At the Supreme Court **HCJ 1785/14**
Sitting as the High Court of Justice

In the matter of:

1. **Dr. _____ Sarawi, ID No. _____**
   Resident of Occupied Territories

2. **_____ Hur, ID No. _____**
   Resident of theOccupied Territories

3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Tal Steiner (Lic. No. 62448) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Bilal Sbihat (Lic. No. 49838) and/or Abir Joubran-Dakwar (Lic. No. 44346)

Of HaMoked Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

Military Commander of the West Bank Area

Represented by the State Attorney's Office, Ministry of Justice
29 Salah-a-Din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6467011

The Respondent

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause, why he should not revoke **amendment No. 36 of the Order Regarding Security Provisions (Judea and Samaria) 5774-2013**, which was issued by it.

The grounds for the petition are as follows:

1. This petition concerns an order issued by the military commander entitled "amendment No. 36 of the Order Regarding Security Provisions (Judea and Samaria) 5774-2013" (hereinafter: the **General Major Order** or the **Order**), according to which "**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 before the military court, and it is final and conclusive**".

2. In so doing the military commander revoked, with the stroke of a pen, the jurisdiction of the military courts to judicially review his decisions for the confiscation of property of Palestinians. From now on, Palestinians whose property was confiscated by the respondent will be able to apply only to the Supreme Court sitting as the High Court of Justice, in order to appeal such decisions made by the respondent.

3. Hence, the military commander severely infringes the right of access to the courts afforded to residents of the Occupied Palestinian Territories (OPT), both pursuant to the provisions of international law, as well as according to Israeli administrative and constitutional law. Furthermore, under the guise of "clarifying the legal situation" the military commander forces the military courts, through legislation, to accept his legal position in the matter, after the courts have rejected respondent's position time and again in their judgments. Therefore, the petitioners argue that the new Major General Order is neither legally valid nor appropriate, and it should be revoked.

Preface

The authority of the military commander to confiscate property of OPT residents

4. The authority of the military commander to confiscate property of OPT residents is drawn from the wording of the Defence (Emergency) Regulations, regulation 84 and regulation 120. These regulations were also referred to in the confiscation orders which were delivered to the petitioners in the case at hand, and which will be presented herein below.

5. Regulation 84(2)(b) empowers the Minister of Finance to confiscate any property which belongs to an association which was declared by the Minister of Defence as an unauthorized association (a declaration which was made pursuant to regulation 84(1)(b) of the Defence Regulations). Regulation 120 authorizes the Minister of Defence to direct by order, the confiscation in favor of the government of Israel of all or any property of any person as to whom the Minister of Defence is satisfied that he has committed, or attempted to commit, or abetted to the commission of, or has been an accessory to the commission of any offence against these Regulations, provided such offence involves "violence or intimidation or any Military Court offence." It should be noted that the military commander entered the shoes of the Minister of Finance, pursuant to the provisions of section 3(a) of the Proclamation Regarding Regulation of Administration and Law (Proclamation No. 2) issued by the military commander on June 7, 1967, upon the occupation of the OPT.

6. An additional source for the military commander's authority to confiscate property, which is relevant to our case, is drawn from the wording of section 61 of the Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) 5770-2009 (hereinafter: the **Order Regarding Security Provisions**). This section provides as follows: "Goods regarding which an offense under this order was committed, or that were given in reward for committing an offense as

noted or as a means for committing or for facilitating the execution of the offense – shall be treated as ordered by the commander of IDF Forces in the region".

The right of an OPT resident to appeal against the confiscation of his money

7. Before the General Major Order was issued, the right to appeal against a confiscation which was made pursuant to the Defence Regulations (under both regulation 84 and regulation 120) derived from the wording of regulation 147A (Amendment No. 15), 1947, according to which "Where, by virtue of these Regulations, or by virtue of any amendment of any Ordinance made by these Regulations, any property, whether movable or immovable, is forfeited […] no question as to the validity of the forfeiture shall be entered in any court, or before any officer of the Government unless the action or proceeding in which the validity of the forfeiture is challenged was commenced not more than three months after the person challenging the validity first had knowledge of the forfeiture".

