At the Supreme Court **HCJ ___/14**
Sitting as the High Court of Justice

In the matter of:

1. **____ Malitat, ID No. _____, Nablus**
2. **____ Dar Musa, ID No. _____, Ramallah**
3. **____ al-Haj, ID No. _____, Jenin**
4. **____ Sualmeh, ID No. _____, Nablus**
5. **____ Ma'sad, ID No. _____, Jenin**
6. **____ Ma'sad, ID No. _____, Jenin**
7. **____ al-Hakim Abu-'Easheh, ID No._____, Nablus**
8. **____ Abu-Diab, ID No. _____ , Qalqiliya**
9. **____ Kharub, ID No. _____, Hebron**
10. **____ Saba'aneh, ID No. _____, Jenin**
11. **____ Abu Diah, ID No. _____ , Hebron**
12. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA No. 580163517**
13. **ADDAMEER – Prisoner Support and Human Rights Association**

all represented by counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irron (Lic. No. 35174) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58008) and/or Bilal Sbihat (Lic. No. 49838) and/or Anat Gonen (Lic. No. 28359) and/or Abir Jubran-Dakawar (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. **Government of Israel**
2. **Minister of Public Security**
3. **Israel Prison Service**

4. Military Commander of the West Bank Area

represented by the State Attorney's Office,
29 Salah-a-Din Street, Jerusalem 91010

The Respondents

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, as follows:

a. Why they should not allow petitioners 1-11 (hereinafter: the **petitioners**) to visit their loved ones, who are incarcerated in Israel;

b. Why they should not allow all family members of Palestinian prisoners who are incarcerated in Israel, regardless of the prisoners' organizational affiliation, to visit their loved ones in prison.

The grounds for the petition are as follows

> Isolating the prisoner from society in order to realize the purposes of the sentence also results in a separation from his spouse, children and wider family circle. **But even though this restriction is inherent to the imprisonment, the existence of a human right to family and parenthood requires that the scope of the violation is reduced as much as possible, to its essential limits only, such as by way of giving controlled permission for family visits to prisoners**, granting furloughs when defined conditions are satisfied, providing facilities that allow conjugal visits between spouses, etc.. **This preserves the proportionality of the violation of the human right, which is inherently required by the loss of liberty resulting from imprisonment**.
>
> (HCJ 2245/06 **Dobrin v. Israel Prison Service**, TakSC 2006(2), 4564, paragraph 15 of the judgment rendered by Justice Procaccia, hereinafter: **Dobrin.** All emphases were added – D.S.).

This petition concerns the right of the residents of the Occupied Palestinian Territories (OPT) to maintain family relations with their loved ones, who are incarcerated in Israel. Not only that the Palestinian prisoners are held within the territory of the state of Israel contrary to international law, the respondents currently violate the fundamental right of these prisoners and their family members to family relations. This fundamental right, of both the family members and the prisoners themselves, is violated as aforesaid by the respondents, who, for about three months now, do not allow family members of prisoners who are organizationally identified with Hamas, the Islamic Jihad and the Palestinian Liberation Organizations, to enter Israel to visit their loved ones.

This general policy of the respondents was established about three months ago, following the abduction and murder of the three Israeli youths in the West Bank. It impinges on all family members of prisoners who are identified with various organizations, and on the prisoners themselves, in view of the fact that the family members, like the petitioners, need a permit from respondent 4 (hereinafter: the **military commander**) to enter Israel and visit their incarcerated loved ones. Respondent 3 (hereinafter: **Israel Prison Service**) also demands that the family members obtain a permit from the military commander to

enter the prisons under its responsibility. Namely, the family members cannot enter Israel and visit prison in the absence of the consent of the military commander and of the Israel Prison Service.

Clearly, this is a particularly offensive policy, which, beyond its direct implications on the right of the petitioners and others like them, to family life, consists of brazen elements of detrimental treatment and discrimination based on political and organizational affiliation, and of collective punishment, which is imposed on innocent parties who did not sin. For all of the above reasons, the decision should not be upheld. Hence this petition and the request for the honorable court's intervention.

Background

1. From the commencement of the second intifada, in October 2000 and until March 2003, the military commander has prevented West Bank residents from visiting their family members incarcerated in Israeli prisons - both in prisons within the territory of Israel and in incarceration facilities in the OPT. Following the hearings which were held in HCJ 11198/02 **Diriyah v. Commander of the Military Incarceration Facility Ofer**, TakSC 2003(3), 2099, the military commander commenced gradually allowing family members to visit their incarcerated relatives.

2. The military commander has initially enabled visits only from the districts of Ramallah, Jericho and Qalqiliya Later on the arrangement was expanded and was applied also to the districts of Betlehem, Tulkarm and Salfit, and eventually the visit arrangement was applied to all districts. The military commander has also established narrow criteria defining who is eligible to visit: spouses, parents and grandparents, as well as brothers, sisters, sons and daughters under the age of 16 or over the age of 46 only. In July 2005, the military commander has broadened said criteria and determined that sisters and daughters may visit their loved ones in prison without age limitation. Later on it was determined that sons and brothers between the ages of 16 - 35 would be entitled to visit their incarcerated loved ones a limited number of times per year. Recently, in HCJ 4048/13 **Arshid v. The Military Commander** (not reported, hereinafter: **Arshid**), some of the limitations which were imposed on the number of times that brothers and sons of the relevant ages could visit the prisoners, were revoked.

3. The military commander does not allow residents of the West Bank to arrive to visits on their own, and does not organize any visitation arrangements of his own. The visits are organized exclusively by the International Committee of the Red Cross (hereinafter: the **ICRC**). Visit applications are filed by the residents at the offices of the ICRC and the latter delivers them to the military commander. The military commander delivers his response to the ICRC, which informs the applicant thereof. The ICRC also organizes the actual transportation - at its own expense, in coordination with the respondent and along with strict security arrangements.

4. According to the regular procedure, when a prison visit application is approved, the applicant receives a one-year permit from the military commander. The permit is valid for ICRC prison visit shuttles only. The permit enables its recipient to visit prison without limitation, inasmuch as ICRC shuttles are available to them (usually, twice a month).

5. If a family member who wishes to make a visit, is classified by the military commander as "precluded from entering Israel", said family member is granted a special permit, which is valid for 45 days only, during which prison may be visited only once. This arrangement, which became common practice in recent years, was implemented by the end of 2004, following a series of petitions which were filed by petitioner 12 (hereinafter: **HaMoked**) on behalf of family members, who were classified as "precluded" and were therefore prevented from visiting their loved ones in prison.

