At the Supreme Court in Jerusalem
Sitting as the High Court of Justice

HCJ 196/07

1. **Yesh Din – Volunteers for Human Rights, Registered Association No. 58-0442622**
2. **The Association for Civil Rights in Israel**
3. **Gisha – Center for the Legal Protection of Freedom of Movement**
4. **The Public Committee against Torture in Israel**
5. **HaMoked – Center for the Defence of the Individual, founded by Dr. Lotte Saltzberger**
6. **Machsom Watch**
7. **Physicians for Human Rights**
8. **Bimkom – Planners for Planning Rights**

All represented by Adv. Michael Sfard of 31 Rothschild Blvd., Tel Aviv 66883; Tel. 03-5607345; Fax 03-5607346

The Petitioners

Versus

1. **The Minister of Defense, Mr. Amir Peretz**
2. **The Commander of the IDF Forces in the West Bank, Maj. Gen. Yair Naveh**

Represented by the Office of the State Attorney, the Ministry of Justice, Salah-a-Din St., Jerusalem

The Respondents

Petition for Order Nisi and Interlocutory Order

This is a petition for an order nisi, whereby the Honorable Court is moved to order the Respondents to give reasons, if they should so desire, why they will not promptly and retroactively repeal the military act of legislation known as '*Directives on Traffic and Transportation (Restriction of Travel in Israeli Cars) (Judea and Samaria), 5767-2006*" (the "**Directive**"), which was signed by the Second Respondent on November 19, 2006 and is due to take effect on January 19, 2007.

This is also a petition for an interlocutory order, whereby the Honorable Court is moved to order the Respondents to postpone the date of commencement of the Directive pending the issuance of a final judgment in this Petition.

*** The Directive which is the subject matter of this Petition is attached hereto as <u>Exhibit A</u>.**

<u>Petition for an Interlocutory Order or, Alternatively, a TRO or, Alternatively, the Urgent Scheduling of a Hearing</u>

This Petition seeks to repeal a military act of legislation signed by the Second Respondent which, according to the Petitioners, legally cements unprecedented discrimination on national grounds and an illegal invasion of the private domain.

The Directive prohibits Israelis and tourists from transporting Palestinians residing in the West Bank in their cars, without a permit from the army.

According to the Directive which is the subject matter of this Petition, it will take effect on January 19, 2007.

If the Petitioners are right, then the Directive taking effect will seriously violate a cluster of basic rights (to equality, dignity, autonomy of free will), and will create a rift between Israelis and Palestinians maintaining legitimate ties. In addition, the Directive taking effect will taint the law in a manner which will seriously damage the State of Israel and its army.

When such a violation of basic rights is created, certainly such a severe, serious and unprecedented violation as described in the Petition, the burden shifts to the authority to prove that the violation is justified.

Therefore, and considering the serious damage to individual rights, to the human dignity of the Palestinian residents of the West Bank, to the basic rights of Palestinian and Israelis seeking to maintain social, political and commercial ties, and to the image of the State of Israel, there is justification for postponing the date of commencement of the Directive pending the final decision of the Petition.

It should be kept in mind that until January 19, 2007, over 40 years of occupation, there has been no such transportation prohibition in the West Bank, and even after the Directive was signed (on November 19, 2006), the Military Commander chose to delay its effectiveness by two months. Consequently, even if there is any benefit to the Directive, it is not so urgent as to be impossible to postpone by several days or weeks.

Therefore, the Court is moved to issue an interlocutory order, ordering the Respondents to postpone the effective date of the Directive pending the issuance of a final judgment in this Petition.

Alternatively only, the Honorable Court is moved to issue a TRO, delaying the Directive which is the subject matter of this Petition from taking effect until the hearing of the Petitioners' petition for an interlocutory order.

Alternatively only, the Honorable Court is moved to instruct the Office of the Court Clerk to schedule this case for hearing as urgently and as quickly as possible, before January 19, 2007, the effective date of the Directive which is the subject matter of this Petition.

Nathan Alterman / Security Needs (1950) [loose translation]

The government's edict
Is unrelentingly fierce:
"Security needs!" – and the discussion ends.
The women are torn from the children by the butt,
And now the situation is already safer.

