[Unofficial Translation]

At the Supreme Court in Jerusalem HCJ /09
Sitting as the High Court of Justice

Shawan Rateb Abdullah Jabarin, ID 959106139

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-- Versus --

The Commander of IDF Forces in the West Bank

Through his representative Adv. of the State Attorney's office,
Ministry of Justice, Salah A-Din Street, Jerusalem

Petition for a Conditional Order

This is a petition for a conditional order in which the honourable court is requested to instruct the respondent to come and give reasons, if he wishes,

(a) Why he should not remove the prohibition placed on the petitioner from leaving the West Bank for abroad;
(b) Why he should not allow the petitioner to leave for the Netherlands between 11-14 of March of this year, in order to receive a distinguished award for human rights defenders, given this year to the organisation Al-Haq, of which the petitioner is the general director, and to the Israeli human rights organisation, B'Tselem.

Request for an urgent hearing

This petition concerns the respondent's decision not to allow the petitioner, who is the general director of the well-known and well respected human rights organisation "Al-Haq", which is based in the city of Ramallah and active throughout the West Bank (hence: "the organisation").

The organisation was recently granted an eminent award given by a Dutch organisation to human rights defenders who struggle for the promotion of democratic values and the elimination of discrimination. The awards ceremony will take place in the Netherlands between 11-14 of March 2009, i.e. in approximately three weeks.

The petitioner was invited to the ceremony in order to receive the award on behalf of the organisation of which he is the general director.

The prohibition regarded in this petition, which severely restricts the petitioner's fundamental right to freedom of movement and therefore his ability to perform his duty as the general director of the organisation, inhibits the petitioner's ability to attend the ceremony and receive the award his organisation has been honored with.

In view of the severe violation of the basic rights of the petitioner and the short time-frame until the awards ceremony, the honourable Court is requested to instruct the secretariat to set this case for hearing as soon as possible and if possible, no later than the end of this month.

"I am here today because, due to certain strange characteristics of the country whose citizens my husband and I are, my husband's presence at the ceremony of the Nobel peace award turned out to be impossible"

Mrs. Yelena Bonner Sakharova, receiving the Nobel prize for peace on behalf of her husband, scientist and human rights activist, Andrei Sakharov, 10 December 10, Oslo.

A. Introduction

1. This petition concerns the respondent's refusal to allow the petitioner, for the past **three years**, to leave the West Bank for abroad.

2. As detailed below, the petitioner is a prominent human rights defender in the West Bank and the restriction of his movement raises an unpleasant odour of harassment against a person working to fortify the human rights of his people. The respondent is preventing the petitioner, as mentioned, from leaving the West Bank for the purpose of his work – to conferences, lectures, working meetings and other such activities as an invitee of legitimate and recognised foreign and international human rights organisations, and even on invitation from the United Nations.

3. The petitioner's matter was heard several times in this honourable Court and as detailed below, was rejected every time on the basis of withheld material presented to the justices with only one side present.

4. The bottom line is that the petitioner has been prevented, for three years now, from exercising his right to freedom of movement on the basis of accusations whose substance and sources are unknown to him.

5. This petition is submitted after the organisation, headed by the petitioner and representing the largest, oldest and most well known and respected human rights organisation in the West Bank, was honored with the eminent award by a Dutch organisation, given to human rights defenders. This year the prize is being awarded to Al-Haq of which the petitioner is the general director, as well as the Israeli human rights organisation B'tselem.

6. If the respondent's decision on the matter of the petitioner remains in force, the petitioner will not be able to accept the award on behalf of the organisation he represents, in a ceremony scheduled to take place in the Netherlands in the second week of March (on the 11-14 of March).

7. The respondent's behavior raises serious misgivings, both on the legal level – due to the fact that the prevention of the petitioner's leaving the country is not done by way of an administrative or other order, while according him the right of hearing and appeal, but rather by the physical means of not allowing him to pass through the border crossing – and on the public level, since the respondent's insistence on keeping the petitioner in the West Bank has the price of damaging the reputation and status of Israel. Such damage could now be especially high, seeing as the petitioner's work is currently receiving international recognition and being honoured with a prestigious award.

8. In this petition it will be argued below that the respondent has illegally injured the rights of the petitioner, both due to the injury to the personal freedom of movement to which he is entitled, and due to the fact that the respondent has disregarded his rights as a *human rights defender* – a representative of civil society to whom the law grants a special and enhanced net of protection. It will also be argued that the respondent did not take all the required considerations and was mistaken in not striking the appropriate balance among them.

9. As mentioned above, this petition was preceded by previous petitions that were submitted in the initial stages of the prohibition, the last of which was submitted eight months ago, during the beginning of June 2008. These petitions, detailed below, were rejected by the honorable court. In this petition the petitioner will ask the honorable court to decide on the matters of principle raised in the previous petition and which did not receive a response in the verdict. In addition, the petitioner will argue that the **significant passage of time** requires a renewed examination of his matter and additional juridical oversight, since it is a well known and entrenched rule that the continuation of injury to basic rights by the authorities changes the point of balance between the competing interests.

10. At the end of the day it is unthinkable, by any normative measure, to permit or ignore clear violations of fundamental rights such as one-sided and secret proceedings in which the subject of the injury cannot defend himself and refute the accusations against him. This statement must not turn into lip-service that is unaccompanied by operative aid. Three years of prohibition from leaving the West Bank would be a severe and harsh limitation for anyone, let alone for someone whose work requires traveling abroad; and when this is done through administrative emergency measures based on withheld and secret material, the matter casts a heavy shadow on the entire regime and its treatment of civil liberties and human rights.

