The Supreme Court **HCJ 6180/08**
Sitting as the High Court of Justice

In the matter of:

1. _____ **Amam**, ID No. _____
   Resident of the Palestinian Authority
2. _____ **Amam**, ID No. _____
   Minor represented by his father, petitioner 1
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger - registered non profit organization**

Represented by attorneys Ido Blum (lic. no. 44538) and/or Yossi Wolfson (lic. no. 26174) and/or Abir Joubran (lic. No. 44346) and/or Yotam Ben Hillel (lic. No. 35418) and/or Hava Matras-Iron (lic. no 35174) and/or Sigi Ben-Ari (lic. no. 37566)

Of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
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The Petitioners

- Versus -

Commander of the Army Forces of the Occupied Territories

The Respondents

Petition for an *Order Nisi*

A petition for an *Order Nisi* is hereby filed which addresses the respondents and orders them to appear and show cause:

A. Why he will not issue petitioner 1 and his minor son, petitioner 2, with entry permits for the purpose of their passage from Hebron, in the West Bank, to the Gaza Strip, where his wife and minor daughter reside.

B. Why he will not desist from making the petitioners' passage conditional on an undertaking never to return to the West Bank.

C. Why he will not put an end to the policy of making the passage of Palestinians from the West Bank to the Gaza Strip conditional on a commitment never to return to the West Bank.

Request for Urgent Hearing

The honorable court is requested to schedule an urgent hearing on this petition, in light of the obvious humanitarian circumstances and the separation that has been forced upon the family for an entire year.

The Parties

1. Petitioner 1 (hereinafter: the "**petitioner**") is a Palestinian resident of Hebron, in the West Bank. The petitioner is married to Mrs. _____ Amam (ID No. _____), who lives in the Gaza Strip. The spouses have two children: _____ who is six years old (petitioner 2) and _____ who is three and a half years old (ID No. _____).

2. Petitioner 3 (hereinafter "**HaMoked: Center for the Defence of the Individual**" or "**HaMoked**") is a human rights organization based in Jerusalem.

3. The respondent is the army commander for the West Bank area, who acts on behalf of the State of Israel, which has held the West Bank under military occupation for more than forty years. The respondent is vested with the authority to permit the entry of Palestinian residents of the West Bank into Israel, for the purpose of their passage to the Gaza Strip.

The factual basis and the exhaustion of proceedings

4. The petitioner got married in 2001 to Mrs. ____ Amam, who lives in Gaza. As a result of the severe restrictions which the respondent has imposed, since 2000, on the passage of Palestinians living in the Gaza to the West Bank, the petitioner remained with his wife in the Gaza Strip, and their two children were born there.

5. In light of the respondent's policy of segregation between the Gaza Strip and the West Bank, which was launched in 2000, and which manifests, inter alia, in the restriction of passage of Palestinians between Gaza and the West Bank, for many years, the petitioner was weary of leaving the Gaza Strip and returning to his home in Hebron, as he knew that were he to leave, he would face great difficulties in reentering the Gaza Strip to return to his wife and children, and that there was little chance that his wife and children would be permitted to cross over into the West Bank. As a result, the petitioner did not return to his home in the West Bank and has not seen his parents, his four siblings and the rest of his family for a period of seven years.

6. In May 2007 the petitioner's mother, who suffers from diabetes, was forced to undergo an operation to amputate her leg at the Almakassed hospital in East

Jerusalem. Under these circumstances the petitioner decided to leave the Gaza Strip and be at his mother's side during her difficult time, despite great concern, and as he hoped that despite the immense difficulties imposed by the respondent on entry to the Gaza Strip, he would speedily return and be reunited with his wife and daughter.

7. The petitioner filed an application for a permit to enter Israel in order to visit his mother who was hospitalized, as stated, in a Jerusalem hospital. His application was approved. On 22 May, 2007 the petitioner left the Gaza Strip with his son, while his wife and daughter were left behind in the Gaza Strip.

   Copies of the entry permits which the petitioner received for the purpose of visiting his mother are attached and marked **p/1.**

8. Upon the completion of his visit, when the petitioner wished to return to the Gaza Strip, he discovered, to his misfortune, that his fears had been realized.

9. The petitioner filed a number of applications to permit his passage from the West bank to the Gaza Strip to visit his wife and daughter through the Palestinian DCO in Hebron, but his applications were denied by the Israeli side. Applications to permit the passage of his wife and daughter from the Gaza Strip to the West Bank were likewise denied.

