



Date: March 25, 2010
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To: Major General Avi Mizrahi
GOC Central Command

Via Fax

Dear Sir,

Re: **Order regarding Prevention of Infiltration (Amendment No. 2) and Order regarding Security Provisions (Amendment No. 112)**

1. I hereby appeal to you regarding the orders cited in the heading which were signed on October 13, 2009 and are due to come into effect on April 13, 2010. These orders substantially alter the law regarding any person currently present in the West Bank, and, regrettably, prior to their signing no public debate allowing for input by actors outside the military, including human rights organizations such as HaMoked: Center for the Defence of the Individual was held. In the time that has passed since the orders were signed, we have studied their provisions and we now wish to present you with our comments, before the orders come into effect.
2. At the outset, we request that in view of the importance of the issue and the dramatic change these orders cause with regards to the human rights of a vast number of people, **their entry into effect be delayed**. This delay is required in order to study our comments and seriously consider amendments to the orders such that the grave injury caused by them is reduced.
3. In order to clarify the extremity of the orders, we shall state at this early point that according to their wording, every living person in the West Bank would become a criminal who faces a penalty of three to seven years imprisonment. Additionally, according to the orders, the West Bank could be emptied of all its inhabitants in a fast track three-day procedure, which, *prima facie*, does not require any judicial review. In view of the conduct of military officials and the positions they have presented to the court, there is grave concern that this scenario will become a reality, despite lacking any legal basis.
4. Beyond the extreme absurdity of this situation, we shall add that the provisions in the orders stipulate stricter arrangements than those found in similar provisions that apply in Israel without any justification. Individuals who have until now been law abiding residents, will suddenly find themselves accused of offences which carry heavy penalties while denied the procedural rights granted to any person inside Israel.
5. Before we detail our comments, we shall clarify that they refer to the Order regarding Prevention of Infiltration (Amendment No. 2) (hereinafter: **the Order regarding Prevention of Infiltration**) and

the Order regarding Security Provisions (Amendment No. 112) (hereinafter: **the Order regarding Security Provisions**). This, when you have thus far argued for the existence of an authority to remove persons from the West Bank pursuant to the Order regarding Closed Zones (West Bank Area) (No. 34) 5727-1967. At face value, it appears that your position remains intact and it is unclear whether the provisions of the aforesaid orders are the definitive arrangement on this issue.

A. The Definition of “Infiltrator”

Dramatic expansion of the definition of “infiltrator”

6. According to the definition in Section 1 of the Order regarding Prevention of Infiltration, an infiltrator is, *inter alia*, “a person who is present in the Area and who does not hold a permit as required by law”. As such, **any person**, currently present in the West Bank – whether he was born in the West Bank or has entered it; whether he has status in the territories of the Palestinian Authority or not – is now required to have a permit.
7. Logic dictates that an “infiltrator” is first of all a person who entered the territory and has done so illegally. This logic has been clearly expressed in existing Israeli law (The Law for the Prevention of Infiltration (Offences and Adjudication) 5714-1954) and was preserved in an amendment to this law (Proposed Law for the Prevention of Infiltration, 5768-2008). What is at issue is a substantive change of the definition of “infiltrator” from one which requires an unlawful active act to one which requires an existential situation and is subject to the military commander’s grace.
8. Moreover: currently, both in Israel and the West Bank, the premise is that a person is duly defined as an “infiltrator” only if he arrives from an enemy state. For this reason, his penalty is more severe than that of an illegal alien who arrives from a friendly country for instance. However, the Order regarding Prevention of Infiltration substantively changes the use of the term “infiltrator” such that it is applied to any person, with no clear justification. I shall remind that a proposed amendment to the Israeli law in this vein was severely criticized for this reason among others and has not yet been passed and made primary legislation.
9. We seek to clarify the extremity of the extensive application of the order’s wording: the order applies to Palestinians who were born in the West Bank and have lived there their entire lives; it applies to foreigners and Palestinians who lawfully moved to live in the West Bank from the Gaza Strip; it applies even to Israelis who are in the West Bank (absurdly, even to the military commander’s soldiers).