8. Therefore, according to this regulation, an "appeal" my be submitted to the court on confiscations made within the framework of an administrative process, within three months from the date the property owner first had knowledge of the confiscation or from the date of its publication in the official gazette. This authority has been affirmed, time and again, by the military courts, and first and foremost in the judgment of the military court of appeals in **Hassin**:

> In my opinion, it is clear that the linguistic meaning of this section (namely, regulation 147A, T.S.) is that the court has jurisdiction to hear appeals on any confiscation decisions (either pursuant to regulation 84 or pursuant to regulation 120). **Indeed, the language is and archaic language, but I find it difficult to understand the sentence "no… shall be entered in any court… unless the action or proceeding… was commenced not more than three months…" as depriving the court of jurisdiction. In my opinion, the above means that the military court has jurisdiction to adjudicate, unless the proceeding has commenced after of three months** […] 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 judgments in the matter of **Karashan** and in the matter of **Abu 'Allan, the inevitable conclusion is that the military court has jurisdiction to hear an appeal on the exercise of the confiscation power of the military commander.**
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> Sole Judge Case (Judea and Samaria) 2169/12 **Ahmad Fadel Ahmad Hassin v. Commander if IDF Forces in the Judea and Samaria Area**, emphases added).

(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).**

9. Respondent's unchanged position, in the proceeding being the subject matter of this petition as in other proceedings, is that the military court does not have and never had jurisdiction to judicially review confiscation orders which were issued by the military commander, even before the Major General Order was issued.

10. To reinforce his said position, the respondent refers, *inter alia*, to the judgment of the Nazareth District Court in MApp 3301/02 **Raed Bader v. State of Israel.** This case concerned the matter of Israeli citizens, whose property was confiscated according to an order issued by the Minister of Defence, pursuant to regulation 120 of the Defence Regulations, and who wanted to appeal said decision. The respondent, apparently relies on the district court's laconic statement, according to which "It is true that no mechanism for the submission of objection or appeal against confiscation of property has been explicitly established in the Emergency Regulations, but the Minister of Defence provided in the confiscation order, which was quoted above, that the association could appeal to him in writing within 14 days" (see paragraph 5 I of the judgment).

11. However, in **Hassin** mentioned above, the military court of appeals referred to the judgment of the District Court, and 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 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.

12. 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 military courts of appeal, in their judgments.**

The new Major General Order

13. As specified above, on December 25, 2013 the Major General Order was published, which deprived, *ad-hoc*, the military courts of the jurisdiction to review the validity of the confiscation orders issued by the military commander. The Order applies to confiscations of funds made

pursuant to the Defence Regulations as well as pursuant to section 61 of the Order Regarding Security Provisions.

14. 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), and therefore it also applies to legal proceedings which were outstanding before the military courts at that time.

A copy of the Major General Order is attached and marked **P/1**.

15. As indicated above, respondent's position is that the military courts were never vested with the jurisdiction to review his decisions regarding confiscation of property of OPT residents. According to him, the petitioners before us, and others alike, may apply solely to the High Court of Justice if they wish to appeal respondent's decisions – which, as specified above, severely violates their rights. According to his said position, the new Major General Order is presented only as a "clarification" of this state of affairs, which the respondent tries to portray as a *fait accomplit* and as a known legal principle.

16. Hence, the opening statements to the Major General Order provide that the military commander directed to issue the Order "since I was of the opinion that it was necessary in order to maintain public order and security in the Area, and **for the avoidance of doubt**"; And the update published by the military advocate general's office in its website concerning the Order states that the Order "clarifies the existing legal situation and constitutes a "**declaration of legislator's opinion**" (see military advocate general's office website http://www.law.idf.il/163-6576-he/Patzar.aspx). The respondent has also expressed this position in our case, in his statement that the Order "**only spells out, clarifies and reiterates the above principle**" (the principle according to which the military court has no jurisdiction to discuss confiscation orders, T.S.)(and see Exhibit P/16 below).

17. **However, the military courts have never accepted respondent's legal thesis**, as clearly indicated in the **Hassin** judgment and in the other cases mentioned above, and thus, it never became an "existing situation". And note: the severe meaning of the above is that the military commander tried to promote a certain legal position in the hearings held before the courts, and as he failed to achieve his goal – he issued the Order, which under the guise of "clarifying the legal situation", **in fact, forces the military courts, through legislation, to accept his legal position**.

The Parties

18. **Petitioner 1** (hereinafter: **petitioner 1**) is a Palestinian resident who was born in Nablus, in 1983. Petitioner 1 comes from an impoverished family. She graduated high school with honors and won a scholarship for medical studies in Jordan. In 2008 petitioner 1 completed her medical studies in Jordan with honors and was qualified as a general practitioner. In 2009 petitioner 1 commenced her pediatric residency at the "Jordan" hospital in Jordan, and at the same time she also works at the hospital and has additional responsibilitues.

