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At the Supreme Court
Sitting as the High Court of Justice

HCJ 5243/14

In the matter of: 1. **HaMoked: Center for the Defence of the Individual
founded by Dr. Lotte Salzberger, A.R. 580163517**

represented by counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Iron (Lic. No. 35174) and/or Noa Diamond (Lic. No. 54665) and/or Benjaim Estejriba (Lic. No. 58088) and/or Bilal Sbeihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448) and/or Anat Gonen (Lic. No. 28359) and/or Abir Joubran-Dakwar (Lic. No. 44346)

Of HaMoked Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Israel Defense Forces**
represented by the State Attorney's Office
29 Salah a-Din St., Jerusalem , 91010

The Respondent

Petition for Order Nisi

A petition for an Order Nisi is hereby filed which is directed at the Respondents ordering them to appear and show cause why:

- a. It should not provide the Petitioner with the names and whereabouts of the Palestinian residents of the Gaza Strip detained by our forces during the fighting in the Gaza Strip and held, at the time the information is provided, inside the State of Israel, in detention facilities run by the Petitioner.
- b. Why it should not maintain updated information on the detention and whereabouts of each detained resident of the Gaza Strip it holds inside the State of Israel, by, inter alia, recording and documenting the particulars of the detainees held in its facilities.

Request for Urgent Hearing

The Honorable Court is requested to schedule an urgent hearing of the petition.

This petition concerns the most fundamental right of every detainee detained by Israeli security officials, to have his detention and whereabouts known. This right is a condition for exercising the detainee's other rights - the right to legal counsel, the right to challenge the conditions of his detention, etc. The detainee's family also has the right to know what has happened to him and where he is being held.

According to media reports over the last few days, and from information received from human rights activists in the Gaza Strip, hundreds of Palestinians have been detained by Israeli army forces during Operation Protective Edge. HaMoked: Center for the Defence of the Individual has been attempting for several days to obtain information about persons detained during the hostilities, but the Respondent has been reluctant to provide the information.

Concern and anxiety over the fate of the detainees grow with the passage of time. The passing time also frustrates – minute by minute – the exercise of their most fundamental rights.

In the Gaza Strip, it is, at present, difficult to locate missing persons, determine who has been killed, who has been displaced and who has been detained. Some bodies have not yet been identified; some have not yet been removed from the rubble. Gaza residents do not know who might still be buried in the ruins and who has been detained. Due to the bombings, travel is difficult and it is difficult to obtain information from the internally displaced who are still suffering from the trauma caused by fleeing from their homes, the bombings and the loss of relatives. Reliable information regarding the identity of those detained by the State of Israel will help alleviate the anxiety and uncertainty felt by the families. Hence the urgency of obtaining the information.

The Grounds for the Petition

1. The Petitioner, HaMoked: Center for the Defence of the Individual (hereinafter: **HaMoked**) is a human rights organization that has, for many years, defended the rights of Palestinians incarcerated in Israel. Its activities involve, inter alia, assisting relatives to locate incarcerated family members by contacting the Israeli security authorities, in particular, the incarceration control center operating from the office of the Chief Military Police Officer (hereinafter: **the control center**).
2. Shortly after the beginning of the ground offensive in the Gaza Strip, the media started reporting about mass detentions of Palestinians who were taken by Respondent's soldiers and transferred to the State of Israel. Considering the difficult situation in the Gaza Strip, the fact that hundreds of thousands have fled their homes and the immense damage to physical infrastructure in the area, families in Gaza do not know if their relatives have been detained and are held by Israel, and have no way of knowing where those who have been detained were taken. As a result, the detainees remain without protection, completely cut off from their families and from access to legal aid and other forms of assistance.
3. In view of the above, on July 24, 2014, the Petitioner contacted the Attorney General, requesting information about where the detainees are being held, including specifics regarding holding conditions in those facilities, how long detainees may be held in these facilities and specifics regarding the legislation pursuant to which the detainees are being held.

A copy of HaMoked's letter dated 24 July 2014 is attached hereto and marked **P/1**.

4. On July 25, 2014, despite the significant communication difficulties and information gaps, as detailed above, HaMoked received two requests to trace two brothers from the village of Khuza'ah,

near Khan Yunis, who had allegedly been detained by Israel. HaMoked contacted military officials, including the control center, in an attempt to trace their whereabouts, but to no avail. HaMoked was initially told that the request could not be processed for technical reasons (e.g., the absence of an ID number). Ultimately, the control center informed HaMoked that it would not provide information about detainees from Gaza.