Permits

10. As stated, from the wording of the definition, currently every person present in the West Bank who does not have a permit is a criminal. The wording of the definition suggests that the permit is **written** and section 5(b) of the order suggests that it is a permit **granted by the military commander** or a person appointed by him in accordance with security legislation, or **Israeli authorities**, under the Entry into Israel Law, **5712-1952**. In fact, the definition is so broad that, according to its wording, it allegedly applies to every person currently present in the West Bank regardless of his status, identity or nationality. We seek to divide our references into two major groups.
 - a. Foreigners – many people who have no status in the Occupied Territories live in the West Bank today. These are individuals who entered the Territories over a decade ago (sometimes much longer than this) and lived there for a time via visitor permits issued to them by the Palestinian Authority in accordance with the Interim Agreement. Many have filed applications for family unification. However, between 2000 and the end of 2007, Israel implemented a “freeze” policy in the context of which it sweepingly refused to grant status in the Territories and or admit

applications for permit renewals transferred by the Palestinian Authority for processing. It has never been argued that this policy was motivated by individual security considerations. The opposite is the case: it has been openly argued, in court, that the considerations were purely political. Such considerations, as known, lie beyond the power and discretion of the military commander, which attests to the blatant illegality of this policy. This “freeze” policy instantly turned hundreds of thousands of foreigners living in the Territories via visitor permits or through the family unification process to “illegal aliens” in their own homes. At the end of 2007, following a petition by HaMoked: Center for the Defence of the Individual (HCJ 3170/07 Dweikat), Israel agreed to process some 50,000 applications for family unification as a political “gesture” to the head of the Palestinian Authority. To the best of our knowledge, some 30,000 applications were ultimately transferred and approved. However, “vestiges” of the unacceptable freeze policy remain – individuals whose applications for family unification were now, after many years of living in the Territories, refused and individuals who did not file new applications whether due to lack of awareness or any other reason.

- b. The expansive wording of the order makes it possible to apply it, ostensibly, even to residents of the West Bank and even if they have legal status. Although this seems an absurdity, past conduct by the military, particularly in a number of cases from the last year, raises grave concerns that the very broad definition of “infiltrator” was indeed meant to facilitate application of the order to **Palestinian residents, holding Palestinian Authority identity cards and having legal status**, particularly to those whose registered address is in Gaza.

As known, over the past few years, and more so recently, the military has taken action to forcibly remove Palestinians living in the West Bank to the Gaza Strip, relying on the fact that their registered address is in the Gaza Strip. Some were born in the West Bank. Others lawfully moved to the West Bank from the Gaza Strip. As known, not one of them required a written permit from the military commander, since, as known, for many years such permits did not exist at all.

In effect, despite the fact that from 1967 to the present day, military legislation included no requirement to hold a written permit, and such permits did not exist, indeed, now, these individuals are facing severe sanctions despite having acted lawfully. The requirement for permits is a recalibration of the existing reality for people who have never before required any consent in order to live in their cities or who received the consent of the military commander many years ago.

I shall note that, as you are no doubt aware, in the past year several HCJ petitions were filed challenging deportation orders issued against residents of the Territories who had lawfully moved from the Gaza Strip to the West Bank and were lawfully present therein. I shall emphasize that in all those petitions, the military’s position was criticized and in one, an order nisi was issued (HCJ 8729/09 Suali; HCJ 2786/09 Salem); **The court clarified that it is impossible to disparage persons who were born in the West Bank or who lawfully moved there and who had never been required to hold any sort of written permit in order to continue to live there.** It is difficult to avoid the concern that the aforesaid orders commit the same sin criticized by the Supreme Court, in completely ignoring the law which was in effect in the Territories for 43 years as well as the conduct of military authorities throughout this time.

As stated, this is an utter absurdity as, according to the definition in the order, the West Bank could be emptied of all its inhabitants for being “infiltrators”.

11. As an aside, I shall add, that according to General Entry Permit (No. 5) (Israeli Residents and Foreign Residents) (Judea and Samaria), 5730-1970, any Israeli wishing to relocate to the West Bank requires

a personal permit document (Section 2(6) of the Order). As far as we know, no settler living in the West Bank has ever received a permit document as stated, such that over 100,000 settlers too will become “infiltrators” on April 13, 2010.