A copy of petitioner 1's qualification certificate to practice medicine is attached and marked **P/2**.

A copy of a certificate attesting to petitioner 1's employment at "Jordan" hospital in Jordan is attached and marked **P/3**.

19. On January 31, 2013 petitioner 1 crossed Allenby Bridge on her way to the West Bank, to visit her parents in Nablus. Petitioner 1 had in her possession a sum of money of 1,000 Jordanian Dinars she

had saved from her salary and which she intended to give to her elderly and impoverished parents to help them with their severe financial condition.

20. When she crossed Allenby Bridge, petitioner 1 was taken for an interrogation by an Israeli Security Agency (ISA) agent, who did not identify himself to her and who interrogated petitioner 1 about the source of the money which she was carrying with her. Petitioner 1 explained that the she had saved said sum of money from her salary as a physician during five months of work, and that she brought the money for her family in Nablus to assist them in their livelihood. Nevertheless, the ISA agent notified petitioner 1 that her money would be confiscated, and gave her a confiscation form concerning the seizure of the money. The form stated that petitioner 1's money was confiscated on "suspicion of transfer of funds to an unauthorized association."

    A copy of the confiscation form which was given to petitioner 1 at Allenby Bridge is attached **and marked P/4.**

21. To complete the picture it should be pointed out that the military commander banned petitioner 1's exit and refused to let her go back to her home and work in Jordan; and that only following a petition which was filed with this honorable court (HCJ 1490/13 **Sarawi v. Military Commander of the West Bank Area)** she was allowed to travel abroad.

22. Petitioner 2 (hereinafter: **petitioner 2**), is a Palestinian, resident of Hebron, who was born in 1988. Petitioner 2 works as an X-ray technician in the "Al Sadaqa" medical center in the city.

    A copy a certificate attesting to petitioner 2's employment at "Al Sadaqa" medical center is attached and marked **P/5**.

23. On March 17, 2013 petitioner 2 travelled to Jordan from the West Bank, through Allenby Bridge, in order to register with a recruitment agency which should have assisted him to find a job as an X-ray technician in a hospital in Saudi Arabia, where he was expected to earn a higher salary.

24. When he entered Jordan, petitioner 2 carried with him the sum of 2,800 Dinar, in order to pay the registration fees to the recruitment agency, and hoping that he would be able to continue from there to Saudi Arabia and use this money during the initial settling down period. It should be noted that this sum of money consisted of petitioner 2's savings from his work as an X-ray technician and from money which he raised with the assistance of his relatives.

25. During the registration process with the agency, it turned out that petitioner 2 did not have a certain document which was required in order to complete the registration. Therefore, petitioner 2 had to return to his home in the West Bank, and go back to Jordan with the required document.

26. Hence, on March 20, 2013 petitioner 2 crossed Allenby Bridge, on his way back from Jordan to his home in Hebron. Petitioner 2 carried with him the sum of 2,224 Jordanian Dinar, the balance of the total amount of 2,800 Dinar with which he entered Jordan, in the first place.

27. When he crossed Allenby Bridge, petitioner 2 was taken for an interrogation by a policeman, who did not identify himself to him and who interrogated petitioner 2 about the source of the money which he was carrying with him. Petitioner 2 explained that the money was the balance of the amount which he brought with him when he crossed over to Jordan, and described how he has raised this money in the first place. Nevertheless, the policeman notified petitioner 2 that his money would be confiscated, and gave him a confiscation form concerning the seizure of the money. The form stated that petitioner 2's money was confiscated on "suspicion of transfer of funds to an unauthorized association."

A copy of the confiscation form which was given to petitioner 2 at Allenby Bridge is attached **and marked P/6.**

28. About three months later, on June 16, 2013, petitioner 2 was summoned for an interrogation by an ISA agent at DCO Etzion. Petitioner 2 arrived to the interrogation on June 18, 2013. He was interrogated again about the money which he had been carrying with him while crossing Alleby Bridge, and he explained again that it was the balance of the amount of money which he had taken with him from his home to Jordan, with the hope to continue from there to a new work place in Saudi Arabia.

29. **Petitioner 3** (hereinafter: **HaMoked**) is a not for profit association which acts to promote human rights in the Occupied Palestinian Territories.

30. The **respondent** is the military commander of the West Bank area, on behalf of the State of Israel, which holds the West Bank under belligerent occupation for forty six years.