11. For all these reasons, the petitioner will seek the intervention of the court against the respondent as mentioned in the opening of the petition.

B. Factual Background

12. The petitioner is a Palestinian civilian resident in the village of Sa'ir in the West Bank, 47 years old, married and a father of four. The petitioner is a veteran human rights activist who has received awards for his activity and in the beginning of 2006 was appointed director of the Palestinian human rights organisation "Al Haq" and he holds this position to this day.

13. The "Al Haq" organisation, whose center is in Ramallah, is the oldest Palestinian human rights organisation active in the West Bank today. Since its foundation in 1979, the organisation has taken part in struggles for the promotion of the human rights of Palestinians in the occupied territories by conducting research, giving legal aid and documenting individual and collective injuries to human rights.

14. The organisation is a recognised human rights organisation which has been cooperating for years with known and recognised foreign, international and Israeli organisations.

15. The respondent is the military commander of the IDF forces in the West Bank, who is appointed to maintain order and public life in the occupied territories as well as the wellbeing and security of the civilians in the occupied territory.

16. By force of his position as the director of "Al Haq" and as a veteran human rights activist, the petitioner is invited from time to time to participate in international conferences, working meetings and lectures abroad.

17. Before he was appointed to his current position, in 2004, the petitioner requested to leave the West Bank in order to study for a Masters' degree in Ireland but was refused by the respondent. In consequence, the petitioner petitioned this honourable court and in the framework of the petition (HCJ7169/04 Shawan Rateb Abdullah Jabarin VS. The Commander of IDF Forces in the West Bank) the respondent re-examined the petitioner's case and decided to allow him to leave for abroad. Therefore the petition was deleted with the agreement of the sides.

    A copy of the agreed request to delete the petition in the said HCJ 7169/04 is attached to this petition and marked Appendix I.

    A copy of the verdict in HCJ 7169/04 is attached to this petition and marked Appendix II.

    In total, the petitioner left the West Bank for abroad on **eight** different occasions between 1999-2006, the last of them in February 2006. Let it be noted that in some of the cases the petitioner was required to sign a commitment form regarding his journey in which he committed not to engage in "terrorist activity" during his stay abroad.

    A copy of a response on behalf of the Attorney General for the West Bank [AGWB] permitting the petitioner's leaving for abroad in February 2006 subject to his signing the said commitment form is attached to the petition and marked Appendix III.

    A copy of a letter on behalf of the AGWB, following his signing of the form, which mentions that the petitioner's leaving for abroad in February 2006 is approved, is attached to the petition and marked Appendix IV.

18. In brackets let it be noted that it is entirely unclear what the legal basis is for the demand to sign the said form as a condition for leaving for abroad, but in any event the petitioner, as mentioned, agreed to sign it, actually signed it, and left for abroad.

19. However, since March 2006 the respondent has systematically prevented the petitioned from leaving for abroad and effectively grounding him to the West Bank – all of it without an administrative order being issued against him, and without there taking place any hearing procedure except for proceedings in this honourable court, which will be detailed below.

20. On 23.3.06 the petitioner arrived at Allenby Bridge in order to leave for Jordan, but he was returned from the Jordanian side of the border and the Israeli security officials presented the petitioner with a police order instructing him to come to Kfar Etzion and meet with the Shin Bet representative responsible for his place of residence. The petitioner acted according to the indication of the order and arrived at the DCO to which he was invited three days later, on 26.3.06.

21. When the petitioner presented himself at the gates of the DCO in Etzion he was required to wait outside the installation for four hours before being instructed to enter. Upon entering the installation his identification card was taken away from him and he was demanded to remove the clothes from his upper body before

entering the installation. The petitioner refused to conform to the demand, which he viewed as humiliating and injurious to his human dignity, and as a result the soldier who conducted the examination sent him home while refusing to return his identification card. The soldier continued to refuse despite the petitioner's pleadings that without it he is unable to legally move in the West Bank. Following this event "Al Haq" made a complaint to the AGWB.

A copy of the complaint submitted by "Al Haq" to the AGWB is attached to the petition and marked Appendix V.

22. The petitioner's identification card was returned to him only after three months, following a request by Adv. Yossi Wolfsohn of the Israeli human rights organisation "HaMoked: Center for Defense of the Individual"

    Adv. Wolfsohn's letter to the AGWB and the letters of reply on behalf of the AGWB are attached to the petition and marked Appendix VI.

23. Following this event, on 4.10.06 the petitioner applied to the AGWB requesting to permit his leaving in order to participate in a conference in Spain, yet his request was denied on the rationale that he is an activist in the Popular Front and therefore his leaving to Jordan (in order to get to Spain) may endanger the security of the area.

    A copy of the letter of Private Tamar Lacquier on behalf of the AGWB of 12.10.06 is attached to the petition and marked Appendix VII.

24. In November 2006 the petitioner was invited to participate in a conference of the organisation "Christian Aid" in Egypt. This is an American Christian organisation which supports activity for human rights around the world.

    The petitioner submitted a petition to this honourable court requesting that the court instruct the respondent to allow his leaving for the aforementioned conference (HCJ 9703/06 Shawan Jabarin VS. The Commander of IDF Forces in the West Bank)

    A copy of the petition in HCJ 9703/06 is attached to the petition and marked Appendix VIII.

25. After a hearing, part of which took place with one side present, and in which the justices of the honourable court were presented with classified material, the petitioner's petition was rejected.

    A copy of the verdict in HCJ 9703/06 is attached to the petition and marked Appendix IX.

