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**At the Supreme Court**  
**Sitting as the High Court of Justice**

**HCJ 3774/07**

In the matter of:

1. \_\_\_\_\_ **Salamah, Identity No. \_\_\_\_\_**,  
Resident of the Palestinian Authority
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

Represented by Abeer Jubran (Lic. no. 44346) and/or Yossi Wolfson (Lic. no. 26174) and/or Yotam Ben-Hillel (Lic. no. 35418) and/or Hava Matras-Irton (Lic. no. 35174) and/or Adv. Sigi Ben-Ari (Lic. no. 37566) and/or Anat Kidron (Lic. no. 37665) and/or Ido Blum (Lic. no. 44538) of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger  
4 Abu Obeidah Street, Jerusalem 97200  
Tel: 02-6283555; Fax: 02-6276317

**The Petitioners**

v.

1. **The Commander of the Army Forces in the West Bank**
2. **General of the Southern Command**
3. **Minister of the Interior**
4. **Minister of Defense**
5. **The State of Israel**

**The Respondents**

### **Petition for an Order Nisi**

A petition is hereby filed for the issuing of an order nisi directed at the respondents and ordering them to come and show cause why they will not issue petitioner 1 entry permits to Israel, for the purpose of traveling between Gaza and the West Bank and back again, to make visits to the *Sharia* courts in the West Bank within the framework of his duties as *kadi* (judge) of the Palestinian Sharia High Court of Appeals, and as legal adviser to the Chairman of the

High Council for Sharia Law, by virtue of an appointment by the Chairman of the Palestinian Authority, and as the General Director responsible for Sharia Courts' Maintenance Funds in the West Bank and Gaza Strip.

### **Request for Urgent Hearing**

The Court is requested to arrange for an urgent hearing to hear the petition in light of the importance of the function filled by the petitioner, including that of general commissioner of the Maintenance Fund. Within the framework of his job the petitioner is responsible for promoting the Maintenance Fund system in Sharia courts both in the West Bank and in the Gaza Strip, since we are speaking of one court system that operates in both the West Bank and the Gaza Strip.

The petitioner is currently in charge of coordinating a program, which has been operating for years in Egypt and in Jordan, and which enables the more orderly enforcement of Sharia court judgments in maintenance and child support cases.

The petitioner has invested many long months learning about the Maintenance Fund which today operates in Egypt and Jordan, and he only recently completed his tour of these countries. He has collected, and still collects data from Sharia courts in the Gaza Strip, but for the purposes of consolidating the final criteria and for tailoring the program to the Palestinian Territories; he must visit other Sharia courts in the West Bank and learn about the needs of these courts from a close vantage point.

In addition to this the petitioner, within the framework of fulfilling his duties, needs to be present from time to time at the Sharia courts in the West Bank in order to closely observe their work and their rulings, for the purpose of coordinating the case law between the Sharia courts, to create harmony and unity in the court system's rulings, and to offer guidance as much as is necessary, to the system's employees.

Both sections of the petition, the factual and the legal, form an inseparable part of this application.

### **The Factual Infrastructure**

The judiciary is not merely a group of judges, a book of laws, a table, chair and lamp. The concept judiciary is wider- wider and deeper- than these. The court is justice and integrity, values and customs, convention and concepts, principles and tenets.

(Justice Heshin, in CA 6339/97 *Rocker v. Salomon Piskei Din* 55 (1) 199, 267)

### **The Parties**

1. Petitioner 1 (hereinafter: the “**petitioner**”) Palestinian born 1969, lives in Gaza.
2. Petitioner 2 (hereinafter “**HaMoked**” or “**The Center for the Defence of the Individual**”) is an organization that works to promote human rights in the occupied territories.
3. Respondent 5 occupies the territories of the West Bank and the Gaza Strip under belligerent occupation.
4. Respondents 2-3 are responsible for issuing permits for entry into Israel for the purpose of providing passage between the Gaza Strip and the West Bank. Respondent 3 is vested with the powers, which it has delegated to respondent 2, who acts according to respondent 4’s guidelines. Respondents 1 and 3 exercise on behalf of the State, each one in his district, their powers with regard to the Palestinian territories, and they bear the obligations towards them.

### **The Factual Infrastructure**

#### **The petitioner’s function as a Kadi, and his need to travel in order to visit the Sharia courts in the West Bank**

5. The petitioner is a judge on the Palestinian Sharia Court of Appeals, and is a legal adviser to the chairman of the High Council for Sharia Law by virtue of an appointment of the Chairman of the Palestinian Authority. He is also responsible for and is the general commissioner of the Maintenance Fund of the Sharia courts in the West Bank and Gaza Strip

A copy of confirmation by Chief Justice Dr. Tisir Rejib Alhamimi, Chairman of the Higher Council of Sharia Law in the Palestinian Authority is attached and marked p/1.