It is good to see that the law is iron and not straw
And that there is a strong hand and a style of steel
That says: File all complaints in writing…
Also for the blind, deported with the child.

There is no laxity or slackness, my innocent friend.
How we have learned this over two years!

How we have voted to let things pass –
How you have learned this, constituent assembly delegate,
A Jew, forgerer of passports for generations
An infiltrator
The son of an infiltrator's son…

A state is not built with white gloves
The task is not always clean and wholesome
Indeed! But it appears that in some parts
We indulge in
A small luxury of muck.

A sort of waste… unhindered extravagance…
And we are, after all, a poor state.

(From: N. Alterman, **Writings** (Vol. II) (Dvir Publishing, 5722, p. 279).

A. "An Israeli Shall Not Transport a Non-Israeli"

1. This Petition concerns an unprecedented act of military legislation, which shamelessly cements in writing a prohibition on Israelis and tourists from transporting Palestinians **in their own private cars** inside the West Bank, which is subject to the control of the State of Israel and its army.

2. The directive implements the ideology of "segregation" ("us here and them there") through statutes and law, while imposing a criminal sanction on members of different nationalities who meet in the private sphere of a passenger car, without a permit from the authorities.

3. We cannot claim a patent on the establishment of a legal system of segregation, since human history is familiar with methods of racial or other "segregation", as was the case in South Africa during the apartheid and in the Southern U.S. states until the 1960s.

4. It is hard to believe, but we too have reached this low point. Twenty three years after *1984*, the Big Brother of the West Bank empowers himself to control the identity of the people we transport in our cars across the West Bank. Sixty years after the "separate but equal" doctrine was declared illegal in the United States, Major General Yair Naveh, with the acquiescent support of Minister of Defense Amir Peretz, establishes a legal structure of "separate and unequal" in the West Bank.

5. The Directive is the climax of the process for the legal cementing of institutionalized, methodical and deliberate discrimination against the Palestinians residing in the West Bank versus Israelis and foreigners being in this region either permanently or from time to time. Along the timeline of the segregation/discrimination process, we may find, *inter alia*, the directives, edicts and orders which together created the "separation fence zone" between the separation fence and the green line, and which established the "permit regime", which renders the zone an area prohibited to Palestinians and open to Israelis; as well as the parallel existence of two separate criminal law systems, the one – military, rigid and outdated, which applies to Palestinians, and the other – modern, liberal and civilian, which applies to Israelis.

6. And yet, from among all the red lines we have crossed, the Petitioners believe that the directive "on traffic and transportation" carries with it a particularly evil seed, as it is a directive which compels civilians to be active agents of discrimination; it being a directive which so grossly invades the private realm; and mainly due to its objective of ripping social, professional, political and personal ties and forcing the "segregation" also upon those who may not be interested in it.

7. We have said "**the process for the legal cementing of institutionalized, methodical and deliberate discrimination**", to which we will now add the broader context – it is a process which is designed **to tighten the control of one national group over another**. Here lies our disgrace at its worst: The combination of the two is precisely the legal definition of **apartheid**.

8. We are still at the preamble of the Petition, we have not yet even reached the specification of its factual background, and already the reader of these lines can hear from afar the clatter of the nearing "security considerations", aiming their weapons at us and seeking to sweep away the Petitioners' moral and legal rage by a storm of military justifications. The Respondents' answer, which is as anticipated as the sun rising in the East, hangs all on the contribution to security made by the directive which prohibits the transportation of Palestinians. "Security supervision over the travel of Palestinian residents in Israeli cars", they say, is a "security measure", the implementation of which – take note – would "hamper the execution of terror attacks in the Israeli home front and in Judea and Samaria" (from the letter of the Public Petitions Officer of Central Command to the Petitioners, see specification below).