26. The continuing restriction on the petitioner's leaving the country, which has injured and continued to injure the functioning of the organisation which he heads, led to a wave of protest by international human rights organisations. On 11.3.2007 the international human rights organisation Human Rights Watch sent a letter to the Prime Minister of Israel, Mr. Ehud Olmert, in which it complained about the narrowing of the petitioner's steps and demanded a removal of the restrictions placed upon him.

    A copy of the letter by Sarah Leah Watson, head of the Middle East and North America division in "Human Rights Watch", of 11.3.07 is attached to the petition and marked Appendix X.

27. Also, three international human rights organisations issued a joint statement protesting the continuing restriction on the petitioner's freedom of movement which prevents him, as the representative of the organisation which he heads, from leaving for abroad for professional purposes and from responding to invitations that he received from non-governmental organisations around the world.

    A copy of the joint statement published by the organisations "Human Rights Watch", "OMCT" and "FIDH" on 25.07 is attached to the petition and marked Appendix XI.

28. On 1.5.07 the petitioner once again applied to the AGWB, this time through his undersigned representatives, requesting to allow the petitioner to leave the country in order to participate in an international conference on peace that took place in Nuremburg, Germany on 25-27 June.

29. Once no answer was received, the undersigned once again applied on 9.5.07 to the office of the AGWB requesting a speedy resolution of the petitioner's application. In his second application the undersigned noted that in the meantime the petitioner had also been invited to a series of working meetings in Geneva in the middle of May, and that a speedy reply was being requested for this reason as well.

    A copy of the letters from the petitioner's representative to the office of the AGWB is attached to the petition and marked Appendices XII-XIII.

30. On 9.5.07 an interim response was received from the representative of the AGWB which stated that "your present application has been transferred for re-examination. When this examination is complete we will inform you of its results".

    A copy of the reply by the representative of the AGWB is attached to the petition and marked Appendix XIV.

31. Time passed and no final reply was received. The petitioned had to miss the working meetings in Geneva and on 12.6.2007 submitted another petition to the honourable court (HCJ 5128/07 Jabarin VS. The Commander of IDF Forces in the West Bank, henceforth: "the previous petition").

32. On 22.6.2007 the honourable court (Hon. Justices Levy, Rubinstein and Alon) rejected the previous petition. In the verdict the honourable justices determined that the classified material presented to them in the presence of one side "gives grounds for the respondent's claim regarding the petitioner's activity in the terrorist organisation the Popular Front"

33. Regarding the petitioner's argument raised in the petition, that where the commander of IDF forces is interested in limiting the right of a West Bank resident to leave for abroad there should be conducted an orderly procedure of issuing an order and holding a hearing, the honourable court said:

> *"We are also of the opinion that there is room for as orderly a procedure as possible, that responses to applications should be given by the authorities after as reasonable a time as possible, and prima facie it appears that it is appropriate that a person whom it has been decided to prevent from leaving will receive notice of it in advance, so that he can consider his legal steps…prima facie there is room for establishing a*

possibility for appealing a refusal, other than by petition to this court in absence of another option."

The verdict in HCJ 5162/07 is attached and marked Appendix XV.

34. On 14.1.2008, seven months after the verdict in the previous petition was issued, the undersigned applied to the respondent in the name of the petitioner and requested that he be allowed to leave the West Bank.

    A copy of the application is attached and marked Appendix XVI.

35. After a technical response confirming the reception of the application (of 20.2.2008) and three reminders on behalf of the petitioner (on 19.2.2008, 19.3.2008 and 6.4.2008), and another interim response on behalf of the respondent (on 6.4.2008), the respondent's final response was received only on 29.4.2008 – **three months and a half after the first application.**

    Copies of the interim responses and the reminders are attached and marked Appendix XVII.

    A copy of the respondent's final response of 29.4.2008 is attached and marked Appendix XVIII.

36. In his final response (Appendix XVIII) the respondent rejected the petitioner's request in light of "classified intelligence information" and "due to his being an activist in the Popular Front organisation".

37. **The respondent did not act according to the recommendation of the honourable court in its verdict regarding the petitioner, did not issue an order and did not conduct a proper hearing procedure**.

38. In light of this, the petitioner submitted another petition to the honourable Court through the undersigned on 4.6.2008 (HCJ 5022/08 *Shawan Jabarin vs. The Commander of IDF Forces in the West Bank*, henceforth: "the third petition").

39. On 7.7.2008 the third petition was rejected by the honourable Court (Js. Levi, Rubinstein and Meltzer), once again on the basis of withheld material that was submitted with one side present and once again without addressing the judicial questions raised in the third petition.

    The verdict in the third petition is attached and marked Appendix XIX.

40. Approximately six months after the verdict of the third petition was given, the undersigned again approached the respondent, requesting to know whether the prohibition of leaving for abroad is still in force.

    A copy of the letter of 5.1.2009 is attached and marked Appendix XX

41. A week later, on 13.1.2009, the respondent's answer was received according to which the prohibition on the petitioner's leaving for abroad remains valid.

42. In early February 2009 Al-Haq was informed that the Dutch organisation Geuzen resistance 1940-1945 had decided to give them their eminent award for 2009, together with the Israeli human rights organisation B'tselem. Geuzen resistance was established by the survivors of the Dutch resistance, which acted during the Second World War in the Netherlands against the Nazis, and is named after the resistance movement. The organisation grants the award yearly to human rights

organisations and to individuals who have worked for democracy and against discrimination throughout the world.