6. Currently, the application of OPT residents to the military commander for the purpose of receiving a permit to enter Israel and visit prison is made according to a procedure which was established within the framework of the hearing in **Arshid**. The procedure establishes, *inter alia*, the manner by which permit applications should be submitted, the types of permits, who is entitled to receive permits, the timeframe for the processing of applications, the identity of the parties who process the applications and the identity of the persons who may be contacted to inquire about the status of a specific application.

The Parties and Exhaustion of Remedies

7. Petitioner 1, the sister of the prisoner ____ Abu Gulmi, born in 1974 and resident of Nablus, has never been detained or interrogated.

8. The prisoner _____ Abu Gulmi, ID No. _____, was arrested in 2006 and sentenced to life imprisonment. He is currently held in Gilboa prison, and is identified by the Israeli authorities as affiliated with the Popular Front for the Liberation of Palestine.

9. Petitioner 2, the wife of the prisoner _____ _____ Musa, born in 1969, a mother of six, resident of Ramallah. She has never been detained, but was interrogated twice on or about her husband's arrest.

10. The prisoner _____ _____ Musa, ID No. _____, was arrested in September 2003 and was sentenced for 17 life imprisonments. He is currently held in Hadarim prison, and is identified by the Israeli authorities as affiliated with Hamas.

11. Petitioner 3, the wife of the prisoner _____ _____ Haj, born in 1972, a mother of three, resident of the Jalqamus village in the district of Jenin. She has never been detained or interrogated.

12. Prisoner _____ _____ Haj, ID No. _____, was arrested in April 2013 and has not yet been put on trial. He is currently held in Megido prison, and is identified as affiliated with Hamas organization.

13. Petitioner 4, the brother of the prisoner _____ Dukan, born in 1972, married, resident of Nablus. He was detained several times in the past, in the first and second intifadas. The last time he was arrested was in 2006, for six months. Since then he has not been detained or interrogated again.

14. The prisoner _____ Dukan, ID No. _____, was arrested in April 2003 and sentenced to 18 years in prison. He is currently held in Ketziot prison and is identified as affiliated with Hamas organization.

15. Petitioner 5, the mother of the prisoner _____ Shar'amteh, born in 1964, married and a mother of five, resident of Jenin. She has never been detained or interrogated.

16. Petitioner 6, the father of the prisoner _____ Shar'amteh and the husband of petitioner 5, born in 1961, resident of Jenin. He has never been detained or interrogated.

17. The prisoner _____ Shar'amteh, ID No. _____, was arrested in January 2013 and has not yet been put on trial. He is currently held in Megido prison, and is identified as affiliated with the Popular Front for the Liberation of Palestine.

18. Petitioner 7, the brother of the prisoner _____ Abu 'Easheh, born in 1965, married and a father of six, resident of Nablus. He has never been detained or interrogated.

19. The prisoner _____ Abu 'Easheh, ID No. _____, was arrested in April 2002 and was sentenced to 18 years in prison. He is currently held in Rimon prison and is identified as affiliated with the Islamic Jihad organization.

20. Petitioner 8, the sister of the prisoner _____ Abu Diab, born in 1967, married and a mother of eight, resident of Qalqiliya. She has never been detained or interrogated.

21. The prisoner _____ Abu Diab, ID No. _____, was arrested in May 2007 and sentenced to 15 years in prison. He is currently held in Gilboa prison, and is identified as affiliated with Hamas organization.

22. Petitioner 9, the wife of the prisoner _____ Kharub, born in 1980, married and a mother of six, resident of Hebron. She has never been detained or interrogated.

23. The prisoner _____ Kharub, ID No. _____, was arrested in June 2010 and was sentenced to 25 years in prison. He is currently held in Nafha prison, and is identified as affiliated with Hamas organization.

24. Petitioner 10, the mother of the prisoner _____ Saba'aneh, born in 1956, married and a mother of two, resident of Qabatiya in the Jenin district. She has never been detained or interrogated.

25. The prisoner _____ Saba'aneh, ID No. _____, was arrested in March 2013 and has not yet been put on trial. He is currently held in Megido prison, and is identified as affiliated with Hamas organization.

26. Petitioner 11, the father of the prisoner _____ Abu Diah, born in 1955, married and a father of four, resident of Hebron. He has never been detained, but was interrogated for a few hours when his son, Mudar, was arrested.

27. The prisoner _____ Abu Diah, ID No. _____, was arrested in February 2007 and was sentenced to life imprisonment plus seven years in prison. He is currently held in Rimon prison, and is identified as affiliated with Hamas organization.

28. HaMoked is a human rights organization, which assists, for many years, Palestininas, residents of the West Bank, to realize their right to visit their family members who are incarcerated in prisons in Israel.

29. ADDAMEER is a Palestinian human rights organization, which, among other things, protects the rights of Palestinian prisoners, including those who are incarcerated in Israel.

30. Respondent 1, the government of Israel, directed the competent authorities to downgrade the incarceration conditions of the Palestinian prisoners imprisoned in Israel, *inter alia*, by the denial of family visits.

31. Respondent 2, the Minister of Public Security, is in charge, on behalf of the government, among other things, on the Israel Prison Service.

32. Respondent 3, the Israel Prison Service, is responsible for the welfare and the protection of the rights of all Palestinian prisoners held in incarceration facilities under its control.

33. The military commander, respondent 4, holds the West Bank under belligerent occupation for forty seven years, and is responsible for maintaining the orderly life of the population in the West Bank. He is the one who incarcerated the loved ones of the petitioners, and he is the one who obligates the petitioners to obtain from him permits for the purpose of making prison visits.

34. By virtue of their responsibilities, the respondents must ensure that the rights of the residents of the territory occupied by Israel are realized, including their right to family visits in prisons, as part of the realization of their right to family life, according to Israeli constitutional and administrative law, international humanitarian law and international human rights law.

35. Petitioner 1 has not seen her brother since he was arrested eight years ago. Applications submitted by her in the past for entry permits into Israel were all denied, with no explanation. The last entry application was filed by her at the offices of the ICRC on January 8, 2013. On February 21, 2013 she was informed that she was classified by the respondent as "precluded", and accordingly, her application would be processed according to the "precluded" procedure. Since then, the respondent did not deign to give her a response, or grant her a permit. Consequently, the petitioner turned to HaMoked, which wrote on her behalf to the military commander, and demanded to grant her a permit.