5. HaMoked, therefore, was forced to send an urgent letter to the HCJ department at the State Attorney's Office, requesting the State to provide it with a list of Gaza detainees apprehended during the fighting and held in military facilities inside Israel. The request was made in order to prevent a situation in which hundreds of people are held in unknown locations, vulnerable to ongoing violations of their fundamental rights.

A copy of HaMoked's letter to the State Attorney's Office is attached hereto and marked **P/2**.

6. The State's response was received on July 28, 2014. It listed the guiding principles the Respondent uses in apprehending and holding detainees from the Gaza Strip. The letter also stated that temporary incarceration orders had been issued pursuant to the Incarceration of Unlawful Combatants Law 5762-2002 against some detainees who were not transferred to IPS custody and referred to legal processing pursuant to detention laws. These detainees **are still held by the military**.
7. The letter concluded with a statement from State counsel that the State did not intend to provide HaMoked with a list of the names of persons detained inside the State of Israel. The letter suggested HaMoked make individual inquiries to the control center. We note at this point, that State counsel listed conditions for processing requests to locate Gaza detainees. **Such requests must include the full name, ID number and documents attesting to the relationship between the applicant and the alleged detainee.** We respectfully submit that these conditions are unacceptable given the situation in the Gaza Strip, wherein human rights organizations receive information intermittently and full details and supporting documents, which are not required in similar inquiries, cannot be expected. This quite aside from the fact that given the dire circumstances in the Gaza Strip, waiting for individual inquiries would be fruitless, such that the Respondent will necessarily fail to fulfil his legal obligations.

A copy of the State's response is attached hereto and marked **P/3**.

8. To complete the picture, we note that on July 28, 2014, HaMoked and Physicians for Human Rights – Israel filed a petition for a writ of Habeas Corpus, on behalf of five individual petitioners from the Gaza Strip, who may be held by Israeli security agencies (HCJ 5226/14 **Iyad Abu Rida v. Israel Defense Forces**). At the time of submission of the petition herein, the Respondent has not yet responded to the petition. Therefore, it is not clear whether the position stated in the letter marked P/3 above will remain the official position of the State of Israel.

In light of the aforesaid, HaMoked was left with no choice but to seek the assistance of the Honorable Court in instructing the Respondent to provide it with the names of Gaza residents incarcerated in its facilities inside the State of Israel, to avert the violation of their rights and their families' right to know whether they are held by Israel and if so, where.

The Legal Argument

Notification of Place of Detention – Respondent's Obligation

9. The right to be notified of an individual's detention and whereabouts cannot be overstated. This is a fundamental right - both of the detainee and of his family. It is a part of the fundamental right to

human dignity. A regime that does not strictly enforce it, but rather conceals persons in its custody from their relatives for substantial periods of time acts callously and severely injures the very humanity of the detainee and his family.

10. The aforesaid right to receive notification has also been recognized as a fundamental right in the jurisprudence of this Honorable Court. As stated by Vice-President, M. Elon in HCJ 670/89 **Odeh et al. v. Commander of IDF Forces in Judea and Samaria**, IsrSC 43(4) 515, p. 517:

The obligation to give such notification stems from the fundamental right a person who has been lawfully detained by the competent authorities has to have these authorities inform his relatives of his detention, so that they know what happened to their detained relative and how they can provide him with the necessary assistance to protect his liberty. **This is a natural right, deriving from human dignity and general principles of justice, and is afforded both to the detainee himself and to his relatives.**

11. Based on this fundamental right, the Supreme Court gave the effect of a judgment to an arrangement reached by the parties in HCJ 6757/95 **Hirbawi et al. v. Commander of IDF Forces in Judea and Samaria**, whereby:

- a. **Upon the detention of a person who is a resident of the Area, notification of his detention and place of detention will be delivered without delay by telephone to a telephone number provided to the detaining official by the detainee.**

The detaining official will give such telephone notification, and will record, in a form prepared for this purpose, the details of the notification he has given and the details of the person who received the notification.

In the event that the detainee so requests, notification by telephone will also be given to a lawyer whose name and details will be provided by the detainee. The detaining official will inform the detainee of his above right...

- b. **The IDF control center** (be it the control center or another body) **will receive from all bodies... updated information regarding the detention and place of detention of a detainee, once daily, so that the detainee may be located** in response to a written request from an external person or body.
- c. **The IDF control center will provide details from said information in response to written requests submitted by public organizations dealing with such matters** and/or in response to written requests submitted by counsel to the detainee or his family.

Following delivery of a written request, the requesting party may obtain the information by telephone.

12. The issue of detainee tracing and the functioning of the control center was also discussed in the decision of Honorable Registrar (as then titled) Boaz Okon in HCJ 9332/02 **Jarar v. Commander of IDF Forces**. In his decision, the Honorable Registrar writes:

The provision of information serves as a means of monitoring and control, but for a detainee, who, all of a sudden loses control of his life, it also has a humane significance. **The importance of the notification for the family whose relative disappeared "without explanation" cannot be overstated. Ensuring detention is public guarantees that the power to detain is not abused and prevents uncontrolled use of such power.** Indeed, the power of the state is immense, be its intentions as benevolent as they may be. Without notification, this power may go unchecked, even if its use is supported by security reasons. There are obvious risks attached to concessions or flexibility. Experience shows that excessive use of power, which is not uprooted promptly, creates a new reality. Power, unlike a boomerang, does not return once it is released. Therefore, the authority should exercise utmost diligence where the exercise of detention powers is concerned. **This diligence requires immediate notification of the detention.**

13. This fundamental right is also expressed in the General Attorney's Guideline (guideline 4.3002 dated January 4, 2004) which states: "**The obligation to give notification regarding a person's detention has been recognized by the courts as a fundamental right of the detainee and his relatives, deriving from human dignity and general principles of justice**".
14. In HCJ 8435/12 **Abu Sal v. Military Commander** (TakSC 8435/12 (3) 8131), a petition for a writ of Habeas Corpus filed by HaMoked after a person detained by the Respondent had "disappeared" for more than 72 hours, Honorable Justice Arbel wrote:

There is no doubt that the error that led to the "disappearance" of a detainee must be thoroughly investigated. **The State, having detained a person by law, must notify his relatives of the fact that he was detained and where he is held**, so that the family knows that their relative has been detained and where he is held and may provide him with the assistance necessary to protect his liberty (para. 17).
15. Thus, the Respondent has a duty to provide notification on the detention in each and every case its forces detain a person and maintain updated information with respect to the place of detention of each and every detainee, all the more so when the detainee is in its own custody. There is also no dispute that the State has an obligation to assist in locating any missing person, inasmuch as it possesses information that may help shed light on what happened to said person. The most fundamental human rights to liberty, life and bodily integrity are at stake here.
16. Hence, the remedies sought herein with respect to the Respondent's duty to provide notification of a person's detention and whereabouts and to maintain updated information with respect to the detention and place of detention of every detainee held by any of the state's authorities.
17. We reemphasize that given the immense difficulties faced by relatives from Gaza who wish to find out whether any of their loved ones have been detained and held by the Respondent, HaMoked wishes to act as a surrogate for the families and ascertain who is held by the Respondent in its facilities inside the country. As detailed in paragraph 9 above, the petition for a writ of Habeas Corpus filed on behalf of five individual petitioners is merely a drop in the bucket compared to the number of detainees taken without their families knowing that they have been taken or where they are. In that sense, waiting for answers to individual inquiries will not aid in the Respondent's compliance with his obligations.

Keeping Record of the Petitioners in the Place of Detention

18. It is self-evident that every detainee has the right to have his place of detention clearly known to all. Recording the detainee's presence in the place of detention is essential for exercising his rights. Only this allows his family and counsel to check with officials in charge of the place of detention on his status, medical condition, detention conditions, if and when he can be visited, etc. Only this allows them to act to ensure his rights as a detainee are upheld. The right of a detainee to be present during legal proceedings against him also depends on proper registration at the place of detention.
19. The failure to keep proper record of a detainee in the place of detention severely infringes upon his and his family's fundamental rights. A state authority which fails to strictly comply with the requirement to keep record of a detainee in the place of detention and to provide updated information based on such records, does not fulfill its obligations and abuses its power.
20. The obligation to keep a proper record of detainees is mandated by statute and orders with respect to detainees held by the Respondent.
21. This petition is supported by an affidavit and power of attorney given on behalf of HaMoked relating to the receipt of information regarding Gaza detainees and its actions in this matter.

For the above reasons, the Honorable Court is requested to urgently issue an order nisi as sought, and after receiving Respondents' response, make the order absolute and order the Respondents to pay for trial costs and legal fees.

Jerusalem, July 29, 2014

Daniel Shenhar, Adv.
Counsel for the Petitioners

(Our file, 83748)