder v. United Kingdom** of 1975, the European Court of Justice held that although the right to access judicial instances is not explicitly stated in the European Convention of Human Rights, the procedural rules specified in Article 6 of the convention, which were designed to secure fair trial (for instance the principle of publicity), would become meaningless in the absence of the right to access judicial instances.

14. The right to access judicial instances was recognized and enhanced by the judgments of international courts. In 1970, the International Court of Justice (ICJ) held in **Barcelona Traction** that:

> Human rights… also include protection against denial of justice.
>
> (**Barcelona Traction, Light and Power Co Ltd**. (New Application: 1962)(Belgium v. Spain)(Second Phase) [1970] ICJ Rep 3, para 91).

The European Court of Justice stated in **Fogarty v. United Kingdom** of 2001 that a decision according to which a whole range of claims would be removed from the jurisdiction of the courts – as provided by the Major General Order in our case – was in contrary with the provisions of Article 6 of the European Convention of Human Rights, as well as with the principle of the rule of law in a democratic state:

> […] **it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 & 1** – namely that civil claims must be capable of being submitted to a judge for adjudication – **if, for example, a State could without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims** or confer immunities from civil liability on large groups or categories of persons (see the Fayed v. United Kingdom judgment of 21 September 1994, Series A no. 294-B, § 65).
>
> (**Fogarty v. United Kingdom** (ECtHR) Reports 2001-XI 137, para 25, emphases added).

And in **Stran Greek Refineries and Stratis Andreadis v. Greece** of 1994, it was held that the intervention of the state in legal proceedings, by legislation which removed from the jurisdiction of the court a certain issue which could have resulted in an unfavorable outcome to the state - as happened in the case at hand when the Major General Order was issued while the proceedings were pending before the court – also constituted a breach of international law:

> … The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art.6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. […] the State infringed the applicants; rights under Article 6 para. 1 (art 6-1) by intervening in a manner which was decisive to ensure that – imminent – outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article (art.6-1).
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> (**Stran Greek Refineries and Stratis Andreadis v. Greece** (ECtHR) Series A No 301-B, para 49-50).

15. This and other judgments were probably considered by the military court of appeals while having made its determination that without judicial review, confiscations of funds made pursuant to emergency legislation would not be upheld by international law:

> As specified above, the interpretation which broadens the scope of judicial review, protects against excessive infringement of the right to own property, by facilitating the filing of applications for remedies with the court, and it is therefore also consistent with the principles of international law.
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> (taken from the judgment given by Judge Mishniyot in the above mentioned **Abu 'Allan** case).

B. <u>The Order Contradicts basic principles of Israeli administrative and constitutional law</u>

16. The right to access the courts has long been recognized as a fundamental constitutional right of primary importance:

> My own opinion is that the right to have access to the court is not a fundamental right in the ordinary sense of the term fundamental right. It constitutes part of different order of norms in our jurisprudence. It may be said – and so do I say – that it is superior to a fundamental right. Moreover, its existence is an essential and imperative condition for the existence of all other fundamental rights. The right to access the court is the source which gives the court its life. The infrastructure which underlies the existence of the judiciary and the rule of law […] blocking access to the court – either directly or indirectly – and even partially, undermines the judiciary's *raison d'etre*. And an impingement on the judiciary is an impingement on the democratic nature of the state. In the absence of the judiciary, in the absence of review of the acts of the individual and the authorities – chaos rules and the state is doomed to extinction. In the absence of judicial review the rule of law collapses and the fundamental rights become extinct… denying access to the court will make judges extinct and in the absence of judges the law itself will become extinct.

(CA 733/95 **Arpel Aluminum Ltd. v. Kalil Industries Ltd**., IsrSC 51(3), 577).

17. On the status of the right to have access to the court as a fundamental right see also: Yoram Rabin **'The right to have access to the courts as a fundamental right'** (Hamishpat Volume E, 5761); LCA 9567/08 **Carmel Ulpinim Ltd. v. Electrchemical Industries 1952 Ltd. (under liquidation)**, TakSC 2011(1), 1107, 1115 (2011); HCJ 6824/07; HCJ 6824/07 Dr. **'Adel Mana' v. Israel Tax Authority,** TakSC 2010(4) 3737' 3755 (2010); HCJ 9198/02 **Israel Medical Association v. Attorney General** (not reported, October 2, 2008); HCJ 1661/05 **Hof Gaza Local Council v. Government of Israel**, IsrSC 59(2) 481, 611-612 (2005).

18. Hence, the General Major Order, which prevents the residents whose monies were confiscated from appealing this decision before the military courts, also contradicts the principles of administrative and constitutional law customarily applied in Israel.