Exhaustion of remedies

Petitioners' correspondence with the representatives of the legal advisor for the West Bank

31. On March 21, 2013 HaMoked sent a letter, on behalf of petitioner 1, to Major Barak Siman Tov, head of the population registration division at the legal advisor's office, in which it demanded that petitioner 1's money be returned to her without delay. The confiscation form which was given to petitioner 1 at Allenby Bridge was attached to the letter.

    A copy of AhMoked's letter dated March 21, 2013 is attached and marked **P/7**.

32. After a few reminders, on August 13, 2013 respondent's response dated August 12, 2013 was received by HaMoked's in its offices. In his letter, the respondent notified that on April 14, 2013 the military commander issued an order for the confiscation of respondent 1's money by virtue of his authority under regulations 84 and 120 of the Defence (Emergency) Regulations, 1945, since "according to reliable and substantive intelligence information presented to him – the funds belonged to an unauthorized association." A copy of the confiscation order, signed by Major General Nitzan Alon on April 14, 2013, was attached to the letter.

    A copy of respondent's letter dated August 12, 2013 is attached and marked **P/8**.

33. On July 25, 2013 HaMoked sent a letter on behalf of petitioner 2 to Major Udi Sagi, head of terror and criminal division at the legal advisor's office, in which it demanded that petitioner 2's money be returned to him without delay. A signed power of attorney and the confiscation form which was given to petitioner 2 at Allenby Bridge were attached to the letter.

    A copy of HaMoked's letter dated July 25, 2013 is attached and marked **P/9**.

34. On July 28, 2013 respondent's response dated July 25, 2013 was received by HaMoked's in its offices. In his letter the respondent notified that on June 2, 2013 the military commander "based on reliable intelligence information which indicated that the funds belonged to an unauthorized association, and could therefore be confiscated pursuant to regulations 84 and 120 of the Defence (Emergency) Regulations, 1945". A copy of the confiscation order, signed by Major General Nitzan Alon on June 2, 2013, was attached to the letter.

    A copy of respondent's letter dated July 25, 2013 is attached and marked **P/10**.

The proceedings which were held before the military court

35. On August 29, 2013 HaMoked appealed respondent's decision to confiscate petitioners' money before the military court Judea (Ofer), pursuant to regulation 147(a) of the Defence Regulations mentioned above.

    App 4735/13 **Sarawi v. Military Commander of the West Bank Area** attached and marked **P/11**.

    App 4737/13 **Hur v. Military Commander of the West Bank Area** attached and marked **P/12**.

36. On September 3, 2013 the decision of the honorable Judge Dahan, which was given on August 29, 2013 was received by HaMoked in its offices, which scheduled a preliminary hearing in the appeals for September 12, 2013.

37. On September 12, 2013 the parties arrived to the military court in Ofer for the preliminary hearing. The petitioners raised various preliminary arguments, including the argument concerning the failure to hold an appropriate hearing, in view of the laconic notice of the State regarding the grounds which served as the basis for the confiscation orders which were issued by the respondent against the petitioners. The respondent, on his part, argued that the military court did not have any jurisdiction to examine the validity of the confiscation orders, and that such jurisdiction was vested solely with the High Court of Justice. Upon the conclusion of the hearing, the court held that the respondent would notify, within 14 days, whether he would deliver a paraphrase of the privileged information upon which the confiscation orders were based, and that the petitioners would notify, within 30 days, whether, in view of said paraphrases, they would be able to exhaust their right to a hearing (As a side note, it should be pointed out, that despite petitioners' repeated requests of the military court's secretariat, they were not provided with a copy of the protocol of said hearing and of the decision which was rendered upon the conclusion thereof).

38. On September 29, 2013 the respondent transferred to HaMoked a paraphrase in petitioner 1's matter, according to which "Monies which belong to the Hamas organization were seized in the possession of the above person, which she helped to transfer to the Area". In addition the respondent transferred petitioner 1's statement made in her interrogation at Allenby Bridge, in which she claimed that the money was saved by her from her salary as a physician and was intended to assist her impoverished family in the West Bank.

39. On October 8, 2013 the respondent transferred a paraphrase in petitioner 2's matter, according to which "Monies which belong to the Hamas organization, which is a terror organization, were seized in the possession of the above person." Here too, the respondent attached petitioner 2's statement made in his interrogation at Allenby Bridge, in which he claimed that the money was the product of his work, that he took it with him to Jordan, and that he has never been involved in security activity of any kind or nature.

40. On October 10, 2013 the petitioners notified the military court, that the paraphrases which were transferred in petitioners' matter were very laconic and vague, and that the statements which were given at Allenby Bridge did not shed any new light on the decision to confiscate their money, either. Therefore, the petitioners argued that they were unable to exhaust their right to have a hearing *vis-à-vis* the respondent, and requested the court to continue to hear their appeal and direct the respondent to return the monies which were confiscated from them.