10. Nonetheless, in March, the Palestinian DCO received a response from the Israeli side regarding the latest application, dated 11 February, 2008. According to the response which was provided, the petitioner would be able to receive the requisite permit **only if he provided a written undertaking never to return to the West Bank.**

    A copy of the notice from the Palestinian District Coordination Office in Hebron regarding to the applications to the Israeli side and the reply which was received, as well as its Hebrew translation, are attached and marked **p/2.**

11. On 21 April, 2008 HaMoked: Center for the Defence of the Individual appealed to the legal advisor of the respondent and requested to permit the passage of the petitioner and his son to the Gaza Strip, where his wife and his daughter were.

    A copy of HaMoked's appeal to the legal advisor for the respondent, dated 21 April 2008, is attached and marked **p/3.**

12. On 6 May, 2008 a reply was received from the legal advisor for the respondent. The response claimed that the respondent's computerized system does not include a record of the petitioner's previous applications and therefore he was being referred to the DCO for submission of an application. However as to the merits of the case, the letter repeated the main points of the same policy that was made manifest in the previous response by the DCO:

    > We would like to emphasize that under the current policy, passage between the Areas is only permitted under exceptional circumstances, and generally speaking repeated passage is not permitted. Therefore

> we request that your client clarify (in his application to the DCO) whether he intends to permanently settle in the Gaza Strip.

A copy of the legal advisor's reply dated 5 May, 2008 is attached and marked **p/4.**

13. It should be noted that this is not the only case in which HaMoked: Center for the Defence of the Individual has had to deal with this unacceptable policy of the respondents. Thus, for example, in the case of a Palestinian resident from Qalkiliya, who applied to travel to the Gaza Strip to visit her husband who was ill with kidney disease, a document was obtained from the Israeli DCO, bearing the title "Refusal Report," which stated:

> As a rule there are no visits to Gaza.
>
> In the present case the applicant is a resident of Qalqiliya who is married to a Gaza resident and who is applying to enter into, and visit Gaza due to his situation. Owing to a lack of authorization for this purpose her application is not approved.
>
> It may be possible to approve a single permit to enter Gaza in the event that she decides to remain there and live with her husband in Gaza. In order to do this she must change her address to Gaza and/or to produce a Palestinian undertaking [?] stating that it is her desire to return to Gaza in order to live there, and she will not return to the Judea and Samaria Area.

A copy of the "Refusal Report" is attached and marked **p/5.**

14. Therefore, the matter is are explicit and clear: It makes no difference how many times the petitioner applies and reapplies to the DCO or to any other organ. The only way the respondent will agree to permit him to return and see his wife and daughter is if the petitioner is prepared to pack his belongings and leave the West Bank Area permanently.

The claim with regard to the difficulty ensuing from return passage and the one-way policy between the West Bank and Gaza

15. In a letter dated 5 May, 2008, as well as in other cases, the respondent claimed that the stipulation with regard to the "once off" passage ensues from the difficulty associated, prima facie, with permitting return passage between the Gaza Strip and the West Bank.

16. However, the respondent's policy in all that pertains to passage in the opposite direction, namely from the Gaza Strip to the West Bank, is completely the opposite: **A Palestinian applying to go from Gaza to the West bank is required to undertake to immediately return to the Gaza Strip upon the completion of the visit,** and sometimes even to deposit large sums of money as a guarantee for his return on the agreed date.

Thus for example, in a petition concerning the passage of a Palestinian woman and her parents from the Gaza Strip to the West Bank, for the purpose of participating in her wedding, the respondent announced that:

> The respondents… are not opposed, beyond the letter of the law, to enabling the passage of petitioners 1-3 from the Gaza Strip to the Judea and Samaria Area for the purpose of participating in the wedding ceremony of petitioner 1, and this on condition that they undertake – all of them – to return to the Gaza Strip after the end of the ceremony, and subject to their depositing a bond in the amount of NIS 20, 000 to ensure their return as aforesaid.
>
> (HCJ 3592/08 **Hamidat v. Commander of the Army Forces in the West Bank** respondent's reply dated 5 May, 2008 at paragraph 27).