43. Following this notice the petitioner received an invitation to participate in the awards ceremony on behalf of the organisation he heads, and in light of this, the undersigned applied once again to the respondent and requested his authorization for the petitioner's leaving for the Netherlands.

    A copy of the application of 9.2.2009 is attached and marked Appendix XXI.

44. On 12.2.2009 we received the respondent's decision rejecting the request.

    A copy of the respondent's response of 12.2.2009 is attached and marked Appendix XXII

45. Hence this petition.

C. The Legal Argument

A. General

46. The petitioner will argue below that there was no basis for the decision that his leaving for abroad endangers the security of the area and that in any event the time that has passed since the restriction was first imposed upon him requires a new balance which places a much heavier onus on the respondent than that which was placed on him in the previous stages.

47. In addition and as mentioned in the opening of the petition, since the previous petition was decided without there being a resolution of the principled legal questions it raised, but rather on the basis of the examination of the classified intelligence material that was presented in the presence of one side only, the petitioner has no choice but to repeat his principled arguments regarding the contravention of the principle of legality and the natural rules of justice and the weight of the freedom of movement and especially the freedom of movement of those who carry the status of *human rights defenders.*

48. Therefore, these will be the petitioner's arguments:

    a. There was no (factual) basis to the claim that the petitioner's leaving for abroad would endanger security;

    b. The passage of time since the restriction was first imposed upon the petitioner requires striking a stricter and more accurate balance which places a very heavy onus upon the petitioner;

    c. The way in which the restriction was imposed injured the principle of legality and the natural rules of justice;

    d. The restriction – in itself and in consideration of the length of time for which it has been in effect – illegally injures the petitioner's freedom of movement as a human being and as a *human rights defender*.

B. Violation of the Right to Freedom of Movement

I. The Respondent's Position

49. The respondent's position, as presented in the previous petition, is that the entire West Bank is a closed military zone, the entry and leaving of which requires permission, and this by force of the Order on Closed Zones (West Bank Area) (no. 34), 5727 – 1967.

50. **That is, the respondent's position is that for the forty one years of the occupation, there has been in effect a prohibition, that applies to about three million civilians, on leaving the West Bank unless they have received permission from the military commander. Let it be said immediately that this position is unreasonable, illegal and does not comply to the rules of international law concerning occupied territory. This position is also frightening and totalitarian in its essence.**

51. The petitioner's position in this part is that the respondent has injured the petitioner's right to freedom of movement, which is anchored in four separate and complementary legal fields applicable to the matter at hand, and did so without complying with the criteria for exceptions that allow an injury to this central right. **It is the petitioner's position that the legal point of departure is that all civilians in the occupied territory have the basic right of leaving the territory, whereas the exception is the placing of a specific and individual restriction on the realisation of this right.**

52. Therefore, first, the petitioner will argue based on international humanitarian law and in particular on the laws of military occupation, which apply to the military governance of the West Bank, that his right to freedom of movement was illegally violated.

53. Second, the petitioner will base his petition on the instructions of international human rights law – both as an independent source and as a source for the interpretation of humanitarian law.

54. Third, it will be argued below that the petitioner has an increased right to defence from the narrowing of his steps by the authorities by force of the developing legal branch of the protection of *human rights defenders.*

55. And fourth, the petitioner will direct attention to the clear instruction of Israeli constitutional law which establishes the right for freedom of movement as a supra-legal constitutional right. Clearly this legal field based on the Basic Law: Human Dignity and Freedom which has strengthened and empowered the judicial code concerning freedom of movement, applies in the matter at hand through the "backpack" of the military commander, as said in HCJ 393/82 ***Jama'iyat Iscan vs. The Commander of IDF Forces***, v. 37 (4) 785, 809-810 (our emphasis):

> "*Every Israeli soldier carries in his backpack the rules of international public customary law which concern the laws of war and the basic rules of Israeli administrative law*".

II. The international law of military occupation – the right to leave and the prohibition on closing borders

56. Article 43 of the Regulations annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land (henceforth: "the Hague Regulations") determine the supreme principle of the administrative order of occupation laws – the duty of the occupying power to restore order and safety in the occupied territory. It is the duty of the occupying power to return civilian life – as far as possible – to their normal course. Part of civilian live is also contact with the outside world, the traveling of civilians out of and the entry of civilians into the occupied territory.

57. Thus, by imposing the duty to allow the existence of normal public life, and in a series of other convention articles, the laws of military occupation anchor a kind of bill of rights for the occupied civilians which replaces, for the period of occupation, the pre-occupation constitutional order.

58. The supreme right given by the laws of occupation to the protected civilians is human dignity. Therefore the supreme duty of the occupying power is to protect human dignity. As in Israeli constitutional law, so also in the international law of military occupation law, many other rights are derived from the right to dignity (the right to dignity is mentioned in many articles of the military occupation conventions including Article 3 shared by the Geneva Conventions, Article 27 of the Fourth Geneva Convention and article 74 to the First Protocol which are all accepted as international customary law).

59. The right to freedom of movement of protected civilians is therefore simultaneously derived from the said duty of the occupying power to restore order and safety, from the duty of seeing to the basic needs of the population, and from the protected civilians' right to dignity – which is the mother of all rights and from which are derived many other basic rights.