6. It should be made clear that the Sharia court system in the Gaza Strip and the West Bank, which comprise Palestinian Authorities' territories, is one entity.
7. By virtue of the petitioner's duties in the Sharia court system, he carries obligations upon his shoulders that he is required to dispense with appropriately. Among other things the petitioner must actively oversee the work of the Sharia courts, including the Maintenance Funds, which requires him to visit the various Sharia courts in the West Bank and Gaza Strip. Likewise the petitioner must seek the golden path in trying to solve the problems encountered by the various courts with respect to the implementation and enforcement of the judgments, and to align the rulings.
8. The duty of the petitioner is first and foremost to serve the Palestinian civilian population, including the protected population in the West Bank. Simultaneously he must promote the work of the various Sharia courts in the occupied territories and the supervision over them.
9. The petitioner studied management of the Sharia legal system in Egypt and in Jordan, and he only recently completed his tour of Jordan and Egypt for the purposes of studying and understanding the manner of implementing the program that has already been operative in those countries, and which is called the "Maintenance Fund" (hereinafter: the "**program**") in order to replicate it and implement it in the territories. The program is meant to unburden the lives of women and children who nowadays, for one reason or other, do not receive the court ordered maintenance. The program will advance the weaker population in the territories and will benefit it.
10. The petitioner is the only person familiar with the details of the program and has conducted comprehensive and comparative research on this issue.
11. In order to implement the program in the Palestinian territories, the petitioner must on his own accord collect data that is suitable for consolidating criteria, and for tailoring the program to the needs of the protected population that will provide them with a fair solution to the distress in which many of the women and their children live.
12. In addition to this and by virtue of the petitioner's duties, his travels are needed in order to prepare the future infrastructure to coordinate laws and rulings of the Sharia

courts in the Palestinian territories with those of the Israeli Sharia courts, including family matters, in light of the differences that prevail between the various courts, a situation that creates harsh distress for married couples, where one of the parties is an Israeli citizen, and the other a resident of the Palestinian Authority.

### **Exhaustion of Proceedings**

13. On 5 February, 2007 the petitioner through the Adalah organization, the Legal Center for the Rights of the Arab Minority in Israel, applied to the Coordinator of Activities in the Territories, General Yosef Mishlav, and requested to receive an entry permit to Israel for the purposes of his passage from Gaza to the West bank, in order to fulfill his duties as a legal adviser in the Sharia courts department, and from time to time to oversee the administrative and legal work of the Sharia courts in the West Bank.

A copy of the letter dated 5 February, 2007 is attached and marked p/2.

14. On 13 February, 2007 a reply was sent from the Office of the Coordinator of Activities in the Territories, which states “from an investigation that was conducted, it emerges that \_\_\_\_\_ Salamah (ID No. \_\_\_\_\_) **has been prevented by the security forces who are in opposition** to the passage through the district of Judea and Samaria. In light of this we are unable to answer the request in the affirmative” (the language error appears in the original (A. G.).

A copy of the letter dated 13 February, 2007 is attached and marked p/3.

### **The Legal Argumentation**

#### **Introduction**

15. In this section we shall examine the proportionality of the respondents’ decision to prevent the passage of the petitioner, in his capacity as Kadi and as Commissioner of the Sharia courts, from Gaza to the West Bank, through Israel, and we shall highlight the ramifications of this prevention of passage on the Sharia court system and on the promotion of the Maintenance Fund system, as well the harm done to the Palestinian civilian population.
16. In the first chapter we will examine the work of the petitioner as Kadi, and the importance of preserving the court system in the Territories, since the task of judge is a neutral task, that is not burdened with socio political baggage.

17. In the second chapter, relying upon international conventions and Israeli court rulings as our guide we shall determine the occupying power's duties to adopt active steps for the purpose of preserving and promoting the interests of the protected population.
18. In the third chapter we shall examine the status of the Gaza Strip and the West Bank before the implementation of the evacuation of settlements from the Strip, and after the evacuation plan, in light of political treaties that were signed during that period as well as the Supreme Court rulings. Likewise we shall highlight the status of the Sharia court system in both the Gaza Strip and in the West Bank.
19. In the fourth chapter we shall examine the rights that have been harmed as a result of the prevention of the petitioner's passage to the West Bank via Israel, including the harm caused to the fabric of Palestinian society. After that we shall examine, as it is currently interpreted in international customary law, the right for citizens of one country to pass through another country.
20. In the fifth chapter we shall examine whether indeed the relevant considerations had been taken account of when the decision was made to prevent the petitioner in his capacity as judge to travel to the West Bank, in light of his security background and the ramifications of preventing such passage.