    A copy of HaMoked's letter to the military commander dated December 10, 2013 is attached and marked **P/1**.

36. The military commander did not deign to answer said letter, and therefore HaMoked had no alternative but to petition on behalf of petitioner 1, to the Jerusalem District Court (AP 17877-04-14 **Hannan Malitat v. The Military Commander**, which was filed on April 9, 2014). Following the filing of said petition, the military commander granted petitioner 1 an entry permit into Israel, valid from June 20, 2014 until August 3, 2014. Petitioner 1 even physically received the permit. However, unfortunately, the permit was valid when the respondents prevented the entry of family members into Israel for the purpose of prison visits, and therefore she could not use the permit and make a visit. Eight years of separation between the brother and his sister continue, and there is no foreseeable solution.

37. Petitioner 2 has last seen her husband in June 2013, one year and three months ago. In December 2013 the military commander gave her an additional permit for 45 days, only after she had petitioned to the Jerusalem District Court, by HaMoked, following the military commander's disregard of her permit application (AP 43329-11-13 _____ _____ **Musa v. The Military Commander**, which was filed on November 22, 2013). However, when she arrived to the facility in which her husband is held she was told that he was not there, and therefore she did not see him. Eventually, the validity of her permit expired and the spouses did not meet. After the permit expired, petitioner 2 filed a new permit application at the offices of the ICRC in January 2014, and again on June 11, 2014. Her applications remained unanswered. At the moment, in view of respondents' policy, it seems that they will not be responded either, in view of the fact that petitioner's husband is identified as affiliated with Hamas.

38. Petitioner 3 saw her husband only once since he was arrested one year and four months ago, in June 2014. She filed a visit application at the offices of the ICRC on May 7, 13. In view of the fact that the military commander did not deign to answer the application, she sought HaMoked's assistance, which wrote on her behalf to the military commander and demanded that permit be given to her forthwith. Consequently, the military commander gave the petitioner a permit to enter Israel for the purpose of visiting her husband, valid for one year, commencing from March 6, 2014. With this permit, she visited her husband in June 2014. However, due to respondents'

policy, petitioner 3 can no longer visit her husband by virtue of the permit in her possession. Hence, her suffering and the violation of her rights continue.

A copy of HaMoked's letter to the military commander dated February 4, 2014 is attached and marked **P/2**.

39. Petitioner 4 has not seen his incarcerated brother since 2012. Despite the fact that he received from the military commander an entry permit into Israel, valid for one year, until March 2015, whenever he arrived with the ICRC visit shuttle to the checkpoint for the purpose of entering Israel, he was sent back and was denied passage through the crossing with no explanation. In view of the above, he turned to HaMoked and requested its assistance. The latter wrote on his behalf to the military commander on June 17, 2014 and demanded that he would be allowed to pass through the checkpoint to visit his brother. The letter remained unanswered, and currently petitioner 4 is precluded from visiting his brother in view of respondents' policy, which renders the permit in his possession meaningless.

A copy of Hamoked's letter to the military commander on behalf of petitioner 4 dated June 17, 2014 is attached and marked **P/3**.

40. Petitioners 5-6 did not see their son since August 2013, when they visited him in prison by virtue of a 45 day permit. It was the only time in which they saw their imprisoned son during the period of one year and eight months of his incarceration. After the visit, the petitioners filed permit applications at the offices of the ICRC in September 2013, which remained unanswered. Therefore, they had to request the assistance of HaMoked, which wrote on their behalf to the military commander on April 10, 2014, and demanded that permits be issued to them forthwith. The military commander did not answer HaMoked's letter. Meanwhile, petitioner 6 was given a 45 day permit, valid from June 20, 2014 until August 3, 2014. However, respondents' policy prevented him from visiting his son. To date, petitioners 5-6 do not receive permits due to respondents' offensive policy.

A copy of HaMoked's letter dated April 10, 2014 is attached and marked **P/4**.

41. The last time Petitioner 7 saw his brother was about a year ago, in August 2013, by virtue of a 45 day permit. After the visit, he filed a new permit application at the offices of the ICRC in September 2013. In December 2013 he was informed that the respondent classified him as "precluded from entering Israel", and that therefore his application would be processed according to the procedure applicable to "precluded" persons. Since then, he has received no additional update, nor has he received the permit itself. In view of the above, he had to request HaMoked's assistance, which wrote on his behalf to the military commander on April 28, 2014, and demanded that permit be given to him, forthwith. On June 8, 2014 the military commander informed HaMoked that the application of petitioner 7 "was under examination". Ever since he has been waiting for a permit, which will not be issued due to respondents' policy.

A copy of HaMoked's letter dated April 28, 2014 and the response of the military commander dated June 8, 2014 are attached and marked **P/5** and **P/6**, respectively.

42. Petitioner 8 has not seen her imprisoned brother since August 2013, more than a whole ago, when she visited him in prison by virtue of a 45 day permit. On December 16, 2013 she filed a new permit application to enter Israel at the offices of the ICRC. The application remained unanswered. Therefore, she had to request HaMoked's assistance, which wrote on her behalf to the military commander on March 30, 2014, and demanded that permit be given to her. On May 11, 2014 the response of the military commander was received at HaMoked's offices, according

to which her permit application "was under examination". Since then petitioner 8 has not received permit, and in view of respondents' policy, it seems that no permit will be received by her in the foreseeable future.

Copies of HaMoked's letter and the response of the military commander are attached and marked **P/7** and **P/8**, respectively.

43. Petitioner 9 has not seen her husband since she visited him in prison by virtue of a 45 day permit, in February 2013, more than one year and six month ago. Since then she has filed several permit applications to enter Israel which remained unanswered. The last application was filed on November 27, 2013. Therefore, she requested HaMoked's assistance, which wrote on her behalf to the military commander and demanded that permit be issued to her forthwith. HaMoked's letter remained unanswered, and petitioner 9 did not receive any permit. In view of respondents' policy, she will not receive any such permit either.

A copy of HaMoked's letter dated May 20, 2014 is attached and marked **P/9**.

44. Petitioner 10 has not seen her son since he was arrested a year and a half ago. She filed several permit applications to enter Israel at the offices of the ICRC, with the last one in December 2013, which remained unanswered. Therefore, she requested HaMoked's assistance, which wrote on her behalf to the military commander on April 10, 2014, and demanded that permit be issued to her forthwith. The military commander did not deign to respond to HaMoked's letter. Last August petitioner 10 has finally received a permit to visit her son, valid for 45 days; However, due to respondents' policy, she cannot use the permit to visit her son. Hence, her deep distress keeps growing.