Similar notices were received in other cases, for example in HCJ 2430/08 **Abu Ghalee v. Commander of the Army Forces in the West Bank** and HCJ 2905/08 **Abu Shenar v. Commander of the Army Forces in the West Bank** (these petitions are still pending before the court)

17. Therefore, in cases of persons who apply to travel from the West Bank to the Gaza Strip, the respondent requires an undertaking **never to return**, whereas in cases of persons who request to travel in the opposite direction – from the Gaza Strip to the West Bank, the respondent requires an undertaking to **return immediately.**

18. The respondent cannot grab at both ends of the stick and turn the passage from the West Bank to Gaza into a one way valve. The respondent may not exploit the plight of the petitioners and others in their situation in order to "encourage" the passage of Palestinians in one direction – from the West Bank to Gaza.

The Legal Argumentation

The respondents' decision is unreasonable and disproportionate

19. When the respondents exercise their authority to grant an entry permit for the purposes of passage to the West Bank, they are only permitted to consider pure security concerns. The only legitimate security considerations that the respondents may consider when they adopt security measures are considerations relating to prevention of future risk (see HCJ 7015/02 **Ajouri v. IDF Army Commander of the West Bank**, *Piskei Din* 56(6) 352, 370 (2002):

> Indeed, the military commander of a territory held in belligerent occupation must balance the needs of the army on one hand, with the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional

> system of considerations, namely, political considerations…
>
> (HCJ 2056/04 **Beit Surik Village Council v. The Government of Israel**, *Piskei Din* 58(5) 807, 829 (2004)

20. The measure adopted by the respondents **does not emanate from security considerations.** The respondents thereby harming the petitioners' basic rights without just cause, and by transgressing on the guidelines to which they committed themselves in the past, namely, enabling passage in humanitarian circumstances.

    The respondent's reply explicitly indicates that he has no opposition (security or otherwise) to the actual passage – and yet **despite this the respondent seeks to confront the petitioner with a radical demand, in terms of which <u>he must undertake in advance never to return to the West Bank.</u>**

21. The respondent is attempting to rid himself of his obligation to concretely and substantively consider applications for passage between the Gaza Strip to the West Bank via Israel in light of the most recent security considerations, **and seeks instead to sweepingly prohibit, permanently, any future passage of the petitioner to the West Bank –regardless of the security situation and the circumstances.** Conduct such as this is completely unacceptable:

> A reasonable administrative authority, like a reasonable person, will only pass a decision on the basis of a factual foundation… an administrative authority that exercises its discretion without clarifying the facts that pertain to the case… or that stands firm in its decision to submit to a specific result, without depending on the facts of the case, is not exercising discretion required by law. In this case one may say about the authority that it is acting arbitrarily. Arbitrariness in turn is a form of corruption. It is radically severe. It is a cause of action for invalidating any administrative decision.
>
> (Yitzhak Zamir, *Administrative Authority* volume 2 733 (1996)).

22. And note well: in order to travel via Israel from the Gaza Strip to the West Bank **and vice versa the petitioner would in any case be required to apply to the respondent to receive his approval.** However this does not satisfy the respondent and he seeks to exempt himself even from the need to <u>examine</u> the petitioner's future applications – in the event that there will be such.

23. It is obvious that an administrative authority may not block the path of a person who wishes to appeal to it, and is obligated to examine the application of a citizen on its merits and to decide its fate after examining current facts and data.

It is here appropriate to quote the dicta of the honorable Justice Zilberg, who stated sixty years ago:

> A clerk cannot avoid a studious perusal of a citizen's application; neither may he suffice with a superficial reading of the application and then throw it away. It is incumbent upon the State clerk to seriously study every application that is brought before it, which is within its scope of jurisdiction, and to decide it.
>
> (HCJ 35/48 **Breslev Ltd. v. Minister of Trade and Industry**, *Piskei Din* 2 330, 334).

24. As stated, the respondent has gone further than "throwing away" applications: he is in fact demanding a sweeping undertaking in advance never again to file applications.

Conduct such as this is patently unreasonable and disproportionate.

Harm to the petitioners' rights

> A person does not have a stronger mental relationship than the relationship he has to his family members. And the relationship between a man and his children and his spouse is the strongest of all. This is true in the relationship between a mother and her children and a father and his children. This is natural law, a law that is stronger and superior to any other law.
>
> (HCJ 4365/97 **John Doe v. Minister of Foreign Affairs**, *Takdin Elyon* 99(1) 7, 30 (1999)).