A copy of petitioners' notice to the military court dated October 10, 2013 is attached and marked **P/13**.

41. On December 9, 2013, about two months after their updating notice was submitted, and since the court has not yet scheduled a date for a further hearing of the case, the petitioners filed a request that a decision in their matter be given.

A copy of petitioners' request dated December 9, 2013 is attached and marked **P/14**.

The new Major General Order and its implications on the proceedings

42. On January 7, 2014 the decision of the military court which was given on January 6, 2014, was received by HaMoked, in its offices. In its decision, the court notified that recently the Major General Order was issued, which may ostensibly revoke the court's jurisdiction to continue to hear the appeals pending before him. Therefore, the court ordered the parties to submit written summations and present their positions concerning the subject matter jurisdiction of the military court to hear the appeals, in view of the new Major General Order. A copy of the relevant Order was attached to the decision.

A copy of the military court's decision dated January 6, 2014 is attached and marked **P/15**.

43. On January 14, 2014 respondent's summations concerning the new Order and the jurisdiction of the military court were received. In his summations, the respondent argued that "the purpose of the Order […] is to unequivocally clarify, that the jurisdiction to exercise judicial review over seizure and confiscation proceedings pursuant to the Defence (Emergency) Regulations, 1945, and over confiscations ordered by the military commander, by virtue of his administrative authority, did not vest with the military courts in Judea and Samaria." In addition, the respondent reiterated his position, according to which even before the Order was issued, the military court did not have jurisdiction to hear such cases, and that the new Order "only spells out, clarifies and reiterates the above principle."

A copy of respondent's summations dated January 14, 2014 is attached and marked **P/16**.

44. On January 21, 2014 the petitioners submitted their summations concerning the new Major General Order. The petitioners argued that the new Order was contrary to the rules of public international law and the principles of Israeli administrative and constitutional law, and therefore – the military court itself must revoke the Order, according to the rule which was established in App (Judea and Samaria) 5/06 **Schwartz v. Commander of IDF Forces in the Area** (hereinafter: **Schwartz**), and which provides that the military court has the authority to revoke an order of the military commander, if it finds that such order does not comply with the norms of international law by which he is bound.

A copy of petitioners' summations dated January 21, 2014 is attached and marked **P/17**.

45. On February 2, 2014the decision of the military court, which was given on January 29, 2014 was received by HaMoked, in its offices. In its decision the court held that "After I have reviewed the arguments of the parties, I am of the opinion that the issue of indirect appeal which was brought by the petitioners to this court is a difficult and important issue and therefore, should be heard by a panel of three judges". The court ordered the parties to notify whether they intended to present their arguments orally before the panel, in addition to their written summations. The court has also ordered the petitioners to notify whether they intended to directly challenge the Major General Order before the Supreme Court sitting as the High Court of Justice.

A copy of the decision of the military court dated January 29, 2014 is attached and marked **P/18**.

46. On February 9, 2014 the notices of the parties were submitted. The respondent notified that he intended to present his arguments orally before the panel. The petitioners notified that they found the written summations which were submitted by them to the court to be sufficient at that point. In addition, **the petitioners notified, that they reserved the right to file a petition with the High Court of Justice concerning the legal validity of the Major General Order, subject the results of the current proceeding and the judgment of the extended panel, when rendered**. The hearing was scheduled for February 27, 2014.

    A copy of respondent's notice dated February 9, 2014 is attached and marked **P/19**.

    A copy of petitioners' notice dated February 9, 2014 is attached and marked **P/20**.

47. Lo and behold, on February 25, 2014, respondent's notice dated February 23, 2014 was received by HaMoked, in its offices. In his notice, the respondent updated that recently a petition had been filed with the High Court of Justice concerning the legal validity of the new Major General Order (HCJ 1292/14 **Hamidat v. Commander of IDF Forces in the Judea and Samaria Area**) by a petitioner who has also been injured by this Order. Therefore, the respondent argued that the hearing which was pending before the military court should be postponed, in order to prevent a situation in which two different legal instances adjudicated the same issue at the same time. It was further argued that priority should be given to a "direct challenge" of the Order before the High Court of Justice, *in lieu* of an "indirect challenge" thereof before the military court. The petitioners, on their part, notified that in view of the circumstances specified in respondent's request, they did not object to the request to postpone the date of the hearing.

    A copy of respondent's notice dated February 23, 2014 is attached and marked **P/21**.