A copy of HaMoked's letter dated April 10, 2014 is attached and marked **P/10**.

45. Petitioner 11 has not seen his son since he visited him in prison by virtue of a 45 day permit in October 2013. Immediately after the visit he filed a new application to enter Israel at the ICRC offices. The application remained unanswered. Therefore, he turned to HaMoked which wrote, on his behalf, to the military commander on April 24, 2014, and demanded that permit be issued to him forthwith. On June 10, 2014, the response of the military commander was received at HaMoked's offices. The response, dated June 8, 2014m stated that the permit for petitioner 11 "will be issued and delivered next week". However, said permit has never been received by the petitioner, and in view of respondents' policy, will not be received by him in the foreseeable future.

Copies of HaMoked's letter and the response of the military commander are attached and marked **P/11** and **P/12**, respectively.

46. On June 12, 2014 three Israeli youths were abducted in the West Bank. Consequently, the Israeli authorities decided to treat OPT residents more harshly. In this context, it became known in those days, following media reports which were published in that regard, that the government decided to empower respondent 2 to downgrade the incarceration conditions for Palestinian prisoners incarcerated in Israel, and particularly those who are identified by Israel as affiliated with Hamas organization. Among other things, the prevention of family visits of said prisoners in prison was brought up. In view of the above, a letter was sent to respondent 2, the Attorney General and the commissioner of the Israel Prison Service, in which they were demanded to refrain from taking such offensive measures. A legal opinion on this issue was attached to said letter. In addition HaMoked requested to be updated about any decision which would be made in this regard.

Copies of the letter and the opinion dated June 18, 2014 are attached and marked **P/13**.

47. Following the abduction, the military commander also decided to completely prevent West Bank family members from visiting their loved ones who were incarcerated in prisons in Israel. A ban on the entry of family members was imposed as of June 15, 2014. In view of the above HaMoked turned to the legal advisor for the West Bank, to the Attorney General and to the Coordinator of Government Activities in the Territories and demanded to immediately resume family visits to all prisoners.

A copy of HaMoked's letter to the legal advisor for the West Bank, the Attorney General and the Coordinator of Government Activities in the Territories dated June 25, 2014 is attached and marked **P/14**.

48. On that very same day a response was received from the office of the Coordinator of Government Activities in the Territories, according to which the letter was received and handled, and that a response would be sent as soon as the examination the matter was concluded.

A copy of the response letter sent by the office of the Coordinator of Government Activities in the Territories is attached and marked **P/15**.

49. In view of the fact that the days went by, the family visits were not resumed thus causing thousands of prisoners to be completely disconnected from tens of thousands of family members, and an official answer has not been received, HaMoked wrote to the HCJ division at the State Attorney's Office. In said letter HaMoked reiterated the reasons which should cause the state to direct the resumption of visits to all prisoners, due to an ongoing and severe impingement on the family members and their incarcerated loved ones. Copies of the letter entitled "Pre-Petition to the High Court of Justice" were also sent to the Attorney General, the Coordinator of Government Activities in the Territories and the legal advisor for the West Bank.

A copy of HaMoked's letter to the HCJ division dated July 2, 2014 is attached and marked **P/16**.

50. On July 3, 2014, a response was sent to HaMoked by the State Attorney's Office, which was received by it on July 6, 2014. The response stated that HaMoked's letter under review and that a response would be sent by the end of the week.

A copy of the response sent by the State Attorney's Office is attached and marked **P/17**.

51. On that day a response was also received from the office of the legal advisor for the West Bank, according to which HaMoked's letter was "under examination" and that upon its conclusion a response would be sent.

A copy of the response of respondent's legal advisor dated July 6, 2014 is attached and marked **P/18**.

52. Notwithstanding the passage of time, and despite the urgency of the letters and their many addressees, no pertinent response has been received by HaMoked from any of the involved authorities. Notwithstanding the lack of official information, data obtained by HaMoked from the large number of Palestinian residents who seek its assistance indicate, that visits of family members of Palestinian prisoners were partially renewed on July 13, 2014.

53. The partiality of the renewal of the visits is manifested, *inter alia*, in the sweeping denial imposed by the authorities on the entry into Israel of family members of prisoners who are organizationally affiliated with Hamas and additional organizations such as the Islamic Jihad and the Fronts, for visitation purposes. In view of the above, HaMoked wrote again to the relevant authorities – the State Attorney's office, the Attorney General, the Coordinator of Government

Activities in the Territories and the legal advisor for the West Bank – and demanded to cease the implementation of said policy and allow family members of all Palestinian prisoners incarcerated in Israel to enter Israel and visit them in prison, regardless of the organizational affiliation of the prisoners.

A copy of HaMoked's letter dated July 17 is attached and marked **P/19**.

54. On August 3, 2014 HaMoked received a response from the Director General of the Ministry of Public Security; However, said response did not provide a clear picture of the actual state of affairs. The response stated that the Ministers' Committee on National Security decided to introduce "changes in the gamut of privileges of Hamas inmates". It was further stated that "the rights of the security inmates of Hamas organization, wherever they may be, were not violated. At the same time, the grant of privileges to this group of inmates… was re-examined." Beyond that, no explicit reference was made, particularly to the relations between the prisoners and their family members, or to HaMoked's position that said case concerned prohibited collective punishment. Needless to note that respondents' definitions according to which certain fundamental rights are defined by the director general as "privileges" are totally unacceptable to HaMoked.

    A copy of the response letter of the director general of the Ministry of Public Security is attached and marked **P/20**.

55. Said vague answer and the absence of any response from the State Attorney's Office, caused HaMoked to turn to the State Attorney's Office once again in an attempt to receive an official and comprehensive response concerning the continued violation of the rights of the prisoners and their family members.

    A copy of HaMoked's letter to the State Attorney's Office dated August 12, 2014 is attached and marked **P/21**.

56. HaMoked's repeated attempts to urge any of the relevant agencies to provide reliable information on this issue, including until when the offensive policy, which was described above, is expected to be in force, bore no fruit.

In view of all of the above, the petitioners have no alternative but to turn to this honorable court and request it to order the respondents to cease the violation, which endures for about three months, of the fundamental rights of the family members of the prisoners who are identified with various political organizations, and of the prisoners themselves.