9. And, indeed, security is the oxygen we breathe (literally, and without any cynicism intended), but security may be improved in many a dark way. Does anyone doubt that the security of the State of Israel would be improved, maybe even tremendously so, by, for instance, a directive prohibiting Palestinians from traveling in motor vehicles entirely? Would such a directive not greatly impede Palestinian terrorists' "executing terror attacks in the Israeli home front and in Judea and Samaria"? And what of prohibiting marriage between Israelis and Palestinians (meanwhile, we only prohibit married couples from living together in Israel, but maybe the better solution, from the security perspective, would be to entirely prohibit such "mixed" marriages)? And why not require Palestinians (by legislation) to mark themselves so that the security forces may know, from afar, that the person facing them is not Israeli? Would such a directive not be conducive to security?

10. There is no doubt that such and other legislative measures would strengthen security, enhance supervision, and hamper "the execution of terror attacks in the Israeli home front and in Judea and Samaria". However, these very measures – although they may strengthen security – weaken, undermine and break our moral backbone. They grant terrorism the greatest achievement it can dream of – our betrayal of the values etched on our banner and for which we established both society and state.

11. The Respondents may have forgotten, but some things are not done. Not even if they aid security.

B. The Factual Background

I. The Parties

12. The Petitioners are Israeli human rights NGOs operating in Israel and in the occupied territories.

13. The First Respondent is the Minister of Defense of the State of Israel, and pursuant to the Basic Law: The Army, is the minister in charge of the IDF (Section 2(b)), and therefore also of the Second Respondent.

14. The Second Respondent is the commander of the IDF forces in the West Bank, who holds all of the administrative and legislative powers in the area held by

the State of Israel under belligerent occupation, in accordance with the rules of international humanitarian law and the laws of belligerent occupation.

II. The Directive

15. On November 19, 2006, the GOC Central Command, i.e. the commander of the IDF forces in the West Bank (the Second Respondent), signed *Directives on Traffic and Transportation (Restriction of Travel in Israeli Cars) (Judea and Samaria), 5767-2006*" (the "**Directive**").

16. The essence of the Directive, in Section 2(a) thereof, states as follows (emphasis added; M.S.):

> "*So long as these directives are in effect –*
>
> ***An Israeli shall not transport a non-Israeli*** *in an Israeli car, in the Region, other than pursuant to a license issued, or issued to the said non-Israeli, by a military commander or a person authorized by him for this purpose*".

17. And an "Israeli" is defined in Section 1 of the Directive thus:

> "*An Israeli – A person who is registered in the Population Registry pursuant to the Population Registry Law, 5725-1965, as being in effect in Israel from time to time, including a person having been issued a visa and a license to reside in Israel pursuant to the Entry into Israel Law, 5712-1952, as being in effect in Israel from time to time*".

18. An "Israeli car" is also defined in Section 1 and is:

> "*A car registered in Israel or a car bearing identifying marks determined therefor in Israel*".

19. The Directive, therefore, prohibits, in practice, <u>any non-Palestinian</u> from transporting <u>Palestinians residing in the West Bank</u>, unless the driver or the passenger have received a permit therefor from the Second Respondent or from another authorized by him.

20. The Directive establishes a bureaucratic system, the sole purpose of which is to enforce and manage the transport prohibition, to receive permit applications and to handle the same.

21. The Directive grants special privileges to two groups of Palestinians, who will be deemed as having received permits, namely (Section 2(c) of the Directive):

    a. Palestinians holding a permit to enter Israel;

    b. Palestinians holding a permit to work in the settlements.

22. In other words, transporting the hewers of wood and drawers of water of the settlements and of the State of Israel, is neither delayed nor conditioned upon a

permit, lest we find ourselves without anyone to clean our streets, build our homes and perform any menial labor we require. That too, unfortunately, in the best tradition of the segregation regimes, which clear the way for servants to reach their masters.

23. Also exempt from the duty of seeking a permit are the following Israelis (Section 2(d)-(f) of the Directive):

    a. An Israeli driver of an Israeli bus in the West Bank;

    b. An Israeli transporting his Palestinian immediate relative;

    c. Soldiers and policemen.

24. It is difficult to overrate the importance of the significance of the order. The requirement for a transportation permit wreaks havoc on those limited communities who continue to maintain a relationship of Israeli-Palestinian friendship and cooperation, even in these difficult times.

25. The Petitioners, each in accordance with its field of activity, maintain such relations. Thus, for example, volunteers of the First Petitioner routinely drive Palestinians from villages throughout the West Bank to Israeli police stations which are usually located inside settlements, so that they may file complaints for criminal offenses committed against them. According to the Directive, such transportation requires a permit from the Second Respondent.

26. The broad scope of the definitions of “Israeli” and “Israeli car” in the Directive, imposes the prohibitions on the transportation of Palestinians even on foreigners and even on those who are required to transport Palestinians by virtue of their duties, such as foreign journalists, various UN agency workers, aid workers and even non-diplomatic representatives of foreign embassies, who enter Israel without requiring a visa.

27. Such is the case, for instance, also with respect to a Palestinian-Israeli seeking to drive his sister and her husband. He can drive his sister without a special permit, but her husband would have to go to the Civil Administration offices and file an application for a special permit.

28. Such is the case also with respect to groups of Israelis and individuals who from time to time visit villages in the West Bank in order to express solidarity with the daily hardships of the Palestinian residents, for the purpose of offering assistance (for instance, in the olive harvest), or simply for social visits (yes, social visits!). A clear example of a relationship which is a combination of a political alliance and an intimate friendship is the connection that has been tied between the group of Israelis who are active in the Palestinian village Bil'in and their hosts. Now, for every trip from the village to its lands in their cars, the Israelis will either have to apply for a permit or risk violating the Directive.

29. This is the moment to recall that a violation of the Directive is a criminal offense. And whilst the damage Israelis may face from breaching the Directive

is not substantial (because according to the policy determined, Israelis are not indicted in military courts), the danger Palestinians face is substantial and tangible. A Palestinian who is caught traveling in an Israeli car with an Israeli driver (and, as may be recalled, an Israeli is also a tourist) without a permit, may find himself being tried at a military court for violation of the Directive or for abetting/soliciting the violation thereof, pursuant to Section 88(c) of the Security Directives Order (Judea and Samaria) (No. 378), 5730-1970; hereinafter the "Security Directives Order"), he will be liable for a penalty of **up to five years' imprisonment** (Section 92 of the Security Directives Order), his magnetic card will be taken away from him and his entire life will be carried on under the cloud of the violation.

30. This is the Directive. According to the provisions thereof, it will take effect on January 19, 2007. There is no doubt that its effect is unprecedented even in the forty years of our military legislation in the occupied territories. Through it, the IDF will supervise the connections between Israelis and Palestinians, and through it it will determine which connections are acceptable thereto and which it will hamper. Indeed, over and above the moral fault of the order, due to its severe violation of human dignity, it also harbors a very dangerous potential of political use. Thus, for instance, a suspicion arises that the policy of granting and denying permits will serve not only security needs, but also as a stick and carrot policy toward political activists such as the Bil'in activists, and others.

31. Without derogating from our argument below against the legality of the Directive, even in case it is proven by chapter and verse that it makes any contribution to security, we would like to note that, to the best of our understanding, this is not the case, and that the Directive does not aid security at all. Several statutory directives prohibiting Palestinians from entering certain areas (such as the separation fence zone), have long since been applicable in the West Bank, there is a prohibition on entering Israel and the settlements without a permit, and all of these are enforced by inspections, barricades and checkpoints. The effect of the Directive which is the subject matter of this Petition is, therefore, to prohibit joint rides in routes that are permissible to Palestinians. It is very difficult to understand what might be the security justification for the Directive.

32. In other words, to the Petitioners' understanding, the Directive concerns not the prevention of Palestinians' movement in certain areas, but joint rides only, which proves that the chief purpose of the Directive is to create segregation and discrimination, and not to preserve security.

III. Exhaustion of Administrative Remedies

33. On November 20, 2006, the First Petitioner sent a letter to the First Respondent, demanding that the Directive be repealed.

34. On November 26, 2006, the First Petitioner sent a letter to the Second Respondent, which too demanded that the Directive be repealed.

35. On November 28, 2006, the Sixth Petitioner sent a letter to the Second Respondent. In this letter, the Sixth Petitioner demanded that the Directive be repealed.

36. On November 29, 2006, the Fifth Petitioner sent a letter to the Second Respondent, and it too demanded that the Directive be repealed.

The letters of the First, Fifth and Sixth Petitioners are attached hereto as Exhibits B-E, respectively.

37. The First Respondent did not answer the First Petitioner's letter.

38. The Second Respondent answered the Petitioners' letters via Captain Miran Levy, Public Petitions Officer of Central Command. In his answer, the Second Respondent rejected the demand to repeal the order.

The Second Respondent's answers are attached hereto as Exhibits F-H.

39. On December 27, 2006, the Second Respondent published an announcement in *Haaretz* newspaper, in which he informed the public of the Directive due to take effect. *Inter alia,* the announcement provided that the Second Respondent had defined several cases in which there was no need to obtain a special permit, one of which was "activists of a human rights organization and international organizations who will receive either a general permit or special permits".

40. Since the Petitioners deem an application for a permit (be it general or special) as wrongful cooperation with juridical discrimination on the basis of nationality, not one of them has applied for a permit, nor do they intend to apply for a permit in the future.

The announcement from *Haaretz* newspaper is attached hereto as Exhibit I.

41. Hence this Petition.

C. The Legal Argumentation

I. General

42. The Petitioners shall claim below that the Directive, apart from being immoral, simultaneously and independently violates three legal fields which apply to the actions of the military commander in an occupied territory: Humanitarian international law, the international law of human rights, and the Israeli constitutional and administrative law.

43. In addition, regardless of whether we classify the matter as emanating from the international law of human rights or from the general principles of international law, the Petitioners shall claim that the Directive creates an **apartheid** regime, as well as a regime of **persecution of a national group**, both of which constitute international crimes.

44. Ultimately, the Petitioners shall claim below that by enacting the order, the military commander has exceeded the legislative authority conferred upon him by international law and the security legislation itself.

45. Before proceeding to the detailed legal analysis, let us take note of the substance of the violation of the basic rights of the Palestinians who, according to the order, are not allowed to step into the cars of Israelis and foreigners without a permit. The violation is, first and foremost, of their **dignity as human beings**:

> "*At the basis of this discrimination stands the attribution, to the person discriminated against, of inferior status, which is a consequence of his allegedly inferior substance. This, of course, entails deep humiliation to the discrimination victim…*
>
> *[Such discrimination] sends a message that the group to which he belongs is inferior, thus creating a lowly image for the members of the group. Thus, a vicious circle is created, which perpetuates the discrimination. The lowly image, which is based on the biological or racial diversity, creates the discrimination, and the discrimination affirms the humiliating stereotypes regarding the inferiority of the person discriminated against. The main element, therefore, in discrimination due to sex, race or similar discrimination is the humiliation of the victim*".

(The opinion of the Hon. Justice Dorner in HCJ 4541/94 Alice Miller v. The Minister of Defense and 3 others, PDI 49(4) 94, paragraph 4 of her opinion).

46. The violation of dignity emanates, in fact, from the individual members of the discriminated group being treated as something *other*, something that is of *lesser value* and therefore not entitled to the same basic rights to which the members of the majority or controlling group are entitled. This is a violation of the very core of the concept of *our common humanity*.

47. This is the *outcome* of the Directive, irrespective of whether or not it was its *purpose*. Israelis and foreigners can transport one another, but Palestinians – like the untouchables caste in India – are outcast. They are, as aforesaid, *other* and *lesser*.

48. It is the Petitioners' position that also the dignity of Israelis is violated by the Directive, as they are forced to cooperate with discrimination on grounds of nationality, either be applying for permits or by refusing to transport a Palestinian not carrying a permit.

49. The Directive also violates the basic freedom of movement and the freedom to maintain social and family ties. In fact, the Directive, and the philosophy of segregation underlying it, violate the individual's personal autonomy to choose and realize, without interference, ties with other individuals, in which respect it also violates the basic rights of the Israelis and foreigners to which it applies.

50. All of these serious violations lead us to the legal analysis. However, before delving into it, we would like to dedicate a few words to the **inapplicability of the doctrine of proportionality** to the issue at hand.

II. There are Things to Which Proportionality is Irrelevant

51. In each one of the legal fields we mentioned (humanitarian law, the law of human rights, Israeli constitutional law), a certain form of the doctrine of proportionality is applicable to some degree or another. The use of this doctrine, which weighs, at times through secondary tests, the damage caused by an act of government versus the benefit it yields, has increased in recent years, and this Court often uses it to decide the legality of military acts in the occupied territories.

52. It is the Petitioners' position that in the case before us, the doctrine of proportionality is inapplicable, and that therefore there is also no importance to the question of to what extent the Directive benefits security.

53. The reason therefor is rooted in the nature of the violation of the basic rights due to the Directive contemplated in this Petition, which violation goes down to the core of the philosophy of the natural rights of man.

54. We do not ask ourselves whether a legal provision which leads to the conviction of the innocent, is proportionate to the benefit it may produce; we do not inquire into the ratio between the economic benefit arising from the legality of slavery and the damage caused to the rights of human beings who become slaves; and we are not supposed to inquire after the benefit deriving from an act of legislation which distinguishes between a Palestinian human being and a non-Palestinian human being, thus violating his dignity as a human being and our dignity as persons maintaining a legal system which is based on a humanistic foundation.

55. The reason is that all of the above, as was recently written in the context of what is and is not allowed in the struggle against terrorism, by one of the greatest philosophers of law, Prof. Ronald Dworkin, are issued *that cannot be weighed* (emphases added, M.S.):

> "*The image of striking a new balance is popular, but it is also peculiarly inapt… The issues we actually face are very different, however, and the balancing metaphor obscures those issues. We must decide not where our own interest lies on balance but the very different question of* ***what morality requires, even at the expense or our own interests***, *and we cannot answer that question by asking whether the benefits of our policy outweighs its costs to us*".

(R. Dworkin, **Is Democracy Possible Here?** (Princeton U.P., 2006), p. 27).

56. Although there is no dispute that upholding human rights requires, at times, balancing and weighing, the philosophical core of the idea of the natural rights of man prescribes that there are some things which government cannot do,

even if any benefit will arise therefrom. One of those things is the mere recognition of humanity and hence of the human dignity conferred on every human being as such.

57. An act of legislation which creates systematic, institutionalized and permanent discrimination between groups of people – violates that very core of human rights, and therefore there is no weight to the question of what benefit arises from such distinction.

58. It is therefore the Petitioners' position that an act of legislation which explicitly and blatantly denies a basic right from one "type" of people, is such that the benefit arising therefrom – if any – is irrelevant.

III. Violation of the International Law of Human Rights

59. The international law of human rights includes myriad prohibitions on discrimination on the basis of nationality. Following is a compilation:

60. The Universal Declaration on Human Rights sets forth, in Article 7 thereof, that:

> "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*"

61. The State of Israel has signed and ratified the International Covenant on Civil and Political Rights, 1966, in which it undertook, *inter alia* (Article 2, emphases added, M.S.),

> "*… to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, <u>without distinction of any kind</u>, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"

62. It should be noted that the prohibition on discrimination was fixed in the Covenant as belonging to the group of rights which cannot be suspended in times of emergency (Article 4 of the Covenant, emphasis added, M.S.):

> "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law <u>and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin</u>.*"

63. Israel has also signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination, 1965. Article 1(a) of the Convention defines the term discrimination:

> "*In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*."

64. There neither is nor can be any doubt that the Directive fulfills the components of the definition "racial discrimination" cited above. It is a distinction; based on national origin; which has the effect of impairing the enjoyment of fundamental human freedoms.

IV. Violation of International Humanitarian Law

65. The prohibition on discrimination underlies many provisions of humanitarian law. Article 3, which is common to the four Geneva Conventions and which is accepted as customary international law and as a sort of "miniature constitution" of humanitarian law, goes to the trouble of explicitly prohibiting discriminatory practices (emphasis added, M.S.):

> "*Persons taking no active part in the hostilities…shall in all circumstances be treated humanely, <u>without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria</u>*."

66. Article 27 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (the "**Fourth Geneva Convention**"), prohibits discrimination among civilians:

> "*…Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion*."

67. Although the article addresses discrimination among protected civilians, and Israelis in the West Bank are not protected civilians, it would appear that the prohibition on the discrimination of protected persons versus non-protected persons follows *a fortiori*.

68. Article 13 of the Fourth Geneva Convention provides that protection of the civilian population under the Convention will be given without adverse distinction based on "race, nationality, religion or political opinion".

69. Article 85(4)(c) of Protocol I Additional to the Geneva Conventions, of 1977, provides that "Practices of apartheid and other inhuman and degrading

practices involving outrages upon personal dignity, based on racial discrimination", are regarded as grave breaches of the Protocol.

70. As we can see, the prohibition on the discrimination of civilians by military forces controlling them, is a fundamental principle of humanitarian law, which is not surprising since humanitarian law in general and the laws of occupation in particular, are a quasi-bill of minimal human rights of civilians in times of war, and there is no codex of human rights which does not include, as a central part thereof, a prohibition on discrimination at least on grounds of race, sex and nationality.

V. Violation of the Israeli Constitutional and Administrative Law

71. The prohibition on discrimination is set forth in the Proclamation of Independence, and was infused into Israeli constitutional law even before the enactment of the Basic Laws, through case law (see: HCJ 98/69 Bergman v. The Minister of Finance, PDI 23(1) 693).

72. The prohibition on discrimination was constitutionally and super-statutorily established with the enactment of the Basic Law: Human Dignity and Liberty (see, *inter alia*, HCJ 7541/94 Alice Miller v. The Minister of Defense et al., PDI 49(4) 94; HCJ 6698/95 Adel Kaadan et al. v. The Israel Land Administration et al., PDI 54(1) 258; HCJ 2671/98 The Israel Women's Network v. The Minister of Labor and Welfare, PDI 52(3) 630).

73. The prohibition on discrimination is also part of administrative law – as ruled, *inter alia*, in the judgments mentioned above – and administrative law "is carried by every IDF soldier in his duffle bag", as ruled often, and recently in HCJ 769/02 The Public Committee against Torture in Israel v. The Prime Minister et al. (judgment dated December 14, 2006, paragraph 18, not yet published); see also: HCJ 393/82 Jamaat Ascan Almaalamoun v. The Commander of the IDF Forces in Judea and Samaria, PDI 37(4) 785, 810.

VI. International Criminal Law

74. The International Convention on the Suppression and Punishment of the Crime of Apartheid of November 30, 1973, defines in Articles II(c) and (d) the crime of apartheid as, *inter alia*, the exercise of various legislative measures on different racial groups, while violating the basic rights of one:

> *"II. For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them…*
>
> *(c) Any legislative measures and other measures calculated to prevent a racial group or groups*

> *from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including … the right to freedom of movement…*"

75. The order prohibiting joint travel of Israelis and Palestinians in an Israeli car is (1) A legislative measure; (2) Which denies a group (although on a national rather than on a racial basis) the ability to exercise a basic right (to freedom of movement, dignity, social ties); (3) For the full fulfillment of the components of the definition of the crime of apartheid, as quoted above, all that remains is to ask whether such legislative measure is committed for the purpose of maintaining domination by one group over the other. To our understanding, a rather reasonable interpretation of the military-security act of legislation in an occupied territory is that its purpose is to maintain domination over the citizens of the occupied territory, and in the case at bar – maintaining the Israeli domination over the West Bank and the Palestinians residing therein.

76. International law is consistent in its condemnation of legal regimes which discriminate against groups: The Rome Statute of the International Criminal Court provides, in Article 7(1)(h), that the violation of human rights based on ethnic grounds constitutes **a crime against humanity of the 'persecution' type**:

> "*Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*."

And 'persecution' is defined in Article 7(2)(g) as follows:

> " *"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;*

77. Although the Directive contemplated in this Petition probably does not fall within the jurisdiction of the international criminal court (since the Rome Statute requires that the offense of persecution be committed in the context of another international crime, "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court") – it fulfills the components of the definition of the crime of persecution, which are: (1) severe deprivation of a fundamental right; (2) of a group on ethnic grounds; (3) by reason of the identity of the group.

78. As we can see, a violation of basic rights by reason of identity (including ethnic or national), is defined as persecution, which persecution is a crime

against humanity. There is no doubt that the order severely violates basic rights (to freedom of movement, social and professional ties and mainly to dignity), nor is there any dispute that they are only directed against and applicable to Palestinians.

VII. Deviation from Authority

79. The Petitioners shall finally claim that the legislative powers of the military commander in an occupied area do not include legislation of the type of the Directive contemplated in this Petition.

80. It is our claim that Article 43 of the Annex to the Fourth Hague Convention on the Laws and Customs of War on Land, 1907, which determines the boundaries of the authority of the military commander to change the laws of the occupied territory, does not empower the Second Respondent to enact discriminatory laws.

81. From the outset, the legislative powers of the military commander are highly limited. As stated in Article 43 –

> "*The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety,* ***while respecting, unless absolutely prevented, the laws in force in the country***."

82. The already limited legislative powers of the occupant (the duty of respecting the laws in force, "unless absolutely prevented" from doing so), are subject to the basic principles of humanitarian law, which include the prohibition on discrimination (see D. Fleck (ed.), **The Handbook of Humanitarian Law in Armed Conflicts** (Oxford U.P., 2003) p. 247, hereinafter the "**Handbook of Humanitarian Law**").

83. See the example given by the handbook for a case in which the occupying power **is required** to change the domestic law of the occupied territory (p. 547, emphasis added, M.S.):

> "*… the occupying authorities should not observe provisions of the national law of occupied territory which 'constitute… an obstacle to the application of humanitarian law' (see the similar wording of Art. 64 para. 1). This refers especially to national regulations not compatible with the provisions of international humanitarian law…* ***e.g. openly discriminatory measures****…*"

84. In other words, not only is there no authority to modify the domestic law of an occupied territory in a manner which creates discrimination, **the occupant is obligated to cancel discriminatory laws which exist in the occupied territory**.

D. Conclusion: Curing the Law

> "*I would say that the whole life of any thinking African in this country is driven continuously to a conflict between his conscience on the one hand and the law on the other… The law as it has been developed… is a law that in our view is immoral, unjust and intolerable. Our consciences dictate that we must protest against it, that we must oppose it and that we must attempt to alter it.*"

(From defendant Nelson Mandela's statement of defense in his 1962 trial, quoted in the final report of the Truth and Reconciliation Commission of South Africa, submitted to President Nelson Mandela on October 29, 1998, Volume 4, Chapter 4, entitled "Institutional Hearing: the Legal Community").

85. The statements quoted above are cited from Volume 4, Chapter 4 of the report of the Truth and Reconciliation Commission of South Africa, which addresses the responsibility of the legal system for the crimes committed by the apartheid regime in South Africa. The Commission asked itself whether lawyers for the State had drafted laws which they should not have enacted; whether counselors defended cases which should not have been defended; whether private attorneys cooperated with laws that should not have been recognized or relied upon; and whether judges failed in the protection of the basic principles of the human community.

86. It is the Petitioners' uncompromising position that the Directive contemplated in this Petition contaminates military law. It is their position that the contamination could be fatal, if not removed immediately. It carries within it a seed of evil, the DNA of a dark regime and a slippery slope, whose outcome no one can tell.

87. This disease – no people know its evils better than our own. Indeed, "A Jew, forgerer of passports for generations / an infiltrator / the son of an infiltrator's son", as Nathan Alterman wrote in his poem which opens this Petition. Of all peoples, we have the tools to recognize the disease and its symptoms at their outset. It is our enhanced duty to beware thereof and to caution against it.

88. The Petitioners are therefore moving this Honorable Court to exercise the authority vested in it, and to order the Directive absolutely repealed, with retroactive effect, so as to erase the Directive from the book of laws of an Israeli governmental branch. As if it had never appeared on the face of the earth.

Therefore, the Honorable Court is moved to issue an order nisi as requested at the outset of this Petition and, after receiving the Respondents' Answer, to render the same absolute.

The Honorable Court is further moved to charge the Respondents with the Petitioners' expenses and legal fees, plus V.A.T. as required by law.

January 7, 2007

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Michael Sfard, Adv.
Counsel for the Petitioners