## **Chapter One**

### **The Importance of the Petitioner's Field Work as Kadi**

21. As stated above, the petitioner seeks to travel from the Gaza Strip to the West Bank via Israel, for the purposes of fulfilling his duties as a Kadi in the Sharia High Courts of Appeal, and as the General Commissioner of the Maintenance Fund of the Sharia Courts in the Palestinian Territories, both the Gaza Strip and the West Bank equally.
22. The petitioner's duties require him to be physically present at the various Sharia courts in the West Bank, in order to closely examine the problems encountered by the courts with respect to the implementation and enforcement of judgments concerning family law and maintenance payments, and in order to harmonize the judgments and workings of the Sharia courts in the West Bank with those in the Gaza Strip. Since it is one court system that has been split into two parts.
23. Ensuring harmony in enforcement of Sharia court rulings in family law, including Maintenance, and preserving the lifestyle of the population are important components

that are among other things meant to preserve the Palestinian public trust in the court system, including the Sharia courts. This is an essential requirement and ensures that a system of justice, law and the rule of law, that are basic to the life of every society and every citizen, is maintained in the territories.

24. It is incumbent upon the judge to be in close proximity to the society in which he operates, for the purpose of understanding their distress and the problems that the public faces. Simultaneously the judge in his capacity as adjudicator which is a neutral body must be disconnected from the social and political struggles of the society in which he lives and which he serves, as expressed by Prof. Barak:

**Judging is a lifestyle that has a certain element of seclusion; that is cut off from the social and political struggles, that places certain limits on the freedom of expression and of reaction; that has a great measure of isolation and internalization. However this is not a lifestyle that is cut off from society. One should not build a wall between the judge and the society that he is active therein. The judge is a part of his nation.** (A. Barak *Shofet BeHevra Demokratit* [A Judge in a Democratic Society] (2004), p. 52).

25. An effective legal system needs to be internally synchronized. In an effective legal system, which serves the public who rely upon it, the stratum of professional judges is supported by the stratum of an effective legal administration. The operation of a functioning legal system is not possible via remote control; much in the same way as reading the judgments of any particular country does not equip the reader with the full picture of the modus operandi of the legal system of that country. Someone entrusted with the management of the legal system needs to learn firsthand the daily conduct of the judges and of the legal administration; must be familiar with the constraints with which they operate; must deal with the dilemmas and with the hurdles and must fashion theoretical models to deal with the needs and problems that arise in the field.

## Chapter Two

### The Protected Population and Israel's Obligation to protect it and to Actively Advance it

26. The maintenance of a functioning legal system is an obligation that falls upon the occupying power in the occupied territory. It is part of the obligation of the occupying power to concern itself with orderly social life. This obligation arises from international customary law, which is established in Regulation 43 of the Hague Regulations:

**This Regulation does not restrict itself to a particular aspect of order and public life. It covers order and public life in all its aspects. Therefore this authority is also applicable - in military and security matters - to a whole host of “civilian” circumstances, including economic, social, educational, sociological, sanitary, health, traffic and the any matters that pertain to a man living in a modern society. As Justice Shiloh said in HCJ 202/81 at page 629:**

**“What is “ensuring order and public life”? The requisite answer: The operation of an orderly administration with all its ramifications, which in our days is practiced in a civilized country, including security, health, education, assistance, yet among other things quality of life and transport”**

*HCJ 393/82 Jam'iyat Iskan Al-Mualiman v. Commander of the IDF Forces, Piskei Din 37(4), 785, 797 – 798.*

27. A functioning legal system is a fundamental element without which orderly social life is not possible. This is even more so, when we are speaking about that section of the legal system, which is entrusted with family law. Law is the normative infrastructure without which society has no independent existence, and the family is the basic unit of human society. A strip of land that is unsuccessful in concerning itself with just laws for its weaker citizens – and in our case: its women and children – can it really be described as having an “orderly administration with all its ramifications”?
28. With respect to the obligation of the State as occupying power, there is no significance, for the purposes of this petition, to the question as to whether the Gaza Strip continues to be regarded as occupied territory, in light of the broad Israeli control in all aspects of life of the residents of the [Gaza] Strip, the sea, air and electromagnetic spaces of the Strip and movement to and from it. There is no dispute



that the West Bank was and is still territory under belligerent occupation, and the judicial function of the petitioner is vital especially for this territory.

29. In addition to the obligation by virtue of Regulation 43 of the Hague Regulations there are the provisions of Regulation 46 of the Hague Regulations (regarding Occupied Territory) and Article 27 of the Fourth Geneva Convention (beginning with disputed situations, even when not in occupied territory). The aims of these provisions are to protect the protected population, including the rights of the protected citizens to life and dignity, their religious and familial rights, their rituals, manners and customs.
30. Aside from these obligations, that are part of international humanitarian law, the respondents are obligated to protect human rights, to facilitate justice and to strengthen the rule of law and order, both according to international human rights law and the fundamental values of Israeli law.
31. The State's obligation, through its military commanders is to protect the rights of the protected Palestinian citizens, and to **actively** work for the preservation of the religious and family rights. This protection needs to be expressed also in the preservation of institutions that under the authority of the Sharia, the protected population's religion and law, are entrusted with the protection of those social and family rights. This in turn requires the Respondents to take active steps for the removal of hurdles for the purpose of ensuring the fitting operation of the Sharia court mechanism in the territories. The determination of the Honorable Chief Justice (emeritus) A. Barak are apposite:

**The provisions of Regulation 46 of the Hague Regulations and of Article 27 of the Fourth Geneva Convention places upon the military commander a double obligation: he must avoid operations that harm the local inhabitants. This is his “negative” obligation; He must perform operations that are required by law to ensure that the local inhabitants do not become harmed. This is his “positive” obligation ... (HCJ 2056/04 *The Bet Surik Village Council et al v. State of Israel et al Piskei Din* 58(5), 807,834-845)**

32. In our case it would be bad enough if the Respondents did not **actively work** to assist in the functioning of the courts and legal services, but they **actively sabotage** the

mechanism created to provide these services to the Palestinian population, whose wellbeing they are entrusted with.