B. Criminal Offence

12. As known, defining a person as an infiltrator renders him criminally liable. Not only could all persons living in the West Bank be expelled from it as per the order (with their property seized for the purpose of financing the removal under section 6 of the order); but now, they also find themselves suddenly declared criminals under section 2 of the order. This, despite having done nothing wrong and having always abided by law.
13. Additionally, the order establishes overly severe penalties. First, regarding those who entered the West Bank unlawfully, the order sets a maximum prison term of seven years. This despite the fact that the parallel arrangement in Israeli legislation, including the proposed amendment to the law, sets a maximum prison term of five years. A seven year prison term is exclusive to those arriving from certain countries listed in the addendums and which are enemy states. There is no sense in a Venezuelan citizen who entered the West Bank unlawfully receiving a harsher penalty than a Venezuelan citizen who entered Israel unlawfully.
14. Second, regarding persons who had entered the West Bank lawfully, the order establishes a maximum prison term of three years. It seems that the parallel offence in Israeli law is illegal presence in Israel; yet, the maximum prison term for this offence under Section 12 of the Entry into Israel Law, 5712-1952, is one year only. This is a far stricter penalty – three times the maximum prison term – relative to the arrangements set forth in Israeli law.
15. It also appears that this alternative is theoretical. First, it is relevant only for those who did indeed enter the West Bank and not those who have lived there their entire lives (and as stated, they too now require a permit). Second, regarding those individuals who entered the West Bank from the Gaza Strip, for instance, they were never given a document attesting to their lawful entry. As the onus of proving their entry was lawful lies with them, there is almost no practical possibility of so proving. Even in other cases it is an unthinkable demand: is it conceivable that a person who entered the Territories from Jordan, with a permit, 20 years ago would now suddenly be required to try and locate the permit he received then? Indeed, it is clear that this is a near impossible onus.

C. Swift Expulsion without Judicial Review

16. While in Israeli law – both existing and proposed – one can challenge a deportation order in the courts, Article 87.14 of the Order regarding Security Provisions stipulates that judicial review of the order shall be carried out by the Committee for Examining Deportation Orders (hereinafter: **the committee**). In state responses recently submitted in petitions pending before the courts, the argument was made that this is an alternate remedy.
17. However, the order does not regulate any possibility of appealing to the committee (with the exception of an application for reconsideration of a decision that has already been handed down). It follows that the person designated for removal must wait until he is brought before the committee where he may stake his claim. Yet, the combination of the Order regarding Prevention of Infiltration and the Order regarding Security Provisions suggests a possibility that persons designated for removal will not even be brought before the committee: According to Section 3(c) of the Order regarding Prevention of Infiltration, the military commander may remove a person from the West Bank after 72 hours (and in some cases even sooner, as stated in section 3(d) of the order); this while under Section 87.13 of the Order regarding Security Provisions, a person can be brought before the committee up to 8 days from issuance of a deportation order.

With no ability to initiate an appeal to the committee, a person is thus dependant on the mercy of the military commander not to remove him before he is brought before the committee. Can a person be expelled from his home without judicial review of the warrant? On this issue we would like to recall the remarks of the Supreme Court:

We wish to reiterate what we have said to parties' counsels in the hearing before us: the state should hurry and take action toward creating a mechanism for "internal" judicial review – alongside this court's review of the holding of removed persons pursuant to security legislation in the Area... as any procedure involving denial of liberty, including the holding of such removed persons, must be carried out according to clear and defined rules and be subject to periodic judicial review.

(HCJ 2737/04 *Kafarneh v. Commander of the Gaza Strip Area Takdin Elyon* 2004(4), 2040).

And the state pledged before the Supreme Court in 2005 as follows:

... the establishment of arrangements for judicial review is appropriate and necessary according to the principles of customary international law... and indeed, as the respondent has notified, the state is taking action toward the prompt creation of an internal mechanism for judicial review – alongside review by this court of the holding in custody of persons designated for deportation. The creation of this mechanism should duly be completed within a reasonable timeframe.

(HCJ 7607/05 *Abdallah (Hussein) v. Commander of IDF Forces in the West Bank Takdin Elyon* 2005(4) 2859, p. 2862).

18. We shall add that the aforesaid periods of time injure the rights of persons designated for removal regardless of the issue of judicial review. The possibility of removing a person following three days (sometimes sooner) obviously does not provide the person designated for removal with sufficient minimum time to hold a proper hearing and sometimes appeal its results, certainly if he is required to produce evidence in order to challenge the decision. On the other hand, a period of eight days during which a person can be held in custody prior to being brought before a judge is clearly disproportionate (see HCJ 6055/95 *Tsemah v. Minister of Defense, Piskey Din* 53(5) 241 (1999)), and it is unclear why it should be doubled relative to the period stipulated under Israeli law which sets a period of 96 hours.
19. Additionally, despite the fact that Article 3(a1) of the Order regarding Prevention of Infiltration stipulates a duty to hold a hearing, indeed, an effective hearing requires that the person designated for removal also be given the right to counsel and the opportunity to confer with counsel, as well as a right to appeal the decision. These rights are not expressly enshrined in the order.