    A copy of petitioners' notice dated February 25, 2014 is attached and marked **P/22**.

48. On February 26, 2014 the military court notified that it had postponed the hearing in the appeals until further notice. Said decision was delivered to the petitioners by telephone, through the secretariat of the military court.

49. **Under these circumstances, when the petitioners realized that the issue of the legal validity of the Major General Order, including the subject matter jurisdiction of the military court, would apparently be adjudicated by the High Court of Justice, and that at this point this issue would not be adjudicated by the military court, the petitioners notified the military court that they retracted their notice dated February 9, 2014, and that they intended to exercise their right to apply to the High Court of Justice and request it to examine the legal validity of the new Major General Order**.

    A copy of petitioners' notice dated February 27, 2014 is attached and marked **P/23**.

50. Hence, this petition.

The Legal Argument

The norms which obligate the military commander

51. The military commander is obligated to act according to three sets of norms. Firstly, the military commander is obligated to act according to international humanitarian law and the rules of military occupation which constitute a part thereof. The respondent is the trustee of the occupied territories

and is not the sovereign thereof. His authorities in the occupied territory derive from international law, and are subject thereto. Obviously, respondent's authority is not derived from the military legislation which he himself promulgates, but rather, from the entire body of international law, which constitute the sole normative basis for the exercise of his authorities (HCJ 2150/07 **Abu Safiya v. Minister of Defence** (not reported, December 29, 2009).

52. Secondly, the respondent is also obligated to act according to international human rights law, and first and foremost, according to UN conventions on civil and political rights and on social and economic rights. It was so held in an opinion of the International Court of Justice concerning the separation wall. This honorable court has also examined the acts of the military commander according to these norms. (HCJ 9132/07 **Al-Bassiouni v. Prime Minister,** TakSC 2008(1) 1213; HCJ 7957/04 **Mara'abeh v. Prime Minister of Israel** TakSC 2005(3) 3333, paragraph 24; HCJ 3239/02 **Marab v. Commander of IDF Forces**, Tak SC 2003(1) 987; HCJ 3278/02 **HaMoked for the Defence of the Individual v. Commander of Military Forces in the West Bank**, IsrSC 57(1) 385).

53. In addition, as an Israeli public authority, the military commander is also obligated to act according to the norms of Israeli public law, including the commitment to human rights and the prohibition to infringe them disproportionately. See, for instance: HCJ 393/82 **Jam'iyyat Iskan al-Mu'allimun al-Ta'wuniyya al-Mahduda al-Mas'uliyya v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 37(4) 785; HCJ 10356/02 **Hess v. Commander of IDF Forces in the West Bank**, IssSC 58(3) 443; HCJ 2056/04 **Beit Suriq Village Council v. Government of Israel**, IsrSC 58(5) 807.

The duties of the military commander under international humanitarian law

54. The Major General Order provides that OPT residents do not have the right to appeal the decisions of the military commander to confiscate their property before the military courts, which are the only judicial instances available to OPT residents. The Order continues to state, that the decision of the military commander to confiscate the property of a resident "is final and conclusive". Hence, the Order nullifies the right of OPT residents to apply to judicial instances so that the latter would exercise judicial review over the decisions of the military commander in their matter. **This situation is in frontal conflict with the provisions of international law concerning the authority and duties of the commander of an occupied territory.**

55. 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…

56. 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.
>
> (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).

57. The right for 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 humanitarian law, and see 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.

58. In addition, when the court is required to examine whether a law promulgated by the military commander complies with the provisions of international humanitarian 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).

59. 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, mainly in view of the severe infringement inflicted by said law on the rights of OPT residents, and primarily on the right to have access to the courts and the right to own property.

<u>Infringement of the right to access the courts</u>

60. The new Major General Order infringes the right of OPT residents to access the courts, **contrary to the norms of Israeli public law**. 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 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 from which the court draws 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, hereinafter: **Arpel Aluminum**, emphases added).

61. 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).

62. As noted above, the right for equal protection before the law depends on the right to access judicial instances, and is also recognized as a fundamental principle of **international human rights law** (see Articles 7-10 of the Universal Declaration of Human Rights; 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.)

63. 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).

64. In its judgment in **Golder v. United Kingdom** of 1975, the European Court of Justice (ECJ) 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.

65. In the judgment of the European Court of Human Rights (ECtHR) in the matter of **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 Article 6 of the European Convention of Human Rights, and hence, constitutes a violation of international human rights 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).**
>
> (**Stran Greek Refineries and Stratis Andreadis v. Greece** (ECtHR) Series A No 301-B, para 49-50, emphases added).