## **Chapter Three**

### **The Gaza Strip and West Bank as One Territorial Unit**

33. The basis for this petition is the geo- political fact which no one disputes: we have before us one socio-political unit (however referred to: the Territories, the Palestinian Authority, or the like) that covers two separate territorial units that share no contiguous territory. In this single unit one society lives there, one administration is operative, and one legal system and one court system prevails.

One community needs a single court system that operates according to a single normative system, and needs one legal administration – and the functionaries in this system including the Petitioner are obligated to bear the burden that flow from this.

34. As we shall see below the State of Israel has recognized and continues to recognize this factual and normative reality. The State of Israel recognizes that the territories comprise one integral unit. In this matter the geo-political reality has not changed and neither has Israel's official stance changed: not after transferring jurisdiction to the Palestinian Authority with the "Gaza and Jericho First" treaties and the Israeli military's exit from most of the ground territories of the Strip, not after the interim treaty of 1995, and not even after evacuating the last settlements and military outposts from the Gaza Strip and Northern West Bank in 2005.
35. We shall also see that customary international law relates to situations like these (countries that are split into two non- contiguous geographical units), and places the duty upon the relevant State to allow passage between these units. Israeli practice and treaties between Israel and the Palestinians reflect these customary norms.

#### **3.A. The Integrity of the Territories in light of Case Law and Political Treaties between the State of Israel and the Palestinian Authority before the Implementation of the "Disengagement Plan"**

36. The integral nature of the Territories is expressed in declarations of the State of Israel within the framework of international treaties and is also established in the rulings of this honorable court. And it shall be stressed: the provisions of the treaties are not raised here in order that the court enforces this or that provision of the agreements.

They are raised here because the integral nature of the territories, recognized in these treaties, is part of the infrastructure that the respondents must take note of when exercising their discretion. This is thus our approach and is also, apparently the approach of the State itself and the approach of this court.

37. On 13 September, 1993 Israel and the PLO signed a document known as the “Declaration of Principles”. In article 5 of the Declaration Israel declared that it recognizes the integrity of the West Bank and the Gaza Strip:

**The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity of which will be preserved during the interim period.**

38. This declaration is also repeated in Article 23(6) of the Gaza and Jericho Agreement, “The Cairo Agreements” dated 4 May, 1994 and in Article 11(1) of the Interim Agreement that were signed in the White House on September 28, 1995. The Interim Agreement applied to the Territories with a military presence and has become a part of the internal law in the Territories.

39. In Article 1 (2) of the First Annex of the Interim Agreement, with regard to security arrangements, Israel committed itself to avoiding placing obstacles to movement between the two sections:

**In order to maintain the territorial integrity of the West Bank and the Gaza Strip as a single territorial unit, and to promote their economic growth and the demographic and geographical links between them, both sides shall implement the provisions of this Annex, while respecting and preserving without obstacles, normal and smooth movement of people, vehicles and goods within the West Bank and between the West Bank and the Gaza Strip.**

40. In article 10 of the same appendix the principles of the **Safe Passage Arrangement** were determined. This arrangement is meant to organize the movement of the Palestinians between the two sections and to overcome Israel’s fear of unchecked entry into its sovereign territory. In light of this, rules for Palestinian entry were determined, and there was even an arrangement for the entry of Palestinians who were barred from entering Israel by placing them on shuttle buses that were secured by the Israel Police.

41. The aim of these arrangements was to preserve the freedom of movement between the West Bank and the Gaza Strip, via Israel, while taking steps to minimize the security risks to Israel. Pursuant to this it was determined that passage would be operated through safe passage cards, that would allow movement on certain routes and at certain times, or through entry permits to Israel. Upon completion of the passage between one section of the territories and the other, no obligation was laid down for the return to the other part of the Territories within a set period, or at all.

In this way the arrangements established a practice that had been the previous custom, in terms of which the West Bank territories and the Gaza Strip, that had been declared restricted areas, are not restricted for movement between each of them but only for movement between them and Israel, and between them and abroad.

42. Despite the arrangements for safe passage, Israel has continued to place harsh restrictions on the freedom of movement and has refused to implement the safe shuttles arrangement. Nonetheless, the situation was much better than it is nowadays, especially in light of the fact that a great many people carried with them a magnetic card that enabled their entry to Israel, and thus their passage between the sections.