60. The Fourth Geneva Convention even determines specifically that protected civilians have the right to leave the territory, but grants the relevant power the authority to prevent this leaving in cases of absolute necessity:

> *"**All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State**….*
>
> *If any such person is refused permission to leave the territory, he shall be entitled to have refusal reconsidered, as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose…"*
>
> *(Article 35 of the Convention)*

61. Whether or not Article 35 quoted above intends to deal not with the issue of the individual leaving of this or the other concrete person but with the authority to entirely close the borders (as suggested by the final part dealing with refusing a "person"), **the rule is that leaving the territory in which the conflict is being conducted should be allowed, and the exception is the prevention of leaving. Order no. 34 is therefore in contravention of a clear instruction of the Geneva Convention whose instructions are customary – and is therefore unconstitutional.**

62. A central parameter regarding the breadth of the exception to the right to leave the occupied territory and the ability to use it is the question of the temporariness of the situation whereby the protected person is under the authority of the power detaining him from leaving. That is, weight should be given to the fact that the area of the West Bank where the petitioner lives has been under long-term occupation this forty years. Relevant here are the words of Professor Yafa Zilberschatz, according to which:

> *"The perception of occupied territories as closed territories may possibly be appropriate for a situation of short-term military occupation lasting a few months, but when the military occupation continues over many years such as that by Israeli of Judea, Samaria and Gaza, it is difficult to view the territories as closed territories from which people do not have the rightful possibility of leaving."*

Yafa Zilberschatz, "Freedom of Movement: Entering a state, remaining in it and leaving it", in **International Law** (2003) (Ruby Siebel, ed.) 189, 217

63. This approach which seeks to distinguish between territories subject to military occupation for many years and territories subject to military occupation for a short period of time, was adopted by this honourable court in HCJ 393/89 Iskan et. al. VS The Commander of IDF Forces in the West Bank et. al., v. 37 (4) 785, 800-802.

64. In any event, it is clear that the respondent's unreserved position and Military Order No. 34 constitute a contravention of humanitarian law which is the very legal source that grants the respondent various authorities including the authorities of legislation in the occupied territory. It is therefore also clear that the respondent has a right to freedom of movement according to humanitarian law and that this has been and is being injured by the decisions of the respondent.

III. International Human Rights Law

65. The respondent will argue that the right to freedom of movement established in the laws of military occupation should be interpreted through the instructions of international human rights law, which also applied independently to the activity of the IDF in the West Bank.

66. This interpretative route was accepted both in the ruling of the International Court of Justice in the Hague (ICJ), which determined that the relation between humanitarian law and human rights law is that of a special and specific law, and in the ruling of the honourable court. On this matter see:

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 (I) I.C.J. 66;

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 2004, para.102-114.

67. That is, even from a limiting approach that grants international human rights law an interpretative rather than independent status in the occupied territory (an approach we do not share), its instructions will apply to any situation that humanitarian law does not address clearly and unequivocally.

68. International courts have opined that humanitarian law should not be seen as an alternative system to human rights law but as an exception to the full and universal applicability of human rights law which is intended to protect all human beings in any situation.

69. Moreover, in the opinion of the International Court of Justice regarding the Separation Wall mentioned above, it was determined that human rights law applies in parallel to humanitarian law, and the exceptions to its applicability are contained within it, as can be seen in Article 4 of the ICCPR. As stated in paragraph 106 of the opinion:

> *"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights…"*

70. In any event, the right to freedom of movement enjoys wide protection in various international conventions. The primary one was the Universal Declaration of Human Rights of 1948 which determined in Article 13(2) that:

> *"Every one has the right to leave any country, including his own, and to return to his country"*

71. Article 12(2) of the International Covenant on Civil and Political Rights of 1966 (ICCPR) (henceforth: "the International Convention") determines that:

> *"Every one shall be free to leave to leave any country, including his own"*

72. An identical wording appears in the Fourth Protocol of the European Convention on Human Rights and Basic Freedoms (ECHR) (henceforth: the European Convention").

73. The American Convention on Human Rights of 1969 also determined in Article 22(2) that:

> *"Every person has the right to leave any country freely, including his own"*

74. Finally we mention that in the African Charter on Human and Peoples' Rights of 1981 (AfCHR), it is determined in Article 12(2) that:

> *"Every individual shall have the right to leave any country including his own, and to return to his country…"*

75. It can therefore be seen that the right to leave the country and to return to it is established both in the universal and in the regional conventions, including the International Covenant on Civil and Political Rights, 1966, which Israel has signed and ratified and which came into force in Israel on 3.1.1992.

76. Due to the fact that this right has been recognised in a long succession of international conventions, in declarations, decisions, reports and international documents, as well as in internal laws of countries (including Israel), it can be said with conviction that the right to leave is a customary right (see Yafa Zilberschatz, "The right to leave a state", **Mishpatim** 23 (5754) 70, 83).

77. International human rights law indeed recognises an exception to the right to leave the country (see Article 2(3) of the European Convention; Article 12(3) of the International Convention). The exception is extremely narrow and is defined thus in the conventions (the wording below is taken from the European Convention):

> *"No restriction shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety…"*

78. That is: an injury to the freedom of movement within the state and out of it is possible under the following conditions:

    a. The injury is carried out by force of explicit authorisation in law;

    b. The injury is necessary in a democratic society;

    c. The injury is necessary for reasons of national security or public safety;

79. The interpretation given to this definition of the exception to the freedom of movement, in the context of leaving the country, is extremely narrow and requires certainty of injury to those interests protected by the exception.

80. In the matter at hand, the injury to the petitioner's rights was not done according to the procedures determined in law (as argued in the previous sub-section). As to the fulfillment of the two additional conditions, the petitioner is convinced that they are not fulfilled but he does not, of course, know the nature of the claims made against him by the respondent (which are being kept secret).