66. And in the **Fogarty v. United Kingdom** judgment of 2001, it was held 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).

<u>The option to apply to the High Court of Justice does not nullify the violation of the right to have access to judicial instances</u>

67. 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 a 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.

68. In fact, the military court held, that **the denial of access to the military courts on this issue, leaving jurisdiction to the High Court of Justice only, 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 judicial procedural 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 the 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 a situation whereby a military court of a first instance has jurisdiction provides for the filing of an appeal before 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.
(Judgment of Judge Lekach in the above mentioned **Hassin;** emphases added).

69. It should be pointed out that the referral of OPT residents, who wish to appeal the decision to confiscate their property, to the High Court of Justice only, has additional severe ramification: the decision deprives these residents of **the right to physically attend and be present in the court hearing in their matter** due to the severe limitations imposed by the respondent on the entry of

Palestinian residents into the territory of the State of Israel and the need to obtain special permits for this purpose; the decision transfers the hearing to **an instance which neither hears witnesses nor conducts evidentiary hearings**, which are essential for the purpose of substantiating the legal validity or invalidity of the decision of the military commander to confiscate the property of residents.

70. All of the above is, as aforesaid, in addition to the various offensive aspects which were specified by the court in **Hassin** which was quoted above, namely: the need to engage the services of an Israeli attorney who, in most cases, charges higher fees than those charged by an Israel attorney *[sic]*, and the need to pay the required court fees payable when a petition is filed with the High Court of Justice, as compared with the proceeding before the military courts with respect of which no fees are payable.

The violation of the right to own property

71. The new Major General Order also indirectly violates the right of OPT residents to own property, since, leaving in the hands of the military commander unrestricted authority to issue orders for the confiscation of residents' property – when these residents are deprived of the right to appeal such decisions before judicial instances which are available to them, namely, the military courts – **means an increased risk of unjustified confiscations, which may not have been upheld by the courts. The violation of the right of OPT residents to own property, which is embodied in the authority of the military commander to issue orders for the confiscation of their property, may be balanced only by giving an opportunity to appeal such decisions,** and have them judicially reviewed.

72. And it was so held by the court with respect to the right of OPT resident to own property:

> **The Area commander must exercise his discretion very strictly and carefully before he issues an order which infringes the right of citizens of an occupied territory to own property. This obligation is imposed on him by the rules of war of international law as by the Israeli constitutional law, which defines the right to own property as a fundamental constitutional right.** He may exercise his above authority when essential military needs so require, or when under the circumstances of the matter, there is an essential need to protect conflicting constitutional rights, which outweigh the right to own property, and when the measure applied to the property of the individual, proportionately balances between the importance of the objective the achievement of which is being sought, and the severity of the injury which may be caused by such infringement […]. The violation of the constitutional right will satisfy the constitutional test if it complies with the values of the state, if it was meant to achieve an appropriate cause, and if it was made to an extent not greater than is required. Hence, the order of the military commander the objective of which is to protect the security, and the implementation of which injures the right of the individual to own property, must comply with the standards of appropriate cause and the existence of an essential need which requires the realization thereof. The content of the order must be the product of reasonable and proportionate discretion, which properly balances between the importance and materiality of the

> objective the achievement of which is being sought and the scope of the injury caused to the individual as a result thereof (**Bethlehem Municipality** [5]).
>
> **(**HCJ 7862/04 **Abu Dahar v. Commander of IDF Forces in Judea and Samria**, IsrSC 59(5) 368).

73. In the context of money confiscations pursuant to emergency legislation, the military court of appeals held that in the absence of judicial review, such confiscations would not be able to satisfy the test of international law, in view of the fact that they violate the right to own property:

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

The infringement of the rights of OPT residents does not comply with the limitation clause

74. The Supreme Court, in its judgments, held that in the examination of the legal validity of an administrative decision which entails an infringement of a fundamental right, the objective of the administrative decision must by firstly examined:

> As we have seen, there shall be no violation of human rights except by a law enacted for a proper purpose (section 8 of the Basic Law: Human Dignity and Liberty). The question whether a purpose is proper, is examined on two levels. The first level examines the content of the purpose; the second level examines the need to achieve it. On the first level, **a purpose is proper, if it constitutes a social purpose sensitive to human rights. In addition, a purpose is proper, if it is meant to achieve general social goals, such as welfare policy or protection of public interests** (see **Hamizrachi Bank** [28] page, 434). On the second level, the purpose is proper if the need to achieve it is important for the values of society and the state. The importance of the need may vary according to the nature of the infringed right.
>
> (HCJ 5016/96 **Horev v. Minister of Transportation**, IsrSC 51(4) 1, 53-54, emphases added).