The right to a family life

25. The right to a family life, including the rights of parents and children, grandparents and grandchildren and siblings, to maintain their family relationships, is recognized in Israeli law and international law. Corresponding to this right is the respondent's obligation to honor the family unit.

26. Article 46 of the Hague Regulations, which constitutes customary international law, establishes:

> Family honours and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

27. And it has already been ruled that:

> Israel is committed to the protection of the family unit by virtue of International Conventions.

(HCJ 3648/97 Stamka v. The Minister of the Interior, *Piskei Din* 53(2), 728, 787 (1999)).

See also: Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966; Articles 17 and 23 of the International Covenant on Civilian and Political Rights, 1966; Article 12 and Article 16(3) of the Universal Declaration of Human Rights, 1948; Article 12 of the European Convention on Human Rights; Article 27 of the Fourth Geneva Convention.

28. The Supreme Court has repeatedly emphasized the major importance of the right to a family life in many judgments, and especially in the judgment that was handed down in the **Adalah** case (HCJ 7052/03 **Adalah v. Minister of the Interior**, *Takdin Elyon* 2006(2) 1754 (2006)).

Thus, for example, Chief Justice Barak writes in paragraph 25 of his judgment:

> Our primary and most basic obligation is to maintain, to nurture and to preserve the most basic and the earliest social unit in the history of man that was, is and will be the basis that preserves and ensures the existence of human society – is this not the natural family.
>
> […]
>
> The family relationship… underlies Israeli law. The family has an essential and central role in the life of the individual and the life of society. The family relationships, which the law protects and which it seeks to develop are of the strongest and most meaningful in the life of man.

The welfare of the child

29. The existence of the International Covenant of the Right of the Child (1989), which was approved by the State of Israel in 1991, and the legislation of Basic Law: Human Dignity and Liberty strengthened the status of the child as a subject with independent rights, and as an independent legal personality.

30. Court rulings have emphasized on more than one occasion that when discussing the welfare of the child, this consideration should have a great amount of weight. The principle of the welfare of the child is an additional consideration which the respondents must consider when they deliberate on the petitioner's application to enter Israel in order to travel to his home in the West Bank.

The dicta of the Honorable Justice Zilberg are pertinent to our case:

> The test of the best interests of the child is a supreme principle… it may not be intermixed or diluted by other kind of consideration. Because when the legislator elevated it to the level that it has achieved in modern

> conception – and this modern conception has been adopted by the Sages of Israel in our era and throughout the eras - because a child is not an "object" that is preserved and held for the benefit or welfare of one of the parents, but he himself is a "subject", he himself is the "litigant", in this essential question, hence it is not possible to disregard his interests through any combination of reasons.
>
> (CA 209/54 **Steiner v. The Attorney General of Israel**, *Piskei Din* 9(1) 241, 251 (1955))

See also:

HCJ 40/63 **Lorentz v. Head of the Execution Office**, *Piskei Din* 17(3) 1709, 1717 (1963);
CA 549/75 **John Doe v. The Attorney General**, *Piskei Din* 30(1) 459, 465 (1975);
CA 2266/93 **John Does v. Richard Roe**, *Piskei Din* 49(1) 221, 271-272 (1995).

31. It is in the interests of children to be raised under the same roof as their father and mother within the framework of a stable family unit. A separation from one of the parents amounts to a traumatic experience which scars the tender souls of children. This is so especially with regard to toddlers, who require the constant care and permanent presence of both their parents. As time passes the damage caused to the children becomes increasingly severe until it is liable to become irreversible.

The right to respect and to freedom of movement

32. Palestinian residents of the Palestinian Authority have the right of freedom of movement within the parts of their land, including movement between the Gaza Strip and the West Bank. since they are viewed as one territorial unit.

See in this regard the recognition by the State of Israel of the Gaza Strip and the West Bank being one territorial unit:

Article 5 of the" Declaration of Principles" dated 13 September, 1993, signed by Israel and the PLO;
Article 23(6) of the Gaza and Jericho Agreement, "Cairo Agreement", that was signed by Israel on 4 May, 1994;
Article 11(1) of the Interim Agreement, which was signed by Israel at the White House on 28 September, 1995;
Article 1(2) of the First Annexure to the Interim Agreement, Security Arrangements;
The Protocol concerning the Implementation of the Interim Agreement (Protocol No. 7);
The Israel-Palestinian Authority Agreement on Movement and Access of 15 November, 2005;
HCJ 7015/02 **Ajouri v. IDF Army Commander of the West Bank**, *Takdin Elyon* 2002(3), 1021 (2002);

HCJ 7052/03 **Adalah v. Minister of the Interior**, *Takdin Elyon* 2006(2) 1754 (2006)).