81. The non-fulfillment of the second condition (that the exception should be necessary in a democratic society) is especially strengthened in view of the petitioner's status as a human rights activist, more on which below.

IV. Protection of *Human Rights Defenders*

82. The petitioner will argue that in his matter there obtains not only the right to freedom of movement that exists for any person, but the enhanced and increased right to unhindered movement which exists for *human rights defenders*. We refer to a developing branch of international law which determines increased defense for persons working in protection of human rights, such as the petitioner.

83. In 1999, as part of the celebrations of the United Nations 50-year jubilee, the General Assembly of the UN accepted the "Declaration on Human Rights Defenders". This declaration defined basic rights which the member states of the United Nations are asked to protect as far as human rights defenders are concerned. The declaration determines in Article 5 (my emphasis, M. S.):

> *"Article 5: For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at national and international levels:*
>
> *(a)* ***To meet or assemble peacefully****;*

(b) To form, join and participate in non-governmental organisations, associations or groups;

(c) ***To communicate with non-governmental or intergovernmental organisations****."*

Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect Universally Recognized Human Rights and Fundamental Freedoms" (UN General Assemblly Resolution 53/144, March 1999(A/RES/53/144)).

84. Note further that in the opening paragraph of the declaration it was noted that the lack of a state of peace does not constitute a justification for injuring the rights contained therein (my emphasis, M. S.):

> *"…Recognizing the relationship between international peace and security and the enjoyment of human rights and fundamental freedoms, and mindful that the absence of international peace and security does not excuse non-compliance"*

85. Thus, *human rights defenders* have been recognised as a special group requiring special protection, similarly to other representatives of civil society such as journalists, members of humanitarian aid organisations and medical teams.

86. And this makes much sense. Human rights activists are a target for attack by the authorities they criticize, similarly to journalists. The authorities, especially those in areas where there is no democracy – such as occupied territories – are greatly tempted to narrow their steps and prevent them from acting freely. Therefore, and since the activity of human rights activists is important in the extreme international law seeks to protect them especially.

87. Unhindered movement – within the territory and out of it and back in – is a condition for the functioning of human rights defenders and human rights organisations. Therefore, their freedom of movement becomes a right whose protection is required not only because of the personal interest of those persons, but because of a wide social interest of the public in general.

88. A report published in 2006 following the visit of the UN Secretary General's Special Representative on the situation of human rights defenders, in Israel and the territories, explicitly addressed the restrictions on freedom of movement in the occupied territories which hinder the work of human rights defenders (my emphasis, M. S.):

> *"Restrictions on the freedom of movement resulting from the Wall and other barriers, checkpoints, closures, requirement of permits and bans imposed on defenders to travel; use of excessive force on peaceful action to protest; use of security and anti-terrorism laws to place defenders under administrative detention; unsubstantiated allegations to undermine their credibility and other forms of harassment, intimidation and humiliation of defenders has rendered their situation absolutely incompatible with international norms and standards of human rights or the principles set forth in the Declaration."*

(Excerpts of the 2006 Report of the UN Special Representative of the Secretary General on Human Rights Defenders, Country Visit to Israel and the Occupied Palestinian Territory, E/CN.4/2006/95/Add.3, 10 March 2006 (p.3)).

89. The petitioner is a veteran activist in the area of human rights who holds the position of director of the "Al-Haq" organisation and seeks to leave the West Bank in order to participate in conferences, seminars and working meetings on issues of human rights, to which he is invited due to his position. As we shall see below, the purpose of the petitioner's journey is significant to the issue of the balance that must be struck between the right of movement and interests that conflict with it. The petitioner will argue, in a spirit similar to the main contents of the Declaration on Human Rights Defenders, that the fact that he seeks the right to leave for the purpose of participating in an international conference on human rights is weighty and concerns also his right to freedom of speech.

V. Israeli Constitutional Law

90. Freedom of movement became a fundamental principle in the Israeli legal system even before the legislation of the Basic Law: Human Dignity and Freedom but there is no doubt that this principle received further buttressing when it was anchored in Article 6(a) of the Basic Law. (See for example HCJ 111/53 ***Haya Kaufmann vs. The Minister of the Interior*** v. 7 534; HCJ 448/8 ***Daher vs. The Minister of the Interior*** v. 40 (2) 701 (henceforth: **HCJ Daher**). After the legislation of the Basic Law: Human Dignity and Freedom see for example, HCJ 4706/02 ***Salah vs. The Minister of the Interior*** v.56 (5) 695 (henceforth: **HCJ Salah**); HCJ 3915/92 ***Leah Lev vs. The Regional Rabbinical Court in Tel-Aviv*** v. 48 (2) 491).

91. These principles that were established both before and after the legislation of the Basic Law: Human Dignity and Freedom, were accepted as also applicable to the activity of the IDF in the territories, and as granting the right to freedom of movement to the Palestinian civilians living in the West Bank. As then Justice Beinish said in HCJ 9593/04 ***Rashed Murad VS The Commander of IDF Forces in Judea and Samaria*** (as yet unpublished):

> *"Freedom of movement is among the most basic human rights. We have underlined that in our legal system freedom of movement has been recognized both as a basic rights that stands on its own feet, and as a right that is derived from the right to freedom, and some would even say that this is a right that is derived from human dignity. Freedom of movement is also recognized as a basic right in international law and this right is anchored in a number of international conventions."*

92. The anchoring of freedom of movement in a basic law dealing with human dignity and freedom reflects well the ancient insight that freedom and movement are inseparably connected to one another. The Greek philosopher Epictetus defined freedom thus: "I go where I wish and return where I wish" (see in: Yafa Zilberschatz, "The right to leave a state" **Mishpatim** 23 (5754) 71).