On 5 October, 1999 the **Safe Passage Protocol** was signed which implemented the principles that were established in the Interim Accords, and especially the opening of the shuttles, something that would have enabled use of the safe passage even to those denied entry to Israel.

A copy of the **Safe Passage Protocol** dated 5 October, 1999 is attached and marked P/4.

43. The safe passage became the most positive development in the matter of free movement between the sections. It enabled full territorial integrity, in turn enabling Palestinian residents of the Palestinian Authority to exercise their rights and also preserved the fabric of Palestinian life in all its fullness.
44. As it turned out the safe passage was operative at full capacity for only one year. Upon the outbreak of the second *Intifada* Israel essentially froze the safe passage arrangement: it ceased issuing safe passage cards and instead movement was once again determined by entry permits to Israel. The safe shuttle program was also cancelled. Nonetheless, the residents continued to file applications for traffic permits for Israeli approval, through the Liaison Office of the Palestinian Authority.

45. Despite the harsh restrictions on movement and the curfews, it still remained Israel's declared position that the West Bank and the Gaza Strip is one integral territorial unit. This declaration was correctly relayed to this honorable court in H CJ 7015/02 *Ajuri v. Commander of the IDF Forces in the West Bank Piskei Din 56(6) 352* (hereinafter: the **Ajouri Affair**).
46. The Ajouri Affair began in August 2002, after the "Defensive Shield" operation. The State decided to deport some of the relatives of the suicide bombers to Gaza. For this purpose the military commander issued an assigned residence order for the Gaza Strip. One of the complaints that were made was that this was not in fact an assigned residence but rather an expulsion; however the State went out of its way in its attempts to convince the courts of the integrality of Gaza and the West Bank and therefore this was an assigned residence within the same district:

**...it should be added that in Article 11 of the "Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip" that was signed in Washington on September 28, 1995 (Treaties, 1071, 33), the parties determined that they view the West bank and Gaza Strip as "one territorial unit"...This provision is also repeated in Article 31(8) to the Agreement and at its very foundation it also determines the mechanisms for the "safe passage" between Judea and Samaria and the Gaza Strip. It must also be noted, that not only does the Israeli side coordinate the management of these two districts, but also the Palestinian side relates to the two districts as if they were one entity, and there is a single and unified leadership of these two districts. The fact that Israel chose to administer these two districts through different generals is an organizational decision, and for our purposes, it does not have much significance... there are not an insignificant amount of countries where there are various law systems that are separated by the different regions (for example the federal states and the China - Hong Kong model) And for certain it will not accept any argument that we are dealing with separate territorial units for the purposes of the provisions of the relevant international law in this matter.**

Paragraph 50 of the State's Reply dated 15 August, 2002 (emphasis added). A copy of the relevant page is attached and marked P/5.

The complete reply may be found on Hamoked's website:  
<http://www.hamoked.org.il/items/490.pdf>

47. As is well known this honorable court accepted the position of the State and declared:

**From a social and political perspective, these two districts are conceived by all interested parties as one territorial unit.**

48. Only at a later stage did Israel begin its selective policy of separation between the Gaza Strip and the West Bank. Within the framework of this policy Israel arbitrarily divided the Palestinian population into the "West Bank residents" and the "Gaza Strip residents", and made the innovative claim, so to speak that a "Gaza resident" requires an Israeli permit to stay in the West Bank.

**3.B. Does the "Disengagement Plan" have any impact on the integrality of the Territories?**

49. The most conspicuous indication that Israel recognizes the integrality of Gaza and the West Bank even after the evacuation from Gaza is the Convoy Agreement, which is primarily based upon the principles of the safe passage from the Interim Agreement and is merely a new version of it: It would be apt in this matter to quote the words cited on November 16, 2005 (the day that the Agreement on Movement and Access was signed) of the head of the Transit Administration in the Ministry Of Defence, Mr. Betsalel Taybber, to the Internal Committee of the Knesset

**Transit will be granted after a full security check, and with a convoy that is accompanied by the security forces, and is protected by the security forces, where we hope to bring about a situation where there will be no transfer of dangerous substances or destructive substances, G-d Forbid, from one place to another...we are dealing with the movement of a number of buses per day that depart from Erez, and which undergo a security check , the passengers then apparently reach Terkumiya, or any other place where they disembark and travel to their destinations in Judea and Samaria. When the day arrives that they want to return they board the buses**

**in Terkumiya and they travel to Erez. The buses will be under supervision and control, including the security issue and including al those who board the buses.** The same applies to trade - this involves a number of trucks that travel from Karni to another place, and there also the trucks will be under full supervision, before they depart or just as they are departing. The merchandise will also be under full and complete supervision. They will be accompanied by security vehicles that will be operated under responsibility of the security establishment. There is no intention currently to build an overpass or underpass; we have a number of alternatives for the access roads, and in accordance with what has been agreed upon in the upcoming days we will also operate it, as has been agreed upon.