33. The right to freedom of movement is the primary manifestation of human autonomy, of his free choice and the realization of his abilities and his rights. The right to freedom of movement is listed among the norms of customary international law

See regarding the right to freedom of movement:

HCJ 6358/05 **Vanunu v. The General of the Home Front Command**, *Takdin Elyon* 2006(1) 320, paragraph 10 (2006);
HCJ 1890/03 **Bethlehem Municipality v. The State of Israel**, *Takdin Elyon* 2005(1) 1114, paragraph 15 (2005);
HCJ 3914/92 **Lev v. District Rabbinical Ecclesiastical Court**, *Takdin Elyon* 94(1) 1139, 1147 (1994).

34. The right to freedom of movement is the motor that sets into motion the tapestry of human rights, the motor that enables a person to realize his autonomy, and his free choice. When freedom of movement is restricted that very "motor" is damaged and as a result thereof some of the possibilities and rights of a person cease to exist. Human dignity is thus harmed. These are the reasons for the great importance attributed the right to freedom of movement.

35. Preventing a person from regularly traveling to broad integral territories within the territory of the State or entity in which he lives infringes upon his social life, his cultural life and human rights, as well as on his freedom of choice. That person is then restricted in the most essential questions of his life: where he will live, with whom will he share his life, where will he educate his children, where will he receive medical care, who will be his friends, where will he work, what will occupy him and where will he pray.

36. The right to freedom of movement is also enshrined in international humanitarian law. The Fourth Geneva Convention reinforces freedom of movement as a basic right of protected persons, whether they are in occupied territory in the territory of an enemy state. Article 27 of the Convention determines that protected persons shall be entitled in <u>all circumstances</u> to humane treatment and to respect towards their human dignity.

37. International human rights law is also a positive source which enshrines freedom of movement as a basic human right. Thus article 12(A) of the International Covenant on Civil and Political Rights, which Israel signed and ratified establishes:

> 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.

38. The aforesaid Article 12 is a positive source. As a source of interpretation see also Article 13 of the Universal Declaration of Human Rights and Article 2 of the Fourth Protocol (1963) to the European Convention on Human Rights.

39. The petitioner's lifestyle, dignity, and right to privacy and autonomy are severely harmed as a result of the respondent's decision not to allow passage to Gaza via Israel (See: CA 2781/93 **Da`aka v. Carmel Hospital**, *Takdin Elyon* 99(3) 574, 595 (1999)).

40. The honorable court has previously recognized that when the army commander exercises his authority vis-à-vis the Palestinian residents of the territories, it must do so while respecting human dignity. (See for example HCJ 4764/04 **Physicians for Human Rights v. Commander of the IDF Forces in Gaza**, *Piskei Din* 58(5) 385, 394 (2004)).

The right of transit via Israel

41. The petitioners are not requesting entry to Israel in order to stay there. The petitioners have no interest or desire to stay in Israel. All they ask is to travel between the two parts of their land, which are geographically separate, with Israel in the middle.

The right in question is therefore not the right to enter Israel – but rather the right of transit via Israel.

42. **The right of transfer/transit** is recognized in international law and is qualitatively different from the right to entry.

We shall now elaborate on this right:

43. Even in Biblical times one may encounter the view according to which people are entitled to legitimately demand to pass through a country:

> Let me pass through thy land: we will not turn aside 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 highway, until we have past thy borders (Numbers XXI: 21).

Refusal of this claim was considered to be arbitrary, and even as justification for going to war.

44. **International law recognizes the existence of a right of transit even if it infringes upon the principle of sovereignty**. A state is obligated to facilitate passage within its territory to foreign subjects wishing to arrive at another state. The right of transit applies when passage is required (even if there are other alternatives), and when there is no harm caused to the State through which the passage is made. The passage may be conducted under conditions which aim to protect the legitimate interests of the State being passed through.

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 the case of an enclave, the right to of passage has the validity of custom, and naturally emanates from the very existence of the enclave. The scholar Farran bases this, among other things, on the legal principle according to which if one grants something, by implication, he also grants everything necessary to make the thing which was granted effectual (*cuicunque aliquis auid concedit concedere videtur et id sine quo res ipsa non potuit*).