93. Indeed, any right, even one that is umbilically connected to a person's freedom, is not alone in the world but is part of an array of rights and interests that must be balanced. The balance determined in jurisprudence <u>in the context of an order prohibiting leaving the country according to emergency regulations</u>, where it is claimed that the right to freedom of movement our of the country conflicts with

the interest of protecting national security is the test of honest and serious concern for harm. As will be seen below, it is our understanding that in the present case there is room for making the text stricter.

94. In the aforementioned HCJ Salah (4706/02) the hon. Justice Tirkel determined norms and criteria which must be considered before we injure freedom of movement to leave the country. Among the criteria there should be examined the severity of harm according to the geographic expanse of the restriction, the duration of time for which it is imposed and the reason for which leaving for abroad is requested.

95. In the matter at hand, the petitioner's leaving the territories is totally restricted and his movement is effectively restricted to the four corners of the West Bank. In addition, the petitioner is restricted from going abroad since March 2006, that is – his freedom of movement has been denied him for the last two years and three months. Since no administrative order has been issued, this restriction is apparently unlimited in tome and theoretically it could remain in place forever.

96. As mentioned, the purpose of the journey is also an important consideration in balancing the injury to the right of movement with the protection of the interest of national security. In the words of justice Tirkel in the aforementioned HCJ Salah:

> ***The purpose of the journey and its destination are important considerations in regard to the severity of injury to the right. The restriction of the right to leave the country of a person whose leaving is vital and important may increase the injury to him****. Someone whose leaving is intended, for example, for medical treatment is not the same as someone whose leaving is for the purpose of a trip. Moreover, the restriction on leaving placed on a person who seeks to make a pilgrimage to a place that is sacred to his religion is an injury to his right to freedom of religion and worship, and as such is very severe."*
>
> (Emphasis added; M. S.)

97. The petitioner seeks to leave the West Bank in order to participate in conferences and working meetings whose content is defence of human rights. Concretely, the purpose of the journey at hand is to participate in an awards ceremony and accept an honourable award on behalf of the organisation that he represents. His leaving, therefore, is part of his work as the director of a human rights organisation. As known to all, an inseparable part of the work of human rights organisations in the exchange of information and opinions with their colleagues overseas. This contact is achieved, among other things, by conducting meetings, giving lectures and participation in conferences.

98. Since March 2006, the petitioner has requested to leave for abroad several times. In all these cases was the leaving for abroad required for his work and in order to meet with representatives of foreign and international human rights organisations and participate in gatherings organised by the United Nations.

99. The purpose of the petitioner's travel, then, is to represent the human rights organisation which he heads. The purpose of the petitioner's travel is to listen and be listened to, to exchange opinions and all for the fortification of human rights in the territories. **The purpose of the petitioner's travel, therefore, also in large part falls under the protection of the principle of freedom of expression which is also, of course, a foundational principle in our legal**

system, and within that under the wings of political expression which is protected more than any other expression (see HCJ 606/93 Entrepreneurship and Publishing Promotion Inc. VS. The Broadcasting Authority v.48 1(2)).

100. This approach, according to which the purpose of leaving for abroad must be examined in order to better balance among the right of movement and the interest of protecting national security, has gained traction among American experts. American jurisprudence is divided on the question, under which amendment to the American constitution does freedom of movement fall. While some have related it to the first amendment and argued that it belongs under the protection on freedom of speech, others have relegated the right to the fifth amendment to the constitution and the right to due process/ in view of these disagreements, American experts have argued that the right to freedom of movement should not be considered in one piece but that inasmuch as the purpose of the journey is a right anchored in the first amendment to the constitution, then it can be restricted only if there is a clear and present danger to the interest that conflicts with it – which is the test for injuring freedom of speech. (for details see Yafa Zilberschatz, "The right to leave a state" **Mishpatim** 23 (5754) 70, 105).

101. An approach that regards freedom of movement as a right equal in importance to freedom of speech also appears in the verdict of Vice-President Ben Porat in the aforementioned HCJ Daher:

> *"…our matter does not concern freedom of speech but freedom of movement, but as usual these are equally weighty rights, as the learned representative of the petitioners argues."*

102. Inasmuch as we accept the approach of the honourable justice Tirkel in the *Salah* case and the approach of the hon. Vice-President Ben Porat in the *Daher* case concerning the importance of the purpose of the journey in regard to the weight of the right of movement on balance with other rights, then **in our matter a stricter test than the "honest and serious concern" test should be applied, and the petitioner's freedom of movement restricted only where there is proximate certainty of damage to national security – which is the extant text for injuring freedom of speech in our legal system.**

103. We are further guided in this matter by the words of the hon. Vice-President Ben Porat, who noted in HCJ *Daher*:

> *"In addition we must bring into consideration the severity of the danger around which the honest and serious concern revolves, since concern for national security can take different forms and be expressed in different ways with different degrees of severity**. A slight or relatively weightless danger is not the same as a danger in connection with a really vital interest**".*
>
> (ibid., paragraph 4, emphasis added, M.S.)