<http://www.knesset.gov.il/protocols/data/html/pnim/2005-11-16.html>

50. According to the Agreement Israel will commit itself to allow the operation of a secured convoy of buses and trucks that will convey passengers and merchandise between Gaza and the West Bank :

**Link between Gaza and the West Bank: Israel will allow the passage of convoys to facilitate the movement of goods and persons.**

51. The detailed arrangements were meant to be determined by the parties until 15 December, 2005 but Israel postponed the arrangement. It is important to note that this arrangement is being raised in this petition since it forms a clear indication that Israel shares the general viewpoint that there is an obligation to maintain the link between the Gaza Strip and the West Bank, since they form one territorial unit. The nature and details of the traffic arrangement in Israel do not fall within the purview of this Petition, provided that the traffic arrangement is fairly reasonable in arranging for the realization of the right to freedom of movement.

A copy of the Agreement dated 16 November, 2005 is attached and marked p/6.

52. In the State's reply that was filed on 7 February, 2006 within the framework of the Petition against the Citizenship and Entry into Israel Law (HCJ 7052/03) the state attorney's office determines that not only is there a full link between the Palestinian

Authority in the Gaza Strip and the Palestinian Authority territories in the West Bank, but also the Palestinian Authority in Gaza and the West Bank forms one political entity:

**The Palestinian Authority is a political entity, with government features and paramilitary forces, and is in control of territories where the majority of the population therein is Palestinian. Even in relation to the territories that are under the effective rule of the State of Israel (Area C), the Palestinian Authority has political, administrative and civil links to the residents of the district... the position of the State of Israel is that that Palestinian Authority is not a state, but a political entity, and thus one must examine its various aspects.**

Paragraphs 10 – 11 of the State’s reply dated 7 February, 2006 in HCJ 7052/03. The reply may be found in its entirety in HaMoked’s website: <http://www.hamoked.org.il/items/4488.pdf>

53. Indeed in the judgment the court accepted the State’s position which views the Palestinian Authority as a political entity, and relates to the Palestinian Territories as one integral political unit. (See: HCJ 7052/03 *Adalah et al v. The Minister of the Interior Takdin Elyon* 2006(2), 1754, 1763).
54. One may therefore clearly see, without entering into the whole question of the current status of the Gaza Strip, that even with the implementation of the “Disengagement Plan”, the respondents still view Gaza and the West Bank as territories of the Palestinian Authority which from an administrative and civic perspective is subject to the same rules and to the same mechanism, and from a management perspective they are a single unit for all intents and purposes.

### **3.C. The Sharia Court System both in the West Bank and in the Gaza Strip**

55. There is no dispute that the Palestinian Territories, both in Gaza and in the West Bank, are administered by one system of Sharia courts, which have their own rules, judgments and a single Maintenance Funds system.
56. It is vastly important for the respondents to see to it that the system that serves the protected citizens operate in the most orderly and effective manner.



57. The petitioner's traveling from Gaza to the West Bank for the purposes of synchronizing judgments between the Sharia courts, promoting the Maintenance Funds program that will benefit women and children, which maintenance they receive is frequently their only source of income, as well as the supervision over the workings of the courts in the West bank, is certainly a fitting purpose and an important step for the purpose of improving the Sharia court system.

## Chapter Four

### 4. A The Right to Dignity, Freedom of Movement and Autonomy

58. The right to freedom of movement is the primary expression of a person's autonomy, a fortiori when we are speaking about a person who fulfills a function in the judicial system whose task it is to serve the civilian population and to protect social and family rights. The right to freedom of movement is among the norms of customary international law:

See:

H CJ 6358/05 *Vanunu v. The General of the Home Front Command Takdin Elyon* 2006(10, 320, paragraph 10;

H CJ 1890/03 *The Bethlehem Municipality and 21 others v. The State of Israel Takdin Elyon* 2005(1) 1114, paragraph 15;

H CJ 3914/92 *Lev v. The District Rabbinical Court Takdin Elyon* 94(1) 1139, 1147.

59. The right to freedom of movement is the motor that sets into motion the web of human and social rights. This is the motor that enables man to execute his autonomy and his choices. When we restrict freedom of movement we also harm that "motor" and as a result thereof some of the choices and rights of man cease to exist. His dignity as a human being is harmed. Thus we see the great importance that is attributed to the right to freedom of movement.
60. When we restrict a judge from regularly traveling to outlying integrated territories, and prevent him from reaching the courts whose workings he is entrusted with supervising, we harm the lifeblood and functioning of the court system, and we harm the cultural life of the Muslim Palestinian society, since for both Sharia and religion, as with the Sharia courts in Israel, there is great importance at preserving the fabric

of social life, including family matters and maintenance; likewise it harms the rights of many Palestinians and the position of the Sharia courts.

61. The right to freedom of movement is also preserved in International Humanitarian Law. The Fourth Geneva Convention establishes the right to freedom of movement as a basic right of protected persons, whether they are in occupied territory or in territory of a hostile state. Article 27 of the Convention declares that protected persons shall be eligible under all circumstances to a respectful attitude to their dignity.