<u>The Legal Argument</u>

> **Holding a person in custody does not automatically revoke all constitutional rights granted to him by virtue of the principles of the Israeli constitutional system**, and they may be impinged upon only to the extent required due to the deprivation of liberty resulting from the incarceration, the needs of the interrogation or trial, or for the purpose of securing a vital public interest, and subject to the provisions of the law (LCA 993/06 **State of Israel v. Mustafa Dib Mar'i Dirani**, TakSC 2011(3) 1298, paragraph 29 of the judgment rendered by Justice Procaccia, hereafter: **Dirani**).

<u>Holding Palestinian prisoners within the state of Israel</u>

57. The policy of the state of Israel concerning the holding of Palestinian prisoners within the territory of Israel is entrenched in the Emergency Regulations (Judea and Samaria and the Gaza Strip – Adjudication of Offenses and Legal Aid) 5727-1967, which were promulgated immediately after the occupation of the OPT in 1967. Since then, the validity of the regulations was extended by primary legislation, and currently they are in force by virtue of section 1 of the Law for the Extension of Validity of the Emergency Regulations (Judea and Samaria and the Gaza Strip – Adjudication of Offenses and Legal Aid) 5767-2007. At the same time, an identical provision is set forth in sections 265(a) and 266(a) of the Order concerning Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009.

58. Said practice directly contradicts three clear provisions of the Geneva Convention IV relative to the Protection of Civilian Persons in Times of War, 1949 (hereinafter: the **Geneva Convention**). According to Article 76 of the Geneva Convention residents of an occupied territory, suspects of offenses should be detained within the limits of the occupied territory. Furthermore – if convicted, they will serve their sentence only within the limits of the occupied territory. The wording of the Article is unequivocally clear:

> Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.

The transfer of a detainee or a prisoner to the territory of the occupying power constitutes "deportation" or at least "forcible transfer". Deportation as well as forcible transfer of protected persons from the occupied territory is unequivocally prohibited, with no exception, by the Geneva Convention (first paragraph of Article 49):

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

59. The violation of said Articles constitutes a severe violation of the provisions of the Geneva Convention, according to Article 147. The scholar Yuataka Arai-Takahashi writes in his book regarding the laws of occupation, as follows:

> The peremptory nature of the prohibition of deportation or forcible transfer can be confirmed by its incorporation into core crimes under international criminal law. Both GCIV and API classify deportation or forcible transfer within the meaning of Article 49(1) GCIV as a grave breach (Yuataka Arai-Takahashi, **The Law of Occupation**, Martinus Nijhoff Pub., 2009, p.476).

60. The policy of the state of Israel, under which Palestinian prisoners are incarcerated within the territory of Israel was discussed and approved by the Supreme Court in HCJ 2690/09 **Yesh Din v. Commander of IDF Forces in the West Bank** (not reported, judgment dated March 28, 2010). HaMoked was one of the petitioners in said petition. However, the honorable court found it necessary to note that the mere fact that the holding of Palestinian prisoners in Israel was lawful, did not derogate from the scope of respondent's obligations towards the protected population in general, and towards the population of the Palestinian prisoners, in particular; the court's assumption was that said policy complied with the rules of international law and Israeli law *because* the respondent met the standards established by international law. The following are the remarks of the Honorable President (as than titled) Beinisch, in paragraphs 6-8 of the judgment:

> The purposive interpretation which befits the provisions of the convention (Geneva Convention – D.S.) to the Israeli reality and the conditions of the Area **primarily requires the grant of substantial weight to the rights of the protected population, including the rights of the detainees**. This court has discussed many times the issue of securing adequate conditions to Palestinian detainees… according to the material standards established in international conventions… as aforesaid, **all of which are currently binding upon the prison authorities, which are obligated to respect the provisions of international law and the standards established by them concerning the conditions of detention and imprisonment in general, and the conditions of detainees who are protected residents according to international law, in particular**.

And specifically concerning respondent's obligation to enable the realization of the right to family relations, by the arrangement of prison visits (paragraph 9 of the judgment of President Beinisch):

> The travel arrangements for the purpose of making visits in Israel require, naturally, coordination and means of transportation, and said issue has been heard by us more than once, **in recognition of the importance of visits of family members, as part of the right for the realization of the family relation… seemingly, the issue of accessibility of family members for visits of their incarcerated relatives requires handling for the improvement and adaptation of adequate arrangements**.

61. Namely, the honorable court held that the holding of Palestinian prisoners in Israel was permitted, provided that respondent's duties under international law were upheld. However, as shown by us in the factual part above, by their policy, the respondents violate said duties; the respondents knowingly limit, by the implementation of an arbitrary bureaucratic measure, the right to visit of a large group of prisoners and their family members.

62. It is a living example of the way by which the holding of Palestinian prisoners within the territory of the state of Israel easily inflicts a severe injury on protected rights. A single decision of any one of the respondents suffices, that by a stroke of a pen violate the right to family life of thousands of prisoners and of tens of thousands of their family members. Such an offensive policy cannot be upheld.

<u>The right to prison visits by relatives and respondents' obligation to arrange them</u>

63. As is known, on November 29, 2012 the General Assembly of the United Nations decided to grant Palestine the status of a non-member observer state (Resolution No. A/RES/67/19). It is clear that also after the resolution of the General Assembly, the military commander continues to bear all duties imposed on him by International law, being the occupying power which holds the area.

64. The right to family visits in incarceration facilities is a fundamental right, both of the prisoners and of their family members. It is a fundamental right premised on the perception of the individual as a social being, living within the framework of family and community. The right to family visits is rooted in a number of Israeli and international legal sources. Among these sources, one may mention the Fourth Geneva Convention (which provides in Article 116 that "Every internee shall be allowed to receive visitors, especially immediate relatives - at regular

intervals and as frequently as possible."), Section 47 of the Prisons Ordinance [New Version], 5732-1971 and the Prison Service Commission Order 04.42.00, entitled "Visit Arrangements of Prisoners" which provides in section 1 that:

> **The visit is one of the important means of communication between the prisoner and his family, friends and acquaintances**. The visit may help the prisoner while in prison and encourage him in times of crisis.