We may also mention the words of the hon. justice Bach in the same case:

> *"In summary it can be said: the "serious" concern, which justifies issuing an order to prohibit a person's leaving the country, **must be based on the assessment, that there is a***

> ***real danger that due to that person's journey abroad a significant harm may come to national security,*** *and in order to define the test from the negative aspect, I would determine that the meaning of the expression "serious concern" is that a slight, marginal, distant or theoretical concern alone does not justify the issuance of an order prohibiting leaving according to regulation 6.* ***In particular we must consider that the fact that this or the other citizen's activity abroad does not seem desirable or even seems harmful from the perspective of the national or political aspirations of the elected government or of the majority of the residents of the country, it does not by itself justify issuing an order to prohibit that citizen from leaving the country".***
>
> (ibid., paragraphs 10-11)

104. And let us remember that both HCJ *Daher* and HCJ *Salah* dealt with the restriction of freedom of movement by way of an administrative order prohibiting leaving the country according to Regulation 6 of the Emergency Regulations, and therefore fulfill the conditions of the principle of legality, yet in any event the judges' indications regarding the balance between the right and the interest that conflicts with it are relevant to our matter as well. Moreover, the petitioner will argue that when the restriction on freedom of movement is done on the force of a general order that prohibits the entire public from leaving the occupied territory, the required bar for proving danger to national security is much higher and that the respondents must present evidence of a real danger that will take place in proximate certainty, if the restriction on leaving is lifted. It is unnecessary to add that the alleged evidence against the petitioner must be specific and based on concrete, trustworthy and up-to-date information in order to fulfill the conditions fro proving the danger to the interest of national security.

C. Disproportionality

105. The petitioner has not been allowed to leave the West Bank for the past three years; he is not permitted to leave to any destination and for any purpose; the restriction was imposed on his movement with no trial or quasi-judicial procedure; he was given neither the right of hearing, nor the right of argument nor the right of appeal; the restriction is extremely severe and its time duration is unlimited.

106. In any case, the respondent is under the obligation to consider a less injurious measure as well as to examine well whether the injury is proportionate to the benefit that derives from it, if any.

107. In the *Salah* case the hon. justice Tirkel determined that in order to fulfill the principle or proportionality, it is necessary to consider the duration of injury to the basic right:

> *"As to the severity of the injury to the right – or the "proportionality" of the injury – the duration of the restriction should be considered as well.* ***The longer the duration of the injury, the greater the severity of the injury. A restriction on leaving the country for a few days is not***

the same as a restriction for a few months or eve for years.

(Emphasis added, M. S.)

108. All the indications that the petitioner possesses indicate that a real and serious consideration as described was not undertaken.

109. And as the hon. justice Tirkel indicates – "**The longer the duration of the injury, the greater the severity of the injury**". In the matter before us, the restriction has continued for almost two and a half years and it is unclear what could lead to its cessation. The petitioner does not know what the evidence collected against him is, what is its source, what is the degree of its reliability and what they say about him. He was not interrogated nor summoned for interrogation.

110. There is also no indication that the respondent carried out a new balancing when he was last requested to allow the petitioner to leave the occupied territory.

111. The petitioner will therefore argue that the respondent did not strike an appropriate balance between the competing interests in his matter.

D. Contravention of the Principle of Legality and the Natural Rules of Justice

112. From our infancy we were taught the rule concerning persons and authorities: any person has the freedom to do whatever his heart desires unless the law forbids it; whereas the authorities may do nothing which the law does not authorize them to do, especially if this involves injury to basic rights.

113. The law applicable to the West Bank does authorise the respondent to restrict the movement of a person, only that the law determines that this should be done by means of an administrative order and according to the procedure determined therein. We refer to Section 4 of the Order Concerning Security Instructions (Judea and Samaria) (Military Order No. 378) which deals with orders of restriction and supervision.

114. This for example, Article 86(b)(2) determines that the respondent may issue a special supervision order according to which a person will be subject to the following restriction:

> *"He will not leave the city, village or district where he lives, without written permission from a military commander:"*

115. By extension it is clear that this authorization also enables the military commander to prevent leaving the occupied territory itself by means of a special supervision order as mentioned.

116. The instructions of the Order Concerning Security Instructions authorize the respondent to restrict a person's movement but also determine that a restriction order or supervision order will be issued only if the military commander "believes this to be necessary for decisive security reasons" (Article 84a of the Order Concerning Security Instructions). The Order Concerning Security Instructions further stipulates a procedural process which includes an appeals committee which will hear the arguments of the person against which the order is issued. Only a restriction order or a supervision order that has passed through the sieve

of an appeals committee and the right of hearing will at the end of the day lead to a legal use – according to the principle of legality – of the authority's authority, in this case the respondent's authority to restrict the movements of a person to the occupied territory alone.

117. In our matter, the respondent argues that he need not conduct any proceedings since **the starting-point is that there is no right to leave the West Bank**. This position, as explained above, is unreasonable in a regime that has existed for over four decades and especially when the humanitarian law of military occupation law explicitly forbids such a practice.

118. Thus, imposing a restriction on leaving for abroad without conducting a hearing procedure and without basing it on a legal source that authorizes injury to a right **in an individual manner** – is illegal, contravenes the principle of legality and causes injury to the rights of the petitioner, who cannot make use of the few protections he is entitled to in the Order Concerning Security Instructions (hearing, appeal procedures, a high bar of balance that requires "decisive security reasons").

119. For this reason too the respondent's decision should be cancelled.

In light of all the said above, the honourable court will be requested to issue a conditional order as requested in the beginning of the petition and, after receiving the respondent's response and a hearing, to make it absolute.

In addition, the honourable court will be requested to charge the respondent with the petitioner's legal expenses, his lawyer's fees, all with legal VAT and interest from the day of charge to the actual payment.

_____ _____

Michael Sfard, Adv. Neta Patrick, Adv.

The petitioner's representatives