C. <u>The parallel jurisdiction of the High Court of Justice does not reduce the infringement of the right to have access to the courts</u>

19. Ostensibly, it may be argued that the Order issued by the Major General does not totally deprive the residents whose monies were confiscated from their right to apply to the court and appeal this decision – in view of the fact that they always have the right to apply to the Supreme Court sitting as the High Court of Justice, which also has jurisdiction to judicially review the decisions of the military commander. However, the military courts have already discussed in length the significant advantages of litigation before the competent local courts, in view of their expertise, their accessibility to residents of the Area and the procedural advantages which they provide. **In fact, the court held, that the denial of access to the military courts on this issue, actually means a total denial of the right to access the courts from many residents.** In view of the importance of court's ruling on this issue, we shall quote it in its entirety:

> The argument that appellant's solution should have been found in the filing of a petition with the Supreme Court seems problematic to me. The proper solution is that a resident of the Area who is injured by the decision of the military commander will have readily available to him an accessible proceeding before a court of first instance which acts according to the administrative rules customarily applied by the courts, rather than an application to the Supreme Court. The better protection for the rights of a resident of an occupied territory is provided by an accessible and available judicial review. **The Supreme Court is not as accessible to the residents of the Area, at least because not all attorneys in the Area can appear before the Supreme Court in Israel. The requirement to apply to the Supreme Court creates, in fact, a bureaucratic barrier and reduces the accessibility of the resident to judicial instances**. There is no doubt that the Supreme Court can and will be able to protect the rights of those who apply to it and will give proper remedies in appropriate cases. However, **the determination that a military court has no jurisdiction means that the vast majority of the residents of the Area will not be able to apply to a judicial instance as a result of the cost of the proceedings: such as the fee payable upon the filing of a**

> **petition with the Supreme Court, the need to engage the services of an Israeli attorney rather than an attorney who resides in the Area and who is not qualified to appear before the courts in Israel, etc**. (and compare **Karashan** and **Abu 'Allan** above). Furthermore, a direct application to the High Court of Justice, **deprives a resident of the Area of the right to appeal, since, according to the respondent, the proceeding should start and end before the High Court of Justice**, whereas in a situation whereby a military court of a first instance has jurisdiction an appeal may be filed with the military court of appeals, following which a petition may also be filed with the Supreme Court sitting as the High Court of Justice […] **In addition, substantively, in view of the expertise acquired by the military courts in the above issues under the law of the Area, their close acquaintance with the security needs on the one hand, and the need to protect human rights and mostly the rights of protected residents in an occupied territory under international law, on the other, I have no doubt that the military courts will be able to grant adequate remedy in appropriate cases.** The objectivity and professionalism of the military courts' judges will provide an appropriate solution for the need to protect the rights of the residents of the Area, in general, and of their proprietary rights, in particular.
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> (Judgment of Judge Lekach in the above mentioned **Hassin;** emphases added).

**The court's authority to revoke the Order according to the Schwartz judgment**

20. On September 17, 2006 the judgment of the military court of appeals was rendered in the **Schwartz** case. This case concerned the matter of an Israeli, resident of Maale Adumim, whose freedom of movement was restricted to Israel and the Maale Adumim area only, under a "special supervision order" issued by the military commander, by virtue of his authority under section 86 of the Order regarding Security Provisions, 5730-1970. The appellant raised various arguments against the validity of the special supervision order which was issued against him, and also claimed that the court had the authority to examine the validity of the mere enactment of section 86 which authorizes the military commander to impose special supervision and restrict the residential area of residents of the Area.

21. The court discussed petitioner's arguments, concerning the special supervision order itself, section 86 and the court's authority to revoke it. **The court held that it indeed had the authority to judicially review the orders of the military commander, when they are in conflict with the norms of international law**, from which the military commander derives his authority in the Area:

> Based on the analysis we proposed above, regarding the status and powers of the military commander, we concluded that they are rooted in international law and the laws of war. International law and the laws of war constitute, therefore, a “supra-norm” which applies in the region, from which the other norms in the defense legislation derive.

> The aforesaid pyramid of norms requires that the acts of the military commander meet the international norm pursuant to which he acts.
>
> The above further requires that where regulations and determinations of the military commander conflict with the international norm, the former must be revoked (see, on this matter, **Drori**, supra, pp. 66-74, in which the author reviewed the earlier judgments of this court).
>
> Based on the aforesaid, **it seems that the inevitable conclusion is that the military courts are authorized to examine the validity of the acts of the military commander in accordance with international law and the laws of war.** Beyond the legal-doctrinal reason with respect to the pyramid of norms, it seems that practical considerations must also result in the same conclusion.
>
> The scope of the powers given the military commander in the region is exceptional when a democratic state which operates under the principles of separation of powers is concerned. **In the special situation of the region, the military commander constitutes both the legislative branch (with the legal limitations specified in article 43 of the Hague Regulations, which we have discussed) and the executive branch**. This unification does not only breach the acceptable balance between the branches, but primarily eliminates, in practice, the mechanisms which provide protection against unrestrained use of the power given the authority.
>
> In the absence of separation of powers, the checks and balances which limit one branch as a result of the independence of the other, are neutralized. The mechanisms of review are weak to non-existent, and the risk of unlawful conduct, or actions which are contrary to the rules of good governance, grows. **Under these circumstances, the strengthening of the judicial branch, if only in the limited areas of its jurisdiction (since it is mostly a criminal legal system), is necessary in order to effectively prevent the government from taking actions which may violate the most fundamental rights**, and primarily the right to liberty.
>
> (Appeal (Judea and Samaria) 5/06 **Eran Schwartz v. Commander of IDF Forces in the Area**, emphases added).