65. Section 2(a) of the procedure concerning visits of prisoners of the military commander also provides in the same spirit as follows:

> Many Palestinian prisoners are held in prisons in the state of Israel. Based on the recognition of the importance of prisoners' visits by their family members, taking into consideration, at the same time, security considerations, Palestinian residents whose relatives are incarcerated in Israel, will be permitted to enter Israel to visit them…

66. And it was so held in this regard in the judgment of Justice Procaccia in LHCJA 6956/09 **Maher Yunis et al. v. Israel Prison Service**, TakSC 2010(4), 189 (hereinafter: **Maher**)**,** in paragraph 8, there:

> Indeed, prison leaves and visits may also be regarded as part of the human rights to which they are entitled also while in prison, and which are not necessarily nullified merely due to the deprivation of liberty resulting from the incarceration, fruit of the penal sanction. **Leaves and family visits are some of the means of communication between a person-prisoner and the world and his close vicinity. He needs them by virtue of his nature. They are part of his self as a human being; they are part of his human dignity. They make an important contribution to his welfare and rehabilitation during his incarceration.**

67. The UN Minimum Standard for the Treatment of Prisoners, 1955 provides, in rule 37:

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

68. A comprehensive study conducted by the ICRC regarding customary humanitarian international law, provides that **the right of detainees and prisoners to receive visits is a recognized right under customary humanitarian international law**:

> **Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.**
>
> … In a resolution adopted in 1999, the UN General Assembly demanded that Yugoslavia respect the requirement to allow detainees to receive family visits in the context of the conflict in Kosovo (UNGA Res. 54/183). In the **Greek Case** in 1969, the European Court of Human Rights condemned the severe limitations on family visits to

> detainees. In 1993, the Inter-American Commission on Human Rights recommended that Peru allow relatives to visit prisoners belonging to the Tupac Amaru Revolutionary Movement. (JM Henckaerts, L. Doswald-Beck, **Customary International Humanitarian Law** p. 448-449 (Volume I: Rules. 2005)).

69. Moreover. The right to visits is not that of the prisoner alone. It is also a recognized right under international law of the family members of the prisoner, whose relations with him were severed when he was put under arrest. One of the scholars summarizes the above as follows:

> People who are sent to prison lose the right to free movement but retain other rights as human beings. One of the most important of these is the right to contact with their families. **As well as being a right for the prisoner, it is equally a right for the family members who are not in prison.** They retain the right of contact with their father or mother, son or daughter, brother or sister who has been sent to prison. Prison administrations have a responsibility to ensure that these relationships can be maintained and developed. Provision for all levels of communication with immediate family members should be based on this principle. **It follows that the loss or restriction of family visits should not be used as a punishment under any circumstances**. (Coyle A. **A Human Rights Approach to Prison Management: a Handbook for Prison Staff** International Centre for Prison Studies (King's College, University of London and the UK Foreign and Commonwealth Office) 2002. p. 95).

A Prisoner's Human Rights Remain Intact during his Incarceration

70. The right to family visits in incarceration facilities is also derived from the governing concept, both in international law and Israeli law, that the mere arrest or imprisonment, do not nullify the fundamental rights of the prisoner. Prison walls limit the prisoner's freedom of movement, with all ensuing consequences, but they do not revoke his other fundamental rights, excluding those denied him in accordance with an explicit provision of the law:

> **It is a major rule with us that he is entitled to any and all human rights as a human being, even when he is detained or imprisoned, and the imprisonment alone cannot deprive him of any right whatsoever, unless this is mandated by and arises from the deprivation of his right to free movement, or when there is an explicit provision of the law to that effect**… This rule has been rooted in Jewish heritage for ages: As stated in Deuteronomy 25, 3: 'then thy brother should seem vile unto thee', the sages established a major rule in Hebraic penal doctrine: 'when beaten – he is like your brother' (Mishna, Makot, 3, 15). **And this major rule is relevant not only after he has completed his sentence but also while serving a sentence, because he is your brother and friend, and he retains and is entitled to his rights and dignity as a human being**. (HCJ 337/84 **Hokma v. Minister of Interior**, IsrSC 38(2) 826, 832; and see also: PPA 4463/94 **Golan v. Israel Prison Service, IsrSC 50(4), 136, 152-153**; PPA 4/82 **State of Israel v. Tamir**, IsrSC 37(3) 201, 207; HCJ 114/86 **Weil v. State of Israel**, IsrSC 41(3) 477, 490).

71. And it was so held in the comprehensive judgment of Justice Danziger in **Maher**, in paragraph 36, there:

> The approach of Israeli jurisprudence concerning the purpose of a person's incarceration is that it is exhausted by the deprivation of the individual's personal liberty, by way of limiting his right to free movement. According to this approach, even when a person is incarcerated, he continues to retain any human rights afforded to him. Indeed, "when admitted into prison a person loses his liberty but he does not lose his dignity."

72. Article 10(1) of the Covenant on Civil and Political Rights, 1966, which was ratified by the state of Israel in 1991, provides that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This Article was interpreted by the human rights committee, the body responsible for the implementation of the covenant, in CCPR General Comment No. 21 dated April 10, 1992, in a very broad manner:

> [R]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. **Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment**.

73. The principle under which prisoners are entitled to all human rights other than those nullified by the mere fact of the incarceration, was also established in articles 1 and 5 of the Basic Principles for the Treatment of Prisoners, adopted by the General Assembly of the UN (in resolution 45/111 dated December 14, 1990). Article 1 provides that:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to Article 5:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, **all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights**, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

The right to family life

74. The draconian limitation imposed by the respondents on the ability of family members of prisoners to visit their incarcerated loved ones, severely violates the fundamental right of the family members as well as of the prisoners to family life. The right to family life is and has always been regarded by society, at all times and in all cultures, as a superior value.

75. The Supreme Court has emphasized time and again the great importance of the right to family life in many judgments, and especially in **Adalah** (HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2), 1754).

Accordingly, for instance writes Honorable President (*emeritus*) Barak in paragraph 25 of his judgment:

> It is our main and basic duty to preserve, nurture and protect **the most basic and ancient family unit in the history of mankind, which was, is and will be the element that preserves and ensures the existence of the human race, namely the natural family**…
>
> The family relationship… lies at the basis of Israeli jurisprudence. The family has an essential and central role in the life of the individual and in the life of society. Family relationships, which the law protects and which it seeks to develop, are some of the strongest and most significant in a person's life.

And in **Dobrin**, the Honorable Justice Procaccia writes (in paragraph 12 of her judgment):

> In the hierarchy of constitutional human rights**, after the protection of the right to life and bodily integrity, comes the constitutional protection of the right to parenthood and family.** The purpose of the right to bodily integrity is to protect life; the right to family gives life meaning and reason…
>
> **This right is therefore situated on a high level in the hierarchy of constitutional human rights. It takes precedence over the right to property, freedom of occupation and even the right to privacy. 'It embodies the essence of a person's being and the realization of his self'**.