62. International Human rights Law is also a binding source that enshrines freedom of movement as a basic human right. Thus Article 12 (1) of the International Covenant on Civil and Political Rights, which Israel signed and ratified declares:

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.

63. The aforesaid Article 12 is a binding source. As the source for interpretation see also Article 13 of the Universal Declaration of the Rights of Man and Article 2 of the Fourth Protocol of the European Convention on Human Rights, 1963.

64. The Palestinian lifestyle, especially in the West Bank, their dignity, social and religious rights, including the right of access to court, the rights to promote the Sharia court system, all have been very harshly harmed as a result of the respondent's decision not to allow the petitioner's passage to Gaza via Israel. (See CA 2781/93 *Miasa Ali Da'aka v. Carmel Hospital, Haifa\_Takdin Elyon* 99(3) 574, p. 595).

65. This honorable court has in the past recognized that when an army commander exercises his authority upon the Palestinian residents of the territories he must do so while honoring the dignity of man. (HCJ 4764/04 *Physicians for Human Rights et al v. The Commander of the IDF Forces in Gaza Piskei Din* 58(5) 385, 394).

#### **4.B. The Right to Passage through States in International Law and in Conventions**

66. **We have seen that the State of Israel and this honorable court view the Palestinian territories as one political unit. We have seen that pursuant to this the State of Israel has taken upon itself the obligation to enable movement in the area that joins the two sections of the Territories. In this chapter we shall see that these obligations are merely a reflection of Israel's obligations according to customary international law. Customary international law limits the prerogative**

**of a state to decide who may enter its gates, where the aim of entry is for passage to another political unit.**

67. Receiving an entry permit to Israel comprises a passage card between the Gaza Strip and the West Bank. International Law recognizes the existence of right of transfer which is somewhat of a limitation on the principle of sovereignty. A state is obligated to enable passage within its boundaries to foreign subjects who want to reach another state. The right of transfer exists when the transfer is necessary (even where there are other alternatives) and when there is no harm to the traversed state. The transfer may take place under conditions whose aim it is to protect the legitimate interests of the traversed state.

The right of passage also exists in a place where there are no close ties, as is the case between Israel and the Palestinians. Classic examples, against which backdrop the principle of the freedom of transfer developed are those cases of **states that have no access to the sea**, (like Switzerland or the Caucasian States) states that are encircled by another state (like West Berlin before the unification of Germany and the Mount Scopus enclave in the years 1948-1967) and **states that are geographically split into two** (like the Palestinian Territories).

A copy of the comprehensive article on this matter by the scholarly Lauterpacht is attached and marked p/7.

68. This is how Lauterpacht describes the right of passage:

**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.**

See P/7, p. 320.

Lauterpacht bases the customary nature of the right of passage on scholarly writings from Grotius until today, as well as the practice of states. He proves that the basic principle of freedom of passage uniformly repeats itself in innumerable bilateral and multilateral treaties (the earliest treaties that he mentions are from the eleventh century), which detailed its concrete implementation in different contexts: in passage

through rivers and waterways or on land through the territories of various states. He shows how the same logic may be used in seaways. Among the more modern and broader treaties in terms of the number of parties, one may make mention of the Convention on the High Seas (1958) (Article 3, the right of states that have no sea coast to free access to the sea); **Convention** on the Territorial **Sea** and the Contiguous Zone, (1958) (Articles 14 – 24 on innocent passage in territorial waters) the United Nations Convention on the Law of the Sea (1982) (Article 125 on the right of access to the sea and freedom of passage) and the GATT treaty (Article V on the right of passage).

Already in the Bible one may find the approach, according to which persons are eligible to come to a country with a legitimate demand **“Let me pass through your 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 passed your borders” (Numbers XXI: 21)**. The rejection of this claim was considered there as arbitrariness and even as a justifiable ground for war.

69. The right of passage is conditional, as stated, on the absence of any harm to the traversed state. For this purpose the right could be contingent upon payments for the expenses incurred for the actual transit, upon demands of quarantine for the prevention of spreading disease, and the like. As to the security consideration, Lauterpacht writes:

**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.**

See P/7, page 340.

70. This approach is reflected in conventions, which in concrete circumstances have established the general principle of right of passage. Right of passage does not cease to exist in times of emergency, and even not during war, however it may be restricted in accordance with the circumstances. The restriction needs, as much as is possible, to

be minimal- both from the perspective of its scope and from the perspective of its duration.