22. In its judgment, the court continues to exercise judicial review over section 86, and after it examines its compatibility with the provisions of Article 78 of the Fourth Geneva Convention and the principles of Israeli administrative and constitutional law, it holds that the military commander acted according to the principles established by these sources, and that therefore it should not be revoked.

23. In **Schwartz**, the court also discussed the parallel jurisdiction of the High Court of Justice to exercise judicial review over the orders of the military commander, and held that this jurisdiction should not be left in the hands of the High Court of Justice alone, and that the existence of an internal review system over the acts of the military commander before a petition is filed with the High Court of Justice, was extremely important:

> True, a resident of the region who considers himself harmed by an order or an act of the military commander is not without relief. The doors of the High Court of Justice are wide open to residents of the region, who have turned to it in many cases. However, great importance is attached to an internal legal system which is capable of exercising judicial review over decisions of the military commander as aforesaid. **This is so firstly, on the declarative level, whereby the military commander is not free to act as he wishes without a judicial-review system on his behalf.** The commander acted in this spirit, when he expanded, time and again, the powers of the military legal system in Judea and Samaria [...]
>
> Furthermore, **there is no dispute that it is easier for a resident of the region to turn to the military courts in the region than to the High Court of Justice**. The military courts are accessible to all attorneys licensed by the Palestinian and Israeli bar associations, without any financial restriction associated with the payment of a fee. **Clearly, the grant of broad jurisdiction to the courts, therefore, benefits the residents of the region, Israeli and Palestinians alike, and grants them many effective legal guarantees, to prevent an improper infringement of their rights**.
>
> (*Ibid*, emphases added)

24. In conclusion, according to **Schwartz**, the military courts have the authority to exercise judicial review over the orders of the military commander, and to examine their compatibility with the provisions of international law and the principles of Israeli administrative and constitutional law. As argued by the appellants above, the new Order issued by the military commander concerning the right to appeal the confiscation orders pursuant to the Defence (Emergency) Regulations does not meet these standards, and even considerably deviates there-from. **Hence, the court must revoke this Order.**

**<u>Alternatively, the hearing should be transferred to the competent court</u>**

25. Alternatively, and should the court decide not to accept appellants' arguments concerning the invalidity of the Major General Order, the appellants will request the court to exercise its authority pursuant to section 10 of the Order regarding Security Provisions, and order to transfer the hearing to the court which currently has the jurisdiction to adjudicate their case, as specified below:

26. Pursuant to section 10 of the Order regarding Security Provisions, the court may "direct on any procedural matter which was not established in this order, of such procedures as it may deem to be the most appropriate for the purpose of making justice."

27. The appellants will argue that the fairest result, assuming that their arguments concerning the invalidity of the General Major Order are not accepted – is to transfer the hearing to the competent court which, of its part, has the jurisdiction to hear the case from the point reached at by the previous court. Thus, all of appellants' efforts invested so far would not be lost and the various proceedings which were held in their case as described above, would not be abolished.

28. This result also complies with the provisions of section 79(a) of the Courts Law, according to which "If the court decided that it could not hear the case before it in the absence of local or subject matter jurisdiction, and that the jurisdiction to adjudicate the matter is vested with another court or tribunal, it may transfer it to that other court or tribunal…"

29. On this issue it should also be noted that in the beginning of the preliminary hearing which was held before the court on September 12, 2013, the honorable judge informed that he would apply the procedures customarily applied to administrative petitions before the civil courts. The transfer of the hearing by the court to the competent court also complies with the provisions of regulations 20 and 21 of the Administrative Courts Regulations (Procedures), 5761-2000.

**Conclusion**

The new Major General Order has brazenly stated that the decisions of the military commander to confiscate assets of residents of the Area, could not be appealed and that "they are final and conclusive". Hence, the military commander has deprived the residents of the Area of their right to access judicial instances, a right which was described by the Supreme Court as being "superior to a fundamental right".

The Major General Order deviates from the provisions of international law, and from principles of administrative and constitutional law as established by the Israeli courts in their judgments. Therefore, according to **Schwartz,** the court must direct that the Order be revoked.

Alternatively, should the court decide not to exercise its said jurisdiction, the appellants will request the court to direct that the hearing in their appeals be transferred to the competent court with which jurisdiction to adjudicate them is vested.

January 21, 2014

( signed )

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Tal Steiner, Advocate
Legal counsel to the petitioners

[File No. 77209, 78312]