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May 13 2010

Ms. Dalia Kerstein, Executive Director
"Hamoked Center for the Defence
of the Individual"
By fax 02-6276317

Dear Madam,

Re: **The Order on the Prevention of Infiltration (Amendment No. 2) and the Order on Security Provisions (Amendment No. 112) – Response**
Yours: 37230 of March 25, 2010
37230 of April 11, 2010

General

1. In your above-referenced letters, which were addressed to the Commander of the Central Command and to the Minister of Defense, you sought to present your comments to the above legislative amendments, and to delay their taking effect. With the consent of the Commander of the Central Command, below is our response to all of your claims, in order.

Background

2. On 13 October 2009, 25 Tishrei 5770, the IDF Commander in Judea and Samaria signed Amendment No. 112 to the Order on Security Provisions (Order on Security Provisions (Amendment No. 112) (Judea and Samaria) (No. 1649), 5770-2009) (the "**Amendment to the Order on Security Provisions**"), and Amendment No. 2 to the Order on the Prevention of Infiltration (Order on the Prevention of Infiltration) (Amendment No. 2) (Judea and Samaria) (No. 1650), 5770-2009) (the "**Amendment to the Order on the Prevention of Infiltration**").

3. The said legislative amendments were signed after an extensive administrative study, which involved IDF bodies, the Israel Police and the Ministry of Justice, in view of the Supreme Court's rulings in several petitions, to the

effect that a judicial review instance ought to be established regarding orders for the deportation of infiltrators. As ruled in HCJ 2737/04 **Kafarneh v. The IDF Commander in Gaza:**

> "The state ought to act early for the establishment of a mechanism of "internal" judicial review – alongside this court's review – of the holding of persons banished under the security legislation in the Area […] As any proceeding involving the denial of liberty, also the holding of such banished persons ought to be carried out according to clear and defined rules, and be subject to periodic judicial review".

4. The legislative amendments took effect **6 months** after the date of signing thereof, on April 13, 2010, in order to enable proper preparation for the implementation thereof. After the signing thereof, the orders were published in Hebrew and Arabic in the Compilation of Proclamations, Orders and Appointments, and were also publicly announced, *inter alia*, in the offices of the defense attorneys and on the bulletin boards at the military courts.

Definition of "Infiltrator"

5. In your letter, you claimed that the definition of "infiltrator" was dramatically expanded, and according to you, currently also includes persons who were born in Judea and Samaria, "foreigners and Palestinians who relocated to the bank from the strip", as well as Israelis and soldiers who are in Judea and Samaria, in view of the need to obtain a written entry permit, which is not given to any person belonging to the above populations.

6. To our understanding, your interpretation of the definition of infiltrator is not at all called for, nor arises from the language of the Order. On the contrary.

7. First, the definition of infiltrator was modified so as to define the infiltrator as "anyone **entering** the area unlawfully after the effective date, or being in the area **without a lawful permit**". This emphasis was added in order to underscore the obvious, namely that anyone being in the area with a permit, is obviously not an infiltrator. Thus, anyone born in the area did not "enter" it and therefore cannot be deemed as an "infiltrator", and likewise with respect to anyone having entered the area **with a permit** (be he a Palestinian from the Gaza Strip, a foreigner or an Israeli), whether a general permit or a personal permit.

8. Second, the military commander has granted, in General Entry Permit (No. 5) (Israeli Residents and Foreign Residents) (Judea and Samaria), 5730-1970, a general entry permit for Israelis and foreigners holding a permit to enter Israel (a B/2 visa which is issued by the Ministry of the Interior), and therefore the Order obviously does not apply to the persons included in the said populations, who enter and stay in the area by virtue of an appropriate permit.

9. Third, in respect of foreigners who have been living in Judea and Samaria for many years without a permit, we shall state that as part of the last political gesture which is mentioned in your letter, Israel handled the applications that

were submitted and the said foreigners received status in Judea and Samaria. To the best of our knowledge, no further applications were forwarded by the Palestinian Authority in this regard, and therefore the grounds on which your claim is based, as well as the exact populations for which the claim has any practical significance, are unclear to us.