The relevant provisions may be found in the New York Convention on Transit Trade of Land-Locked States (1965) The full text of the Convention is located at- <http://www.austlii.edu.au/au/other/dfat/treaties/1972/4.html>

#### **Article 12 - Exceptions in case of emergency**

The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency endangering its political existence or its safety may, in **exceptional cases and for as short a period as possible**, involve a deviation from the provisions of this Convention on the understanding that **the principle of freedom of transit shall be observed to the utmost possible extent during such a period.**

#### **Article 13 - Application of the Convention in time of war**

This Convention does not prescribe the rights and duties of belligerents and neutrals in time of war. The **Convention shall, however, continue in force in time of war so far as such rights and duties permit.**

## **Chapter Five**

### **The Respondents' Obligation to Weigh up all the Relevant Considerations**

#### **Balancing Security considerations against the Needs of the Protected Population**

71. The respondents claim that there are security reasons for opposition to the petitioner's transit to the West Bank via Israel, but they do not detail the reasons or validity of the security impediment.
72. It falls within the powers of the respondents to grant entry permits to Israel for the purpose of transit from Gaza to the West Bank and vice versa. The decision needs to be taken after balancing the security considerations of allowing the petitioner entry into State territory during his transit to the West Bank against other relevant considerations for the purpose of this decision, including the welfare of protected citizens in the West Bank in light of the function filled by the petitioner, and the

program whose realization he has been entrusted with, and which comes to serve first and foremost the protected civilian population.

73. As noted above the prohibition of the petitioner's departure to the West Bank via Israel will qualitatively harm the promotion of a law enforcement system in the Sharia courts including matters concerned with Maintenance and Family Law, since the petitioner is the most authoritative person for the promotion of the Maintenance Fund program and is the General Commissioner of the Maintenance Fund of all the Sharia courts in the Territories.
74. The question that may be asked is if there is a security impediment against the petitioner, why was his departure via the Rafah passage to Egypt or to Jordan over the course of the last few years permitted, even before the implementation of the "Disengagement Plan", and why was there no indictment filed against the petitioner, or why was he not at least detained for an investigation.
75. The only time the petitioner was detained was in 1987, for a few days, but there has never been an indictment filed against him. In 1997 when the petitioner was at the Rafah Crossing he was detained by an Israeli Secret Service agent, but was released a few minutes later.
76. Whenever there is opposition based on security concerns to a Palestinian crossing, via Israel, from Gaza to the West Bank and vice versa, the only option open to him to appeal that decision is to apply to the law courts. The respondents generally speaking do not file their opposition in the time allotted and after the passing of a certain period of time they do not revisit their decision on their own initiative.
77. The respondents have adopted tough measures, which not only harms the rights of the petitioner as judge, including the right to dignity and to freedom of movement and the right to freedom of occupation, but also the Sharia court system in general, something that has grave ramifications on the character of the system and the service that in the future it can provide to the civilian population.
78. This factor intensifies the harm to a Palestinian from whom the respondents have withheld his freedom of movement, since that harm has become a complete injury to the basic rights that have been recognized both by virtue of International Humanitarian Law and by virtue of Israeli law.

79. The absence of a mechanism which is authorized to examine, on the merits, the application of a Palestinian whose departure to the West Bank the respondents have prevented with the claim that there is a security impediment or because of a failure to meet the bureaucratic criteria which have been set by the respondents, leaves the Palestinians and human rights organizations with only one avenue to deal with the situation – the filing of a petition with this honorable court.
80. The respondents' decision to prevent the passage of the petitioner to the West Bank via Israel is arbitrary and does not stand up to the test of proportionality and reasonableness, and was reached before the respondents examined the ramifications of preventing the petitioner's passage to the West Bank, and the impact upon the promotion of the Maintenance Fund system in the territories as a whole.

**And in conclusion**

81. The petitioner's travels to the West Bank, via Israel, are important for the preservation of the harmony within the Sharia court system, which is one unified system in the West bank and Gaza Strip.
82. The function of the Sharia courts is to deal with family matters, child custody, maintenance, etc. The petitioner is the Commissioner of the Sharia courts for maintenance matters and for the enforcement of court judgments, and as part of his employment duties he must from time to time visit the West Bank in order to closely supervise the workings of the courts, to understand the problems with which the judges deal and to guide the employees there.
83. For some years the respondents have prevented the petitioner's entry to the West Bank, a situation that has greatly impacted the functioning of the Sharia court system, and the difficulty of managing the system. At the same time the petitioner- Kadi has been scrupulous in learning how the Maintenance Funds function in the other states, in order that to be able to implement such a mechanism in the territories since currently there are problems with implementing the judgments and the maintenance payments.
84. Therefore an error has occurred in the respondents' exercise of their discretion, an error that ought to be corrected for the purpose of preserving the Sharia court system in the territories and the rights of the protected Palestinian population.

This petition is supported by an affidavit signed before an attorney from the Gaza Strip and sent to the undersigned by fax, which was coordinated telephonically. This honorable court is moved to accept this affidavit, and the power of attorney which was also given by fax, taking into account the objective hardships with respect to a meeting between the petitioner and his legal representative.

For all these reasons the honorable court is requested to issue an order nisi as requested, and after hearing the respondent's response, make it absolute,. Likewise the court is requested to order the Respondent to pay the Petitioners' costs and attorney fees.

30 April, 2007

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Adv. Abeer Jubran  
Counsel for the Petitioners

(T.S 49157)