75. As indicated above, the respondent declared that the purpose of the new Major General Order was only to "clarify the current legal condition", in order to properly protect "public order and security in the Area".

76. **However, before the Order was issued, under the legal situation which prevailed, the military courts most certainly had jurisdiction to review the decisions of the military commander**. As explained in length in the preface part above, the wording of regulation 147 of the Defence (Emergency) Regulations, as well as the interpretation of the military courts, support the right of OPT residents to apply to the military courts and file with them an appeal against respondent's decision to confiscate their property.

77. It therefore follows that the meaning of the new Major General Order is the creation of a **new legal situation**, **under which the right of OPT residents to apply to judicial instances is severely limited**, and under which the military courts are forced to accept a legal thesis which was rejected by them in the past.

78. Under this new situation, the military commander is free from the ties of the military courts' judicial review, and can issue orders for the confiscation of the property of OPT residents, which are not subject to external review and with respect of which no explanation should be given to a judicial instance. This is the real purpose of the Major General Order, and these are its objectives.

79. It is clear that this situation does not promote "public order and security in the Area", as argued by the military commander in the preface to the Order; and it is anyway clear that the purpose of the Order is not a "social purpose sensitive to human rights", and it may not be argued that it "was meant to achieve general social goals." **The real purpose of the Order is to promote respondent's own narrow and inappropriate interest only: the ability to take an aggressive administrative action of property confiscation, without the limitations of judicial review**.

80. This purpose, of granting the respondent unlimited power to confiscate the property of OPT residents, **is not compatible with the values of the state**; it infringes the right of the residents to apply to judicial instances, the importance of which for the protection of the rule of law and democracy was discussed by us above; and subjects these residents to governmental arbitrariness by the military commander. As stated by Justice Cheshin in the above mentioned **Arpel Aluminum**:

> Hence, the purpose of the basic laws is to entrench, reinforce, instill in us the values of the state; these values – values which exist independent of the basic laws – feed the basic law and are the source of its vitality. **This is the spring from which we draw our water to revive our souls. These are "the values of the State of Israel as a Jewish and Democratic state". The term democracy asserts – even cries out – the existence of a judiciary**. Democracy's brain consists of three lobes: the legislative lobe, the executive lobe and the judiciary lobe. The brain – with its three lobes – controls the body, gives the body vitality and shapes its life. Once you have paralyzed one of these lobes, democracy dissolves and dies out. The inevitable conclusion is that the existence of the judiciary – as an essential lobe in the body of the democratic state – asserts the prohibition to block the blood vessels which carry blood into the body, the prohibition to deprive a person from access to the court. A proper arrangement for accessing the court – yes; preventing access altogether – either directly or indirectly – definitely not.
>
> (emphases added)

81. **Therefore, the new Major General Order is meant to serve an improper purpose, which does not comply with the values of the State of Israel; and for these reasons, the Order should be revoked, according to the criteria set forth in the limitation clause**.

82. In view of the fact that the new Order does not satisfy the two pre-conditions of the constitutional examination, there is no need to examine whether or not it satisfies the third pre-condition – proportionality; **since one cannot discuss the "proportionality" of a governmental act, which is**

made for a purpose which is totally improper. We have also shown that respondent's declared purpose in having the Order issued – the ostensible "clarification of the current legal situation", does not comply with the legal situation which existed before the Order was issued, and for this reason also a discussion of the proportionality of the decision at this point, is not required.

Conclusion

The new Major General Order brazenly states that the decisions of the military commander to confiscate assets of residents of the Area, may not be appealed and that "they are final and conclusive". In so doing, the military commander deprives 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, and does not satisfy the conditions of the limitation clause.

In view of all of the above, the honorable court is hereby requested to issue an *order nisi* as requested, and after receiving respondents' response, make the order absolute. In addition the court is requested to order the respondent to pay petitioners' costs and legal fees.

This petition is supported by affidavits which were signed before attorneys in the West Bank and Jordan, and were sent to the undersigned by fax, subject to coordination by phone. The honorable court is requested to accept these affidavits and the powers of attorney which were also sent by fax, taking into consideration the objective difficulties involved in a meeting between the petitioners and their legal counsels.

March 9, 2014

_____
Tal Steiner, Advocate
Counsel to the petitioners

[File No. 77209, 78312]