10. And finally, with respect to residents of the Gaza Strip, we shall respond that both in the petitions mentioned in your letter and in additional petitions which concern the "right" of Gaza residents to live in Judea and Samaria without a permit (such as HCJ 660/08 **Aisha Amer**), our position remains unchanged, namely that the military commander in Judea and Samaria is entitled to determine the conditions for entering and staying in the area. It is our position that Gaza residents are not "exempt" from the duty to obtain permits to enter and stay in Judea and Samaria.

Criminal Offence

11. In your letter, you claimed that the Order sets forth excessively severe penalties, particularly in comparison with the parallel punishment in Israel. A review of the Order reveals that not only has the punishment not been aggravated relative to the previous Order that was in force, it was even made more lenient.

12. Thus, regarding an infiltrator, the penalty in the Infiltration Offence Order was alleviated to 7 years' imprisonment, *in lieu* of the 15 years' imprisonment under the previous Order. In addition, regarding armed infiltration it was determined that the penalty for this offence would be 20 years' imprisonment, *in lieu* of the previous life sentence.

13. Ultimately, more lenient punishment was determined in respect of an infiltrator, who shall prove that he entered the area lawfully, whose punishment shall be 3 years' imprisonment.

14. We shall make two remarks in respect of your claims regarding the "lack of logic" in the punishment which was determined. First, to our understanding, there is logic and justification to determining different and severe penalties in the area relative to those determined in the Israeli legislation, in view of the area's unique characteristics. It shall be recalled that the area of Judea and Samaria is a closed military area under belligerent occupation. In view of the above, the circumstances in the area are different, hence the differences relative to the law applicable in the State of Israel.

In this context, we shall refer to the ruling of the Supreme Court in HCJ 1073/06 **Walid Maslama v. The Military Court of Appeals for Judea and Samaria**:

> "As a general rule, also the claim regarding the need to equate the level of punishment in the area with the level of punishment in Israel, should not be granted. This issue, of course, underlies the differences between the penalties set forth in the Israeli law and the

> penalties in the security legislation prevailing in the area, and it stems from the handling of the circumstances in the area".

And to the ruling of the Supreme Court in HCJ 10416/05 **Drar Elcharov v. The Military Court in Judea**:

> "The differences between the level of punishment in the area and the level of punishment in Israel originate from the difference between the relevant laws which are applicable in Israel versus the laws which are applicable in the area, and therefore it has already been ruled that as a general rule, petitions concerning this issue do not fall within the exceptional cases which justify our intervention, as long as the military courts operate within the law".

And recently, the ruling of the court in HCJ 7932/08 **Drar Charov v. The IDF Commander in Judea and Samaria**:

> "The existence of a gap between the law in the area and the law in Israel, **in itself**, is not grounds for judicial intervention, and it stems from the different – historical and current - circumstances".

15. Second, in respect of an infiltrator who shall prove to have entered the area lawfully, according to you, this is a theoretical possibility, since it is inapplicable to persons entering Judea and Samaria from the Gaza Strip. In this regard, we shall respond that, as aforesaid, our position regarding entry from the Gaza Strip is different, and, to our understanding, anyone having entered the area prior to the year 2000 is required to return to his home in Gaza upon cancellation of the safe passage. Either way, this issue is still pending before the Supreme Court and we are awaiting its decision on the matter.

16. You further claimed that the alternative is inapplicable to anyone having entered Judea and Samaria many years ago, since he would not be able to locate the permit granted to him "20 years ago". To our understanding, as aforesaid, upon the completion of the political gesture which was also mentioned in your letter, there should not be in the area any residents who have been there for many years without a permit, since they have long since received status in the area. With regard to anyone having entered the area recently, the order will certainly apply to him, and insofar as he entered the area with a permit – he would easily be able to produce evidence thereof.

<u>Deportation without Judicial Review</u>

17. In your letter you complain that while the judicial review of the deportation order would be performed before the Committee for the Examination of Deportation Orders (the "**Committee**") within no more than 8 days, it would, in fact, be possible to remove a person prior thereto, since there is no possibility to approach the Committee, unless the military commander shall have chosen to present the deportee's case before the Committee. You further complain that the Order does not establish the rights of the person slated for

deportation to be represented and to consult with his attorney, as well as the right to appeal the decision.

18. In this regard, we shall respond that according to our understanding of the legislative amendment, the deportee will be able to approach the Committee during the period of time in which he may not be removed from the area (72 hours from the moment of issuance of the deportation order in his case). We intend to incorporate the above into the relevant command procedure, such that alongside informing the person slated for deportation of his rights in accordance with Section 3(A3) of the Order, including, *inter alia*, his right to have a close person notified of his being held in custody, we intend to inform him that he may approach the Committee to have the deportation order brought before the Committee for its review.

19. To our understating, presenting the individual order for judicial review is not required in each and every case, since there are infiltrators who will not so desire and who will choose to exit the area immediately upon receipt of the deportation order. Moreover, experience demonstrates that in most cases the persons slated for deportation are held in custody upon receipt of the deportation order, pending coordination of the deportation with their countries of origin, and therefore they will be brought before the Committee within the time frame set forth in the order, namely, 8 days from the date of issuance of the deportation order.

20. In reference to the right of representation, we refer you to Section 3(A3) of the Order on the Prevention of Infiltration, whereby:

> "Where a deportation order is issued under subsection (a), the infiltrator will be given information in writing or orally, to the extent possible, in a language he understands, regarding his rights under this order, as well as his right to have a person close to him and an attorney notified of his being held in custody."

And to Section 87.19(c) of the Order on Security Provisions, which explicitly determines that "A person held in custody may avail himself of a representative when pleading before the Committee…", thus establishing the right of representation before the Committee, if the person held in custody so chooses. In view of the aforesaid, we have found no basis to your claim of prejudice to the rights of the infiltrators whose case shall be presented before the Committee.

21. With regard to the right of appeal, we shall note that since we are concerned with a judicial committee and not with a court, we have found no reason why there is a duty to enable a right of appeal from its decisions to an additional instance. The Committee's decision may be challenged, as is the case today, through a petition to the High Court of Justice.

Holding in Custody and Release on Bail

22. In this regard you stated in your letter that, contrary to the Israeli law, the Orders do not include the possibility of releasing the person held in custody

due to the lapse of time, and that the discretion of the military commander and of the Committee is limited in respect of lack of cooperation by the person slated for banishment, due to both the lack of a definition of "cooperation" and the need to locate countries which will agree to accept him. In addition, it was claimed that restricting discretion with respect to a judge in criminal affairs or administrative detentions, is unjustified.

23. In this regard, we shall respond that in view of the security considerations involved in the need to hold infiltrators in custody, such as the persons currently slated for deportation, against whom deportation orders have been issued and who are held in custody, the lapse of time **in itself** cannot, as a general rule, constitute a circumstance for release. However, it arises from the provisions of Section 87.14(c) that the Committee will be able to order the release of a person held in custody, if it is convinced that there are special grounds so justifying, if his release poses no danger. Therefore, if the person slated for deportation will seek to convince the Committee that he should be released from custody since his extended custody constitutes special grounds so justifying, he will be able to do so.

24. As for the discretion regarding the lack of cooperation by the person slated for deportation, we shall state that the purpose of this section is to prevent a situation where deportation is rendered impossible through frustration thereof by the designated deportee. To our understanding, the broad definition in Section 87.14(c)(1) does not require "pleading before one hundred countries and more " by the designated deportee, since this circumstance is a **broadening** circumstance whose purpose is to provide examples for considerations in this regard, but does not exhaust the Committee's consideration in the matter, which, as may be recalled, is a judicial committee with broad discretion.

25. In addition, with regard to your claim on the military commander's discretion and authority, these will henceforth be subject to the Committee's review. Clearly, this benefits the persons slated for deportation, since the committee is a judicial committee, which will periodically review the holding in custody, and will be able to re-examine the issues of the infiltration and the custody.

26. In respect of the restriction of the Committee's discretion, we believe that the Committee has been granted broad authorities and that its discretion is not restricted in the sense specified in your letter. The fact that a judge will have certain authorities as a member of the Committee and other authorities as a judge in the court where he serves – is of no consequence. The same occurs also in Israel, where a magistrates court judge presides as registrar at a district court, and his authorities in each one of the instances are entirely different, or where a district court judge sits as part of a criminal panel or, alternatively, in a hearing of an administrative petition – the authorities are derived from the instance and from the scope of the discretion entrusted thereto by the legislator.

Substantive Provisions regarding the Committee's Work

27. In the last part of your letter, you grieve of the Order lacking substantive provisions, since the legal fate of a person whose release was ordered by the Committee is unclear, since it is unclear whether it will be possible to revoke a deportation order where a person cannot be deported to the country whence he came, and finally, since the degree of the Committee's independence is unclear due to the need to receive the military commander's position in certain cases.

28. In respect of the said claims we shall respond that the legislative amendments contain all of the substantive provisions, including Section 87.19(a) which concerns procedure, whereby "in any procedural matter which is not mentioned in this Title, the Committee shall hear in the manner which it deems the most effective for reaching a decision in the matter". This section allows the Committee broad discretion with regard to its manner of operation, and appears to enable effective and fair hearings, according to the Committee's best judicial discretion.

29. As for the claim regarding the legal fate of a person whose release was ordered by the Committee, such matters do not concern the Committee and are irrelevant to the legislative amendments at hand. The status of a person whose release from custody was ordered by the Committee is within the military commander's authority, and is derived from various considerations, which the Committee is neither authorized nor able to consider, *inter alia*, in view of the political issues involved in this matter.

30. With respect to your claim regarding the impossibility of revoking a deportation order where a person cannot be departed to the country whence he came, it shall be noted that this fact in itself will indeed not be able to serve as grounds for the revocation of a deportation order by the Committee for understandable reasons, where the countries of origin of some of the infiltrators to Judea and Samaria refuse to accept their residents back into their territory.

31. Finally, the need to receive the military commander's position is required in certain cases in view of the security ramifications which the Committee's decision may have. Such is the case, where revocation of a deportation order or release from custody are concerned. Clearly, the need to receive the military commander's position does not mean accepting the military commander's position on the merits without discretion, and it is unclear what your concerns in this regard are based on.

32. **In conclusion**, the legislative amendments were signed by the IDF commander in Judea and Samaria more than six months ago, were published and brought to the public's attention in various ways. These Orders certainly do not injure a “huge number” of persons, in view of the minute number of deportation orders which are issued each year by the military commander, and their sole purpose was in fact to improve the legal situation with regard to the implementation of deportation orders which are issued by the military commander. In view of all of the aforesaid, we have not deemed to revoke the legislative amendments or to delay their taking effect.

Sincerely,

[signature]
Limor Tachnai, Major
Head of Population Registry Section
On behalf of the Legal Advisor

cc: Bureau Chief of the Military Advocate General
Bureau Chief of the Commander of the Central Command
Assistant Coordinator
Legal Advisor to the Defense Agencies
Assistant Head of National Section
Bureau Chief, the Judea and Samaria Division
Deputy Attorney General (Consultation) – Adv. Mike Balas
Director of HCJ Department - Adv. Osnat Mandel
Senior Assistant to the Attorney General – Adv. Raz Nizri
Military Advocate General Headquarters – Head of International Law Department