D. Holding in Custody and Release on Bail

20. According to the orders, a person may be held in custody pending execution of the deportation order. Unlike Israeli law which acknowledges a person's remainder in custody for over 60 days as grounds for release from custody, the orders do not include such grounds. In this situation, the military commander and the committee are not empowered to order the release of a person from custody due to the passage of time.
21. Additionally, the discretion of the military commander and the committee to release a person from custody is denied if they maintain that "his removal from the Area is delayed due to the absence of

full cooperation on his part or if his release may pose a danger to the Area or to public health or safety” (Section 6(b) of the Order regarding Prevention of Infiltration; Section 87.14(c) of the Order regarding Security Provisions, as well as section 87.14(d)(2)). These provisions raise a number of issues.

22. First, the Order regarding Prevention of Infiltration does not include a definition of “cooperation”. Assuming there is no overlap between the definition in Section 6(b) and that in Section 87.14(c) of the Order regarding Security Provisions; indeed this is a vague and broad definition which imposes an unclear onus on the person designated for removal as a condition for his release from custody.
23. Second, the definition of “cooperation” in the Order regarding Security Provisions stipulates that a person’s refusal to be deported “to a third country if his return to the country from whence he came to the Area is not possible” is outrageous. It is impossible to require a person to knock on the doors of over a hundred countries in which he has no interest and which have no interest in him, as a condition for his release from custody. On this issue, I shall remind that only recently, the HCJ criticized a similar demand made of a detainee and ordered its revocation (HCJ 1268/10 **‘Omar Mahmoud v. Military Commander of the West Bank Area**).
24. Third, it is a complete negation of the committee’s discretion. A military judge presiding as a criminal or administrative detention judge may release a person to his home. Yet the same judge cannot release the very same person if he presides over his case in the capacity of a judge on the committee. It is an unreasonable provision which has no justification.

It shall be noted that only recently, a man who was held in custody was released to his home under the very same circumstances (HCJ 2786/09 Salem), this according to a decision of the military court. According to the orders’ wording, it will no longer be possible to release a person whose holding in custody was found to be unjustified since both the military commander and the committee will be prohibited from doing so.

25. I shall further add that according to Section 87.15 of the Order regarding Security Provisions, the matter of a person who is held in custody will be brought for periodic review within 60 days of the date on which the preceding decision was handed down. This is a doubling of the period stipulated in Israeli law which requires periodic review after 30 days. Here too, it is unclear why there is a need for a stricter approach regarding the rights of a person held in custody compared to the situation inside Israel.

E. Absence of Substantive Provisions regarding the Operation of the Committee

26. In addition to our comments regarding the arrangements set forth in the Order regarding Security Provisions, I shall add that the order lacks substantive provisions.
27. Second, the fate of persons whom the committee ordered released is unclear. In Israeli law, if the committee ordered a person be released from custody, he or she will receive a temporary visa from the minister of the interior. This arrangement is logical, as it is clear that such person is entitled to move freely about the territory. The Order regarding Security Provisions lacks a similar arrangement regarding those released as per the decision of the committee or the military commander.
28. Third, there are situations where a person cannot be deported to the country from whence it is claimed he arrived, despite full cooperation on his part. It is unclear whether in this situation the committee may order the revocation of the deportation order. Assuming it is not empowered to do so, the fate of a person released from custody under Section 87.14(d)(1) of the Order regarding Security Provisions but whose deportation order remains intact is unclear.

29. I shall finally comment that in view of the wording of Section 87.18(b) of the Order regarding Security Provisions which allows the committee, and in some cases, even requires it to accept the position of the military commander, the extent of the committee's independence, which is crucial for the carrying out of justice in each and every case, is unclear.
30. Before I conclude, I seek to recall the instruction of the High Court of Justice regarding the establishment of a mechanism for judicial review with regards to the Order regarding Prevention of Infiltration:

“We repeat the wish for the swift completion of the establishment of the judicial review mechanism. In the complex circumstances under which the State of Israel operates with regards to the Judea and Samaria and Gaza Areas, it is particularly important that procedural arrangements are the best possible, even if the Geneva Convention does not require judicial review... indeed the spirit of international law, and moreover, the principles and spirit of Israeli law justify this.”

(HCJ 5887/09 **‘Odeh v. Commander of IDF Forces in the West Bank**, *Takdin Elyon* 2006(3), 809, 711 (2006)).

Conclusion

31. In view of the above, we are of the opinion that the provisions of the aforesaid orders severely injure the substantive and procedural rights of a vast number of people while blatantly breaching both Israeli and international law. We are of the opinion that the arrangements set forth therein should be reexamined before they take effect. Therefore, I request that you delay the entry of the orders into force and examine their provisions in accordance with our comments.

Sincerely,

Dalia Kerstein
Executive Director

Copies:

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