In the words of Farran:

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

47. The right to transit also exits where there are no close ties. Classic cases where the principle of the right of transit has evolved are those cases of **landlocked states** (for example Switzerland or the Caucuses), **enclaves** that are completely engulfed by another state (for example West Berlin before the reunification of Germany and the Mount Scopus enclave between 1948-1967) and **states that are geographically divided** (such as the Palestinian territories).

48. In his comprehensive article on the right of transit, the scholar Lauterpacht describes it 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 transit on the writings of scholars, from Grotius and to present day, as well as on the practice of States. He proves that the basic principle of freedom of passage is consistently repeated in numerous bilateral and multilateral treaties (the earliest treaties to which he refers date back to the eleventh century), which regulated its concrete implementation in various contexts: passage through rivers and waterways or terrestrial passage through the territories of other states. He shows how the same logic was exercised with respect to seaways.

Amongst the most modern and broad treaties, in terms of the number of signatories, mention may be made of the Convention on the High Seas (1958) (article 3 thereof, with respect to access of landlocked states); the Convention on the Territorial Sea and Contiguous Zone (1958) (articles 14-24 thereof, with respect to the right of innocent passage); the United Nations Convention on the Law of the Sea (1982) (article 125 thereof on the right of access to and from the sea and freedom of transit) and the GATT Treaty (article V with respect to the right of transit).

49. The right of transit is conditioned, as stated, on the absence of harm to the state passed through. For this purpose the right may be conditioned on the payment of expenses that are related to passage itself; on other requirements such as quarantine to prevent the spread of disease, and so on.

50. With regard to security considerations, Lauterpacht writes the following:

> 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.
>
> (*Ibid*. at 340).

51. This approach is reflected in the covenants that have enshrined, in concrete circumstances, the general principle of the right of transit. The right of transit does not cease to exist at the time of emergency, nor during a time of war, however, it is possible to restrict this right pursuant to the circumstances. The restriction must, be as minimal as possible – from the perspectives of both its scope duration.

The right of transit as opposed to the right of entry

52. The right of transit and the right of entry are different rights and are qualitatively distinct from each other – both from a legal perspective and from a practical perspective.

53. When dealing with transit, the required **period of stay** must be brief. It is equal to the shortest period of time needed to cross the relevant portion of land. With respect to the **purpose of entry**, in the case of transit, the person passing through a state has no interest in this state, and his sole purpose is to reach his desired destination on the other side – the transit is the means but not the goal. This is obviously contrary to entry, where the purpose of the person entering is presence in the state and sometimes even residence or employment.

54. The difference in the nature of these two rights has significant ramifications on the level of potential security risk ensuing from each of them, as well as on the ability of minimizing the risk. As opposed to entry for the purpose of a long-term stay, transit carries with it a far lesser security risk. Moreover, in the case of transit, it is relatively easy for the state passed through to minimize the security risk almost entirely, by means of stipulating conditions with respect to the transit. It may, for example, dictate a particular route, impose various security requirements, and even closely supervise their implementation.

55. Thus, the scope of the right of transit is broader than the scope of the right of entry for the purpose of a stay, and therefore weighty arguments are required in order to violate this right.

Summary

56. The petitioner's sole request is to pass through Israel together with his son, and see his wife and daughter in the Gaza Strip. The respondent has no security claim against the petitioner, and he is even prepared to permit the passage, but he is exploiting the opportunity and the family's distress in order to compel the petitioner – like others in his situation – to sign an undertaking never to return to the West Bank.

    Such a policy is completely unacceptable, exceeds all bounds of reasonableness and proportionality and clashes head-on with the obligations of the respondent as army commander and as an administrative authority.

This petition is supported by an affidavit which was signed in the presence of an attorney in the West Bank, and which was sent to the undersigned by fax, after coordination via telephone. The honorable court is requested to accept this affidavit, as well as the power of attorney which was also given by fax, considering the objective difficulties with respect to a meeting between the petitioners and their counsel.

For all these reasons the honorable court is requested to issue an order nisi as requested, and after receiving the respondent's response, to make it into an order absolute. The court also requested to charge respondent with the petitioners' costs and attorney fees.

10 July, 2008

[T.S. 55489]

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Adv. Ido Blum
Counsel for the petitioners