76. Family rights are also recognized and protected by international public law. Article 46 of the Hague Regulations provides:

> **Family honor and rights**, a person's life, personal property as well as religious faiths and worship customs **must be respected**.

And in **Stamka** it was held that:

> Israel is obligated to protect the family unit under international treaties (HCJ 3648/97 **Stamka v. Minister of Interior**, IsrSC 53(2) 728, 787).

And see also: Articles 17 and 23 of the Convention on Civil and Political Rights, 1966; Article 12 and Article 16(3) of the Universal Declaration of Human Rights, 1948; Article 12 of the European Convention on Human Rights; Article 27 of the Geneva Convention; Article 10(1) of the International Convention on Economic, Social and Cultural Rights of 1966; The preamble of the Convention on the Rights of the Child of 1989.

<u>The violation of the right of the family members and of the prisoners is not proportionate</u>

77. According to the principle of proportionality, a protected human right may be violated only to the least extent required to achieve the objective, for which said right is being violated. The respondents must exercise their discretion "in a manner that will not, *inter alia*, violate the right other than to the least extent required, and in a manner that the relation between the damage

caused as a result of the violation of the right and the possible advantage which may arise from the achievement of the objective will be reasonable (HCJ 6226/01 **Indor v. Mayor of Jerusalem,** IsrSC 57(2) 157, 164).

78. This honorable court laid down the foundations, according to which the proportionality of the violation of a human right is examined. A violation of a right will be proportionate if it satisfies three cumulative subtests: the rational connection test (which examines the correlation between the means used and the realization of the objective underlying respondents' policy); the least injurious means test (which examines whether the objective could have been achieved by another means, which violates the human right to a lesser extent); and the test of proportionality in the narrow sense (according to this test, even if the means used leads to the realization of the objective, and even if it is the least injurious means for the realization thereof, the damage caused to a protected human right by the means used must be of proper proportion to the gain brought about by that means)(see HCJ 5016/96 **Horev v. Minister of Transportation**, IsrSC 41(4)1, 53-54; **Stamka** above, page 777).

79. In view of the limitation clauses in the Basic Laws, the proportionality principle was adopted as a means for the examination of the lawfulness of laws, and hence, it is used as a condition for the lawfulness of any administrative act (HCJ 987/94 **Euronet Kavei Zahav (1992) v. Minister of Communications**, IsrSC 48(5) 412, 453). The proportionality of the violation of the rights of the Palestinian prisoners and their family members, will be examined taking into consideration the severity of the infringement, and in view of the superior status of the right to family life: "All three subtests… should be applied and implemented taking into consideration the nature of the violated right" (HCJ 1715/97 **Israel Investment Managers Association v. Minister of Finance,** IsrSC 51(4) 367, 420).

80. **The first subtest: the rational connection** – the first stage in the examination of the proportionality of respondents' policy concerns the question of whether a rational connection exists between the objective of safeguarding security and the means of the imposition of a sweeping limitation on the right of family members of prisoners, who are identified with certain organizations, to meet their incarcerated loved ones.

81. In view of the severity of the violation inflicted by respondents' policy on the right of the petitioners, and many others like them, to see their incarcerated loved ones, a clear, significant and proved connection must exist between said policy and the realization of the objective of safeguarding security.

82. Case law provides that an administrative authority must lay down an appropriate factual infrastructure to substantiate its decisions. Said infrastructure must be based, *inter alia*, on the gathering of substantial data and evidence. Said ruling has an even greater effect and importance when the substantiation of measures which violate a fundamental right is concerned. In the absence of data and factual infrastructure there is no basis for the alleged connection between the means and the objective:

> When a denial of fundamental rights is concerned, it is not sufficient to present equivocal evidence … I am of the opinion that the evidence required to convince a statutory authority that there is justification for the denial of a fundamental right, must be clear, unequivocal and convincing… the greater the right the stronger the evidence which should serve as the basis for the decision concerning the reduction of the right (EA 2/84 **Neiman v. Chairman of Central Elections Committee**, IsrSC 39(2) 225, 249-250).

83. Namely, the respondents must show that their sweeping policy which denies the petitioners and all family members of the Palestinian prisoners who are identified as organizationally affiliated with Hamas and additional organizations, of their right to maintain family relations with their incarcerated loved ones, is based on data and evidence, according to which it is indeed capable of preventing harm to security. In the absence of such factual infrastructure, respondents' policy will not satisfy the rational connection test.

84. **The second subtest: the least injurious means** - the least injurious means test concerns the question of whether the security objective may be realized in a different way, which will injure the fundamental rights of the petitioners, and others like them, to the minimum extent possible.

85. The severe limitation imposed on the right of the petitioners and other family members to prison visits does not satisfy this test. It is a sweeping arrangement, which puts an entire group of the population under suspicion, and exposes it to a "different treatment" solely due to a criterion which is based on the political-organizational affiliation of the prisoners whose family members wish to visit in prison.

86. This honorable court has held more than once that sweeping arrangements, as opposed to arrangements which are based on a specific-individual examination, are disproportionate measures, which injure the individual beyond need (HCJ 3477/95 **Ben Atiya v. Minister of Education**, IsrSC 49(5)1, 15).

87. In **Saif** (HCJ 5627/02 **Saif v. Government Press Office**, IsrSC 58(5) 70, hereinafter: **Saif**) the honorable court examined the lawfulness of the decision of the Government Press Office, according to which the Office would stop issuing journalist certificates to Palestinian journalists, including those who were holding entry permits into Israel, and would not extend the validity of certificates which were issued in the past. The grounds given by the state to its sweeping refusal were its concern that government officials in Israel would be injured in press conferences or in government offices, in view of the fact that a journalist certificate facilitated the access to said places. According to the state, an individual security check cannot obliterate the risk posed by an OPT resident, since such risk derives from the mere residency.

88. The judgment, which rejected the state's arguments, provides that security considerations are not an absolute value and that "balancing is required between the interest of safeguarding security and other opposing protected rights and interests." (**Saif**, paragraph 6 of the judgment of Justice Dorner). It was further held that "the total refusal to issue journalist certificates to Palestinian residents of the Area – including those holding entry and work permits in Israel – indicates that no balancing whatsoever was made between the considerations of freedom of speech and information and security considerations, and in any event, the balancing which was made was not proper" (paragraph 7 of the judgment of Justice Dorner).

89. And it was so held on this issue by President Barak, in his judgment in **Adalah** (paragraph 69 of his judgment):

> The need to adopt the least harmful measure often prevents the use of a flat ban. The reason for this is that in many cases the use of an individual examination achieves the proper purpose by employing a measure that violates the human right to a lesser degree. This principle is acceptable in the case law of the Supreme Court.

90. As indicated above, the respondents must prove that the limitation imposed on the issue of entry permits into Israel to family members of prisoners who are affiliated with certain organizations, is based on solid grounds of evidence and data.

91. However, the fact that the permits which are granted to the petitioners, and other family members like them, are issued in any event after an individual examination, raise a deep concern that the failure to conduct an individual examination is not based on security considerations. Thus, President Barak continues to state, in paragraph 69 of his judgment in **Adalah** as follows:

> There may be cases in which the individual consideration will not realize the proper purpose of the law, and a flat ban should be adopted. However, before reaching this conclusion, **we must be persuaded, on the basis of proper data, that there is no alternative to the flat ban**. Sometimes the choice of the flat ban results from a failure to determine the form of the individual consideration and not because such a consideration is ineffective. In **Stamka**, Justice M. Cheshin held — with regard to the policy of the Ministry of the Interior that required the foreign spouse who was staying in Israel to leave it for a period until his application for a status in Israel was examined — that: 'The clear impression is that the **weakness in the supervision of the Ministry of the Interior** was one of the main factors… for the creation of the new policy; and instead of strengthening the effectiveness of the supervision, the Ministry of the Interior took the easy path of demanding that the foreign spouse to leave Israel'

92. The implementation of the above in our case indicates that the respondents chose the "easy path": an arbitrary limitation on visits of all family members of prisoners who are organizationally affiliated with certain movements. The fact that the permits which were issued to the petitioners by the military commander, were issued following an individual examination, indicates that the respondents can conduct an individual examination of permit applications. The respondents choose to impose a sweeping limitation on the possibility of carrying out an individual examination and making an individual decision concerning the applicant, according to his personal details, in a manner which stains the policy with lack of proportionality.

93. **The third subtest: proportion between the means and the objective** – the third proportionality test concerns the question of whether the scope of injury inflicted on human right, as a result of respondent's policy, is proportionate to the objective the realization of which is sought.

94. According to the third subtest, if the gain brought about as a result of the policy is considerable, the violated right will be defeated by it. The nature of said subtest is different from that of its two predecessors, as it focuses on the violation of the human right which is caused as a result of the realization of the objective underlying the policy. It embodies the idea according to which "there is a moral barrier, which cannot be surmounted by democracy, even if the objective to be realized is proper" (President Barak HCJ 8276/05 **Adalah v. Minister of Defence,** TakSC 2006(4) 3675, 3689).

95. In the case at hand, said policy severely violates a very fundamental right, the right to family life. The justification of the violation of said right, if any, should serve a public interest of the first degree.

96. Nevertheless, the objective of safeguarding security, if it is indeed the objective of the policy, as proper and important as it may be, is not an absolute value and it does not justify any violation of human rights. The security justification is not absolute, and it must be balanced against other needs. Thus, for instance, in **Saif** the court emphasized that a theoretical security risk posed by a journalist, who holds entry permits into Israel, does not justify an inevitable violation of protected rights and discrimination between foreign Palestinian journalists and all other foreign journalists. Security is never absolute and it may be defeated by other rights HCJ 5100/94 **The Public Committee against Torture in Israel v. The Government of Israel**, IsrSC 53(4) 817).

97. The heavy price paid by the petitioners, and others like them, as a result of the implementation of respondents' policy concerning the ban on prison visits, is exaggerated and excessive. The speculative security advantage which arises – if at all – of this policy, is not proportionate to the severity of the violation of petitioners' right to maintain family relations with their incarcerated loved ones.

Improper Discrimination

98. Respondents' decision to prohibit the petitioners and others like them, from visiting their incarcerated relatives, who are affiliated with these or other organizations, constitutes improper discrimination. This new policy constitutes downgrading of incarceration conditions of all prisoners associated with Hamas, the Fronts and the Islamic Jihad, as compared to the other "security prisoners" - due only to their organizational and political affiliation.

99. It is a well known rule in Israeli law that equality is supreme and foremost among legal rules. Upon the legislation of the Basic Law: Human Dignity and Liberty, the right to equality was acknowledged as part of a person's right to dignity, according to an interim model which includes within the limit of human dignity not only psychological injury or humiliation and slander which harm the core dignity of a person (see Justice D. Dorner in HCJ 4541/94 **Miller v. Minister of Defense**, IsrSC 49(4) 94, 131-133), but also discrimination which does not involve humiliation, so long as it is closely and objectively connected to human dignity (see paragraph 39 of President A. Barak's judgment in **Adalah**).

100. The obligation not to discriminate – which is nothing but a mirror image of the right to equality – is incumbent primarily upon governmental authorities. "An authority is prohibited from discriminating, which is: unequal and unfair treatment of equals." (HCJ 1703/92 **CAL Cargo Airlines v. Prime Minister**, IsrSC 52(4) 193, 204 as well as HCJ 803, 678/88 **Kfar Vradim v. Minister of Finance**, IsrSC 43(2) 501, 507-508, hereinafter: **Kfar Vradim**).

101. In **Kfar Vradim** the Court ruled that equals should be treated equally and non-equals should be treated differentially relative to the difference between them (*Ibid*, 507). Thus, clearly, the different treatment of a particular group within the general population of so called "security prisoners", which is differentiated only by the ostensible political and organizational affiliation of its members, constitutes improper discrimination which is prohibited by the rulings of the Supreme Court. In this spirit, President Barak quotes Justice Haim Cohen, who stated as follows:

> The dignity that may not be infringed on and which merits protection is not only a person's good reputation, but also his status as one among equals. The harm to his dignity is not only a result of slander or insults and vilification, but also discrimination and oppression, prejudicial and racist or degrading treatment. The protection of human dignity means not only a prohibition on slander, but also securing his equality in rights and opportunities, and the prevention of discrimination based on sex, religion, race, language, opinion, **political or social affiliation**, family lineage, ethnic origin, property, or education (H. Cohen, "**The Values of a Jewish and Democratic State**, page 32). (HCJ 6472/02 **Movement for Quality Government in Israel v. the Knesset**, TakSc 2006(2), 1559, 1578.

102. Furthermore, such discrimination in strictly prohibited by international law. Article 14 of the European Convention on Human Rights explicitly states that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, **political or other opinion**, national or social origin, association with a national minority, property, birth or other status**.**