At the Supreme Court **HCJ 3170/07**
Sitting as the High Court of Justice **Scheduled for 24 September, 2007**

1. **Dr. _____Yunis Dwikat**
2. **Dr._____Yunis**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger – Registered Non-Profit Association**
4. **The Association for Civil Rights in Israel**
5. **B'tselem- Israeli Information Center for Human Rights in the Occupied Territories**
6. **Gisha: Legal Center for Freedom of Movement**
7. **The Public Committee Against Torture in Israel**
8. **Yesh Din: Volunteers for Human Rights**
9. **The Jerusalem Center for Legal assistance and Human Rights**
10. **Adalah: The Legal Center for Arab Minority Rights in Israel**
11. **Physicians for Human Rights**

The Petitioners

Represented by Adv. Yossi Wolfson and/or Adv. Oded Feller
Tel: 02-6283555 and Fax: 02-6276317

v.

The State of Israel et al

Represented by the Sate Attorney
Ministry of Justice, Jerusalem

The Respondents

Response on Behalf of the Respondents

1. Pursuant to the decision of the honorable Justice A Hayyot of 10 April, 2007, and in anticipation of the hearing that has been set by the petition for 24 September, 2007, the respondents are honored to present the response to the petition.

2. This petition, like the more than the 40 other petitions that are pending before the honorable court, deals with the petitioner's application to allow the continued residence, of the petitioners, who are citizens of foreign states in the territories of the

Judea and Samaria Region, and this by virtue of their marriages to residents of the Region.

3. The respondents' position is that by law the petition, like all the other petitions that will be heard jointly with this one, as well as the pending petitions should be dismissed, for the reason that the decisions that are under attack by the petition do not establish a basis for the court's intervention, and this is because it involves decisions that are largely political, as will be explained below.

   The furrow in which such a decision may be located has been threshed out by the judgments of the honorable court over the course of a number of years. The general perspective of this threshed out furrow brings a person to the one and only conclusion – in terms of which the petition is not rooted in the legal arena but rather in the political arena which deals primarily with the issue of implementing the interim agreements, and therefore it should by law be dismissed.

   In this response we will first present the legal framework in which an application of this sort should be viewed in light of the draft document established by the interim agreement and its implementation after the outbreak of armed hostilities. Because of the non- implementation of the draft interim agreement we will later on present the current law as has been established by explicit rulings of the honorable court more than twenty years ago before the interim agreements. These two facets of the law lead to one conclusion according to which the issue that we are dealing with may be located in the realm of political considerations, a realm which the honorable court does not customarily interfere with.

   Before presenting the pre–interim agreement legal frameworks, and the situation that flowed from it, we would like to precede this by a comment on the nature of the requested assistance, which is immigration due to marriage.

(A) Nature of the requested assistance - immigration due to marriage

4. Our case, like most of the petitions related to this petition, does not involve families that were split up because of war, but rather it pertains to Palestinian who traveled to other countries, where they met their spouses who were residents of the countries that they traveled to, and now they would like to bring them back to the region.

5. In fact employing the term "family unification" for the situation described in our petition is not entirely accurate. Since, family unification, as pointed out by the learned authors Rubenstein and Urgard in their article "Human Rights: State Security and Jewish Majority: The Case of Emigration for the Purposes of Marriage" (*Hapraklit* [The Advocate], 45, 5766, 319 is used to describe a situation in which the family has become separated because of a situation of armed hostility. In contradistinction the situation described in our petition, as in dozens of other petitions relating to it , is as said above a situation in which a resident of the region requests that his or her spouse be granted legal status in the region, even though this involves foreign citizens.

6. Accuracy as to the nature of the requested assistance is of significant importance in international law. For this purpose the words of the leaned Y. Dinstein in his article "Family Unification in the Occupied Territories" *Iyuney Mishpat* [Legal Issues] *13* (5758) 223 are most apt:

> **And while assistance for the renewal of ties and for meetings between family members who have severed relations as a result of the war is an important precondition to the unification of these families, it is noteworthy that section 26 does not impose any substantial obligation to allow this unification through a migration to or from the occupied area. Certainly this section does not contain one iota on those families where a split does not flow directly from a war situation" [emphasis added]**

7. Therefore the requested assistance in our matter to permit "immigration due to marriage" which is at the center of what is being requested in this matter and not "family unification", the latter of which, at least according to international law is a concept which has a very different meaning to the assistance requested in our matter and therefore has different consequences.
8. Bearing in mind this comment - which is seemingly semantic but which in fact contains the seeds to the necessary answer to the petition – we will present the various legal strata. And we will begin with a presentation of the interim agreement between Israel and the Palestinian Authority.

(B) Interim Agreement between Israel and the Palestinian Authority.

(B)(1) Implementation of Interim Agreement between the years 1995-2000

9. As stated, these petitions deal with applications for **immigration to the region due to marriage.** On the basis of a series of agreements between the State of Israel and the PLO, the Palestinian Authority was established. Israel and the Palestinian Authority signed a series of agreements within the framework of which many of the governmental powers were transferred to the Palestinian Authority, including authority in the areas of health, education, and for our purposes – the area of population registration.

Pursuant to the principles that were consolidated in the agreement, a range of powers in the area of population registration were transferred to the Palestinian Authority, where the mechanism for exercising these powers were clearly enunciated in the Interim Agreements, some of which powers required the prior approval of the Israeli side.

It should be made clear, in order to remove all doubt, that in the area of population registration, the responsibility and authority of the Palestinian Authority applied to the general Palestinian population in the Judea and Samaria Region, including those who lived in Area C, as defined by the Agreement.

This is how things are with regard to issue of the main subject of the petition, namely applications for immigration due to marriage.

According to section 28 of the Civil Appendix to the Interim Agreement with the Palestinian Authority, one must file applications of this kind with the Palestinian Authority, which has the power and authority with respect to immigration due to marriage in its territory, subject to the prior approval of Israel.

Section 28(11) of the Civil Appendix establishes:

> In order to reflect the spirit of the peace process, the Palestinian Authority may, with the prior approval of Israel, issue permanent residence in the West Bank and Gaza Strip to
>
> A. investors for the purposes of encouraging investment;
> B. spouses and children of Palestinian residents; as well as
> C. other people for humanitarian purposes with the goal of advancing and improving family unification.
>
> A copy of section 28 of the Civil Appendix to the Interim Agreement with the Palestinian Authority is attached and marked MS/1.

10. It should be noted that ever since the transfer of authority and powers to the Palestinian Authority in November 1995, the Palestinian Authority has agreed to issue permanent residence in the region, within the framework of annual and comprehensive coverage, which is determined by Israel and by the Palestinian Authority. Indeed permanent residence in the region because of marriage has been granted by the Palestinian Authority, subject to the approval of the Israeli side. However the applications are filed by Palestinian residents with the relevant Palestinian factors in the Palestinian Authority, and they transfer their decisions, according to their own decision making and discretion subject to the Annual coverage that has been established by Israel and the Palestinian authority, to the Israeli side. It must be emphasized that the Palestinian Authority is the decider as to which applications are transferred to the Israeli side, and which are not.

(B)(2)Outbreak of Armed Hostility and the consequent law

11. On 29 September, 2000 armed hostilities broke out between Israel and the Palestinians**.** The scope of the losses and the scope of the active forces turned the armed conflict into a daily war.

12. **From the beginning of the armed hostilities between Israel and the Palestinians, the regular working relationship that was established by agreements between the Palestinian Authority and Israel ceased to exits so that because of that, and against the backdrop of this severance, there was a complete suspension of the implementation of the mechanism that operated by virtue of the Interim Agreement in the matter of transferring applications for immigration as a result of marriage for prior approval.**
    In addition, a decision was also reached during that same period by political factors in terms of which applications for immigration due to the marriage of Palestinian residents would no longer be handled. The Palestinian Authority also ceased to transfer applications for approval by the state of Israel, and anyway it was not possible to have them approved.

    Since then, all handling of applications for immigration due to marriage has in fact stopped**.**

13. The respondents would like to emphasize that the honorable court has on many occasions established, in its judgments on petitions that were filed by residents of the region, that there is no place for its intervention in the respondents' position which states that at this point in time, and against the backdrop of the security – political situation in the region, applications for immigration due to marriage shall not be handled.

    And see for example HCJ 2231/03 *Lemia Ismail Abed Rabo Elshalalda v. Commander of the Benjamin Strip Takdin Elyon* 2003(2), 250 (2003) where the honorable Justice Procaccia declared:

> "…Secondly, an application for family unification in the name of the petitioner was never transferred by the Palestinian Authority to Israel. Moreover, ever since October, 2000 Israel has ceased to handle applications for family unification, which relate to the Judea and Samaria region in the face of violent hostilities that take place in the region, and in light of the political – security reality which prevails there… **as to the actual petition - this court has not in the past intervened with government policies not to deal at this stage with applications for family unification that apply to the region that is governed by the Palestinian Authority in light of the security -political realities in the territory (Cf. HCJ 5957/02, Eatedel v. Commander of the Benjamin Region et al of 26 August 2002). There is no place for us to intervene in the respondents' policies even in the case before us** [emphasis added]

14. To complete the picture in this matter it should be pointed out that between the months of September 2005 and March 2006 the respondents examined the possibility, in the framework of staff work that was undertaken in the subject, to renew the work relationship with the Palestinian side and thereby to once again handle applications in issues of population registrations, including applications for issuing permanent residence in the region. This staff work was approved by the political echelon and first steps were taken to implement it in the field.

    The problem was that in the month of February 2006 the Hamas Movement won the elections to the Palestinian Authority. As is known the Hamas Movement refuses to recognize the existence of the State of Israel and likewise the agreements which the state signed with the PLO, including the Interim Agreement.

    Against this backdrop the State of Israel reached decision number 4780 of 1 April 2006 to freeze contacts with the Palestinian Authority because it had become a "terror

authority that was threatening to the State of Israel", and therefore Israel returned to the policies which had operated before it was prepared to grant leniencies in this matter, where it was prepared to receive applications for granting visitor permits for exceptional humanitarian reasons, as well as applications for a visit for the purposes of registering minors in the population registry.

Government decision number 4780 of 11 April, 2006 is attached hereto marked MS/2.

15. We shall also note that after the fall of the Hamas Government and the establishment of the government headed by Salam Fayad Israel has worked to strengthen ties with the chairman of the Palestinian Authority, Abu Mazen and with the Fayad government in various areas. Within the framework of these ties there are now contacts on the most senior level between the Israeli side and the Palestinian side. These contacts can lead to certain benefits of one kind or another in the subject matter of the petition. Nonetheless it involves a very sensitive political issue, and anyway not an issue that may be tested by legal criteria.

16. We have thus seen that within the legal framework that the petition operates it is for all practical purposes entirely based on the implementation of the interim agreement.

Even in this context the honorable court established on more than one occasion that the issue of implementing the interim agreement is a political issue where there is no place for intervening in it, and we shall expand upon this further, but before we have done so, we would like to devote some words to the legal situation that prevailed in the region even before the Interim Agreement came into effect.

The aim of this survey is to show that even before the interim agreements, which as stated transferred the approvals of the subject matter of the petition into the hands of the Palestinian Authority, the honorable court has dealt with the question of the army commander's obligation to permit immigration to the region due to marriage in the region, and found that an obligation of this kind was not imposed upon him.

What this means is that even if theoretically we were to accept the petitioners' position – analogous on its own as we shall expand upon later on- that one should ignore the draft outlined in the interim agreement, we would find that our legs are standing in the primary legal stratum where even then there was no legal obligation

placed upon the army commander to permit immigration to the region as a result of marriage.

If this is how things were even before the interim agreements came into force, a fortiori that is the situation today.

(C) The era before the interim agreement - *Shahin* judgment

17. The honorable court has already been required in the past – and even in the era that preceded the period of the interim agreement – to deal with the issue, which the petitioners have sought to raise in this petition, as to the scope of responsibility of the army commander pursuant to international law, with an emphasis on the respondents' obligations in relation to the approval of applications due to the marriage of residents of the territories.

    Within the framework of HCJ13/86 *Shahin v. Commander of the IDF Forces in the Judea and Samaria Region, Piskei Din* 41(1) 197 (hereinafter HCJ *Shahin*) the subject of the hearing before the court as stated was the constitutionality of the then policy of the region commander of significantly minimizing the number of applications for immigration due to marriage which were answered. In this judgment, and after a comprehensive analysis of the scope of the state's obligations according to international law, the honorable court established that **there is no defect to significantly minimizing the number of applications for immigration due to marriage which they must answer, after these applications became a form of massive immigration into the region.**

18. The reason for this reduction was grounded in the fact that "already the phenomenon of family unification and of applications for family unification have changed from their original character. It originated in policy that was meant to solve problems that had created the Six Day War and the resultant situation; it was continued out of a will to assist, out of humanitarian considerations that went beyond the letter of the law, in cases that harshly affected the local population in the Judea and Samaria regions and in the Gaza Strip – but eventually it became a very confusing and problematic question – with its political and security facets – of a way of immigrating into the regions (HCJ *Shahin*, 197)

The honorable court after a comprehensive analysis of international law – dismissed the petitions. And thus it spoke:

> **The question that has been put before us, in practice... whether there is an obligation on the respondents' authorities to permit massive transit that encompass thousands of people from one side of the cease fire lines to the other, if the policy guidelines which the respondent has drafted for himself, in terms of which he will only issue a permit in special and exceptional cases but not in the many cases in which a man from Judea and Samaria or from Gaza wants to change the permanent residence of his wife who comes from a neighboring country, and whom he married when she visited the occupied territory as a tourist or when he went for a visit to one of the neighboring countries.**
>
> **This is our understanding, and this is our guiding principle, that the respondent's policies and modus operandi entails a consideration of each and every case according to the individual circumstances and in each case they will also re-examine to see if there are exceptional humanitarian considerations.**
>
> **It is the hope of us all that peace will also solve these problems, but solving it here and now during a time of war, by allowing the transit of the masses – and not of individuals – into the areas occupied by the IDF forces, cannot serve as a cause for this court's intervention against the backdrop of the petitions before us.**

In the absence of the aforesaid legal obligation that allows immigration for the purposes of marriage in the regions, the honorable court has left the work of organizing the issue of immigration for the purpose of marriage to the army commander.

19. The honorable court made an in-depth examination of the general principles of international law – and especially The Hague Regulations and the Fourth Geneva Convention – and the conclusion was that these do not **institute an obligation** on Israel to enable immigration by virtue of marriage to the occupied territories – in general, and in times of war – in particular.

We shall begin with a summary of the detailed analysis of the obligations pursuant to international law that was carried out by HCJ *Shahin* **From this summary it emerges that international law does not impose an obligation on decisions by an army commander on whether he should allow immigration by virtue of marriage to the territories.** And thus was said (emphasis ours):

> **The Hague Regulations of 1907 and the Fourth Geneva Convention contains no explicit reference whatsoever to the matter of family unification in general and to the right of entry of citizens of other countries to the region that is held by belligerent occupation. Would a state that held any territory by belligerent occupation want to act pursuant to the language and spirit of the above-mentioned conventions it would have no obligation to allow the entry to its region of a visitor or tourist in general or of a man seeking a spouse in the region, in particular There is also no obligation in the written expressions of the conventions, to permit its residents to exit the region of the military administration for the purposes of work, a visit, marriage or joining one's spouse; how much more so when it involves the exit and entrance to the regions and from the regions which are under the command of the body that declares the existence of a war situation with the state responsible for the military administration. The commonly accepted practice of the past and of the present demonstrates that at a time of a war situation freedom of movement is severely restricted, much more than is the normal practice in Judea, Samaria and the Gaza Strip, to which many have been permitted entry whether as tourists or whether within the framework of family unification It bears mention that that with regard to the exit from territories under the control of the enemy and the subsequent entry into an area under control of the second fighting party, the severe approach has on more than one occasion in the past taken the guise of a very non- humanitarian approach as did happen during World War II when they prevented family unification or entry into other country because of an escape from enemy territory , despite the fact that those humans who sought to escape,**

could expect certain death if they would not find a place willing to absorb them.

These phenomena are mentioned by me not from an abstract humanitarian vantage point, but in order to examine if indeed there are criteria set by Public International Law that ascribes to the right of entry from enemy territory to territory under the control of the state which is in a war situation the status of a legally acquired right.

Indeed there is in these conventions an obligation to honor family rights and to extend special protection to women, and the Fourth Convention even contains a long list of provisions to ensure food and medical care and the transfer of information from an area under military administration even with regard to the right of a protected alien to leave the country which has become one of the sides in an armed conflict, but in each case there is no mention, and not even a tiny insinuation, of rules that apply to the subject matter that is before us

The lack of any general reference in the above- mentioned Conventions to the issue of family unification should come as no surprise since family unification was always considered an important humanitarian issue, but was always handled on the principle of *ad hoc* arrangements which were unique to the circumstance of each case and which changed with time and with the security and political conditions…

Moreover the examples that were brought by Professor Baronali were taken from a set of circumstances that were completely different because not one of those examples involves the transfer of people from a country that finds itself in a state of war with its neighbor and into territory that is held under belligerent occupation. In none of the cases was there a consolidation of general principles that created mandatory and general customary norms with regard to the area under belligerent occupation or where precedents were created in this area which meet the

definition of evidence of general practice that is accepted as having the force of law"

It would not be superfluous to add that in this judgment the honorable Chef Justice Shamgar broadly surveys the additional sources of international law – treaties and declarations – without discussing their applicability to Israel, and finds that also in these documents there is no recognition of immigration due to marriage. This includes article 13 of the Universal Declaration of the Rights of Man, article 8 of the American Declaration of Rights and Obligations of Man, articles 12- 13 of the International Convention of Civil and Political Rights, and other relevant documents. See at 210 – 211 of the abovementioned judgment.

20. Parenthetically it may be noted that another and more updated expression to this concept of international law may also be found in the words of the learned Julian Ku in his essay "Customary International Law in State Courts" 42 *Va. J.Int'l L.* (2001) 265, 322.

21. Therefore already within the framework of the judgment in the Shahin case the honorable court established that the exiting arrangements in international law do not endow the petitioners with a right which places a corresponding obligation on the state to allow immigration by virtue of the marriage of the residents of the region with their foreign spouses, who are not and have never been residents of the region.

    And if this is how things were during the era prior to the Interim Agreement, a fortiori they still apply today, during a time period when explicit agreements have been reached with the Palestinian Authority in the matter of applications for immigration due to marriage, which have transferred the authority and responsibility for handling these matters to the latter (as stated subject to the draft that was included in the agreement which required prior approval by the Israeli side.

(D)The focus of the question in dispute

22. In practice the petitioners in their petitions are asking the state to assume for itself full powers in the field of immigration due to marriage because of the inoperability of the interim agreement, and not only should the state do this but it should also approve every application for granting residency status in the region, for this same reason.

Our above argumentation was designed to show the futility of this claim – for even if there was place for it to overcome the hurdles that have been placed before it as shall be detailed below – even in a legal situation where the interim agreement had never come into being the petitioners would still have failed to show cause, since it would have followed the aforesaid *Shahin* judgment. Pursuant to the rulings of the honorable court, the petitioners cannot raise any legal right which establishes an obligation on the part of the state to allow immigration by virtue of the marriage of residents of the region to aliens. This issue contains political hues, and its resolution lies in the political and not the legal arena.

The above stated position received full force from 1995, when the responsibility for this matter was handed to the Palestinian Authority within the framework of the interim agreement. In these agreements a mechanism for handling immigration due to marriage was consolidated. It is indeed true that this mechanism is not being implemented today against the backdrop of the political-security situation. However it is against this backdrop that we need to focus the question that is in dispute.

23. The respondents are of the opinion that the question that is located at the center of the petition is whether one may force the state through legal means to ignore the existence of the interim agreement and breach them, whether by exercising them unilaterally or whether through any other means, or alternatively to renew the working relationship with the Authority even within the current security – political reality.

    The respondents' position, which has already been established by the honorable court on numerous occasions, is that this matter is one of those essentially political issues with which the court traditionally does not interfere. We shall now expand upon this issue.

(E) The respondents' position

The circumstances of this petition

24. The respondents would like point out that the petitioner has lived in the region unlawfully since the year 2000. In fact, for the last seven years she has taken the law into her own hands, by unlawfully living in the region after she entered it by virtue of visitor's permit that was issued for a restricted period.

Nonetheless, recently (9 September, 2007) the honorable court ruled once again that it will not open its doors to those who have taken the law into their own hands. See HCJ 3483/05 *D.B.S. Escort Services Ltd. Et al v. Minister of Communications et al* (unreported) where the honorable Judge Gronis said:

> **"It is a general principle that "a person must decide in his heart whether to seek the court's assistance or to take the law into his own hands. A person cannot do these two things at once..." (HCJ 8898/04 *Jackson v. Commander of the IDF Forces in Judea and Samaria* (unreported 28 October, 2004). For the most recent ruling pertinent to this judgment see HCJ 851/06 *Amona Farmer's Co-operative for communal settlements Ltd. v. Minister of Defense* (not yet published, 29 January, 2006); HCJ 6102/04 *Moadi v. Minister of the Interior* (unreported 26 September, 2005) HCJ 1547/07 *Bar Kohva v. Israel Police* (not yet published, 11 July, 2007). The court shall not open its doors to those who have taken the law into their own hands, deride the provisions of the law and seek to put before the Authority a *fait accomplis*. The prohibition on taking the law into one's own hands falls under the rubric of the broader general principle that requires that a litigant who applies to the court for its assistance come with clean hands, (see for example HCJ197/81 *Friedman v. Mayor of Eilat*, Piskei Din 36(2) 425 (1982), HCJ 212/56 *Slonimsky v. Petah Tikva Municipality, Piskei Din* 11 446, 448 (1957); D"N 19/68 *Petah Tikva Municipality v. Minister of Agriculture, Piskei Din* 23 (1) 253 (1969); HCJ 609/75 *Israeli v. Mayor of Tel Aviv – Yafo, Piskei Din* 30(2) 304 (1976). The subject under discussion falls under the principle that has been defined as a thresshold cause in the matter of applying to the High Court of Justice or the Administrative Court. A litigant who acts with unclean hands will find that his petition is summarily dismissed without his claims being heard on the merits".**

25. **An investigation undertaken into the concrete facts of the petition revealed that in this case the Palestinian Authority did not transfer the said application to the Sate of Israel for its approval. Thus the mechanism that was established in the agreement was not operative and did not operate in our case**. In these circumstances and pursuant to the legal framework that has been approved time and

again by the honorable court, the verdict for this petition should be an outright dismissal since in these circumstances the Authority did not deliver to the Israeli side an application for immigration due to marriage in the cases of the petitioners (and see for example HCJ 10548/06 of 4 September, 2007.)

26. In dozens of judgments, some of which have only been given very recently, the honorable court accepted the State's claim which states that in situations such as these the verdict of these petitions should be an outright dismissal. Thus for example the court once again related to this issue in HCJ 5898/06 *Kaher Mahmud Hassan Ibrahim v. The State of Israel* (unreported) (emphasis not in original):

> **The verdict in this petition is an outright dismissal… in her response the respondent makes it clear that according to what she has been informed from the office of the legal adviser in the Judea and Samaria Region, from an investigation in the computerized system available to them, the Palestinian Authority did not transfer an application for family unification in the petitioner's matter to the Israeli side, so that in any event an application such as this was not handled. It also emerges from the investigation that even an application for a visitor's permit to the region was not transferred (the last investigation was carried out even though the petitioner himself does not claim that he filed the aforesaid application). In a long series of judgments that were given in similar cases, it was established that so long as the Palestinian Authority has not transferred the application for approval by the state of Israel, the latter is not a disputant of the petitioner and any grievance in this matter should be addressed to the Palestinian Authority (see HCJ *Kinana v. Commander of the IDF Forces in the Judea and Samaria Region*, a judgment of 27 May, 2003 by Judge Hayut; HCJ 6133/03 *Abu Bahar v. Minister of Defense, Piskei Din* 57(6) 651 given by Judge Naor, HCJ 1195/05 *Abu Mialah v. Commander of the IDF Forces in the West Bank*, a judgment of 16 May, 2005).**

The core assumption underlying these rules is that the question as to the manner of implementing the Interim Agreement, or more precisely, the question as to its

unilateral violation by the state, as the petitioners are claiming, is essentially a political question.

27. We will expand upon this position below.

(E) (2) The question as to the manner of the implementation (or non-implementation) of the Interim Agreement as a political question

28. The respondents' position is that the question as to the manner of the implementation (or non-implementation) of the Interim Agreement is a decidedly political question.

29. If we are to contextualize the question we need to remember that ever since the outbreak of armed hostilities between Israel and the Palestinians in the year 2000, the working relationship between the Palestinian Authority and Israel has been significantly limited.

    In the area that forms the subject of the petition the working relationship has ceased to exist. As a result of this the operation of the mechanism that was consolidated within the framework of the Interim Agreement for applications for immigration due to marriage has been suspended. Ever since then, applications for living in the region owing to marriage that have been filed by the residents of the region have not been handled.

30. In light of the aforesaid, the petitioner's application should be read not as forcing compliance with the Interim agreement but rather asking the court to order the state to violate it.

    The reason this is so is that pursuant to the provisions of the agreement, the State of Israel is not permitted to unilaterally grant someone who is not a resident of the region a visitor's visa or permanent residence in the region. Granting residence in the region, including granting Palestinian certification is not subject to the authority of the State of Israel.

    Should Israel unilaterally adopt such actions it would form a violation of the Agreement. We would like to point out that this does not involve a specific or marginal violation of the agreement; rather our assessment is that of the requested assistance was granted it would mean that there would be a violation in tens of

thousands of cases. Clearly the permanent residence of tens of thousands of aliens in the region is a political issue of the highest degree.

31. The respondents are of the opinion that a decision as to the implementation of the agreement- and especially the decision whether to violate it – is a decidedly political decision.

    According to the rulings of the honorable court the court shall not interfere in government decisions which are political by their very nature. In any event it cannot be determined that avoiding a violation of the agreement is unreasonable.

32. With respect to the implementation of the agreement, it would not go without saying that according to the provisions of the Interim Agreement the Palestinian Authority has an obligation to deal with the issue of unlawful residence in the territories of the Authority.

    According to the provisions of Article 28(15) to the First Addition to the Civil Annexure of the Agreement, **it is upon the Palestinian Authority to ensure that visitors to the Region not settle in the region longer than the period determined in the visitor's permits in their possession.**

    In this regard it should be mentioned that even before the cession of a working relationship between the Authority and Israel as a result of the outbreak of armed hostilities, the Authority avoided fulfilling its duties according to the agreement, in the sense of expelling those who were unlawfully living in the region, because their visitor's permits had expired. The problem is that the armed conflict has made the situation that much worse.

33. There therefore cannot be a dispute that in circumstances where the Authority has avoided fulfilling its obligations in accordance with the Agreement, in the sense of expelling those who were unlawfully living in the region, it is within the powers of the State of Israel to do so, in order to ensure the security of the Region and the security of the State.

    And in this matter we can only make reference to the honorable court in HCJ 4297/04 *Hazam Haled Yassin et al v. The Civil Administration in Judea, Samaria et al* (not yet published) where it is stated: as follows:

> **"…we shall like to add, that according to the data kept by the respondents there are tens of thousands of aliens living in the territories of the Authority whose visitor's permits have expired, but the Authority has done nothing to remove them, in spite of the obligations according to the Agreement with it. This failure explains why the respondents have adopted the approach in terms of which they will not permit the entry of aliens to the territories so long as the Authority does not fulfill its obligations in accordance with the Agreement."**

34. In conclusion of this chapter, we shall see that the political agreements to which Israel appended its signature determined the clearest procedure for approving settlement in the region due to marriage by the Israeli side, which has also been approved by the honorable court in a series of judgments.

35. The manner of implementing the agreement is an essentially political decision, and therefore no justification may be raised for the honorable court's interference.

(E)(3)The scope of judicial review of decisions that are of a political nature

36. The respondents are of the opinion that at this juncture, and considering the legal situation that has been detailed above and the political situation in the Region, a decision whether to allow the continued residence of foreign subjects in the territories of the region , as aforesaid, in stark violation if the Interim Agreement is a decidedly political matter.
37. Pursuant to settled law the scope of intervention by the honorable court in decisions of a political nature is minimal. The court has repeatedly upheld this principle in a series of judgments. In HCJ 66/99 *The Temple Faithful Movement v. The Attorney General, Piskei Din* 54(1) 199, Justice Y. Zamir determined:

> **And it must assess the foreseeable consequences of every decision, and the risks entailed therein, not only in light of legal principles, but also in light of extrajudicial values and interests, which may have an impact on communal peace and on the general welfare. Generally speaking, the court is not the correct or appropriate adjudicative body to balance considerations such as these and to**

bear responsibility for the consequences of its decision. This is the classical role of the political echelon, first and foremost of the government. The assignment of roles amongst the various state organs, and a correct evaluation of the powers and responsibilities of each organ, generally requires the court to allow the political echelon to fulfill its role, in a case such as this, with no interference by the court…

Even though the court has been careful, time and again, to clarify its position on this question, there are still petitioners who from time to time turn to the court with an application that attempts to force it to make a decision in classically political matters. Even bodies and groups that are critical of the court, claiming that it so to speak trespasses into the political arena, and would like to manage the affairs of state, are liable to apply to court in political matters, when it is more convenient for them to conduct the struggle in such a matter in court rather than in the political arena. However from the court's perspective, in the same way that it tries to scrupulously fulfill its task and not to shy away from tough decisions, in an area suited to it, so too the court when fulfilling its functions is punctilious not to deviate into areas outside of it.

38. The issue of approving settlement in the Region due to marriage, as well as the relationship with the Palestinian Authority for the purposes of approving applications is an issue that is not exclusively humanitarian. Indeed the humanitarian aspect is part of it, but in the circumstances that have been created since the outbreak of armed hostilities with the Palestinians, it is not the sole aspect. At the core of the decision regarding the change in policy with respect to living in the region is the political-security consideration.

    This issue encompasses questions with respect to balancing between the various political- security considerations. Considerations that are related to the State of Israel's foreign relations and its position with respect to political contacts with the Palestinian Authority, and other considerations. In HCJ 4481/92 *Gabriel Bragil, Secretary General of the "Peace Now" Movement v. The Government of Israel, Piskei Din* 47(4) 210 the honorable court dismissed a general petition that was filed

against civilian settlement in the occupied territories. With respect to the political nature of this question Chief Justice Shamgar said:

> **There are those who have attempted to transfer disputes which are predominantly of a political hue to the domain of the court. I pointed out there, that as far as I was concerned I did not believe it was possible to create a hermetically sealed practical law or a filtering system that prevents disputes that have political elements sliding into the area of a High Court of Justice hearing. The criterion that has been applied by the court is of a legal nature but the subjects of public justice also encompass political principles in the various meanings of this concept. <u>The question that must be presented in a case such as this is generally speaking, what is the predominant nature of the dispute</u>. As has been explained the criterion applied by the court is legal, and pursuant to it a subject will be examined for its suitability for a court hearing, namely <u>whether it is a subject that is predominantly political or whether it is predominantly legal.</u>**
>
> **In the case before us it is patently obvious that dominant nature of the subject is political, and so it has continued to be so from the beginning until now.**

39. Moreover the respondents are of the opinion that in the circumstances that have been created, the decision that is being requested by the petitioners is **<u>a violation of the agreement</u>** and of the draft that has been outlined (even if this requirement is presented on the assumption of the *de facto* implementation of the Agreement). A decision regarding the implementation of the Interim Agreement, the format and scope of this implementation is a political decision of the highest form, which is subject to the government's broadest discretion.

These things are especially valid at this present moment in time in which there is political sensitivity, for obvious reasons.

Even with respect to the specific context of interference in the respondents' policies that relate to settling in the region the court has found that there is no place to interfere, and see in this matter the judgment of the honorable court in HCJ 8881/06

Gazunah v. The Army Commander in the Judea and Samaria Region, which has not been published, which states as follows:

> **We do not have it within our power to grant relief for the petition. As is known it is not the court's practice to interfere with policies that the government has adopted in accordance with the security situation and the development of relations between the Palestinian Authority and the State of Israel, when the applications are for the return of residency or for family unification which pertain to the region, (HCJ 2231/03 *Abed Rabbo v. The Commander of the Benjamin Region* (not yet published) [Justice Procaccia]**

And for a more general perspective see, on this matter, drawing an appropriate analogy, also the dicta of Justice Zamir in HCJ 6029/99 *Pollard v. The Prime Minister and the Minister of Defense, Piskei Din* 54(10), 241 at 248:

> **"The court does not form a part of the Public Administration and is not accustomed to managing the affairs of state. The role of the court is restricted to reviewing the constitutionality of decisions and actions of the administrative authorities, including the government. However the remedy requested by the petitioner involves the court in routine administrative affairs. It deviates from the role of the court and from the assistance the court is accustomed to granting. This is especially so in the matter under discussion, owing to the nature of the matter. <u>The correct framework for dealing with the matter at hand which has to do with government activities aimed at freeing the petitioner is Israel's foreign policy. It requires contacts with the United States Government at various levels, including the level of heads of state. In this area, as is well known the government has very broad discretion, so that correspondingly the court's review powers are very restricted.</u>**

Also in our case the requested assistance is located in the area of foreign policy, since it requires contacts with the Palestinians on the general level, and in the main – it is located at the very heart of the government's discretion. Therefore the respondents are of the opinion that there is no place for the honorable court's interference in a

political decision which is a decision related to the nature of the relationship with the Palestinian Authority.

40. In this petition as in dozens of other petitions related to it, the subject matter being dealt with is extrajudicial – predominantly political and security oriented – which the Government of Israel is permitted and duty-bound to consider, with regard to the manner of managing the state's foreign relations and the long-term impact that is liable to arise as a result of a state decision in the aforesaid area.

41. In light of the aforesaid the honorable court is requested to dismiss the petition.

42. The facts stated in this response are supported by the affidavit of Lieutenant General Shlomi Muhtar, Head of the Department of the Operations Branch at the Coordinator of the Activities of the IDF in the territories.

Today: 6 Tishrei 5768
18 September, 2007

Chani Ofek
(signed)
Senior Deputy A to the State Attorney

Itay Ravid
(signed)
Assistant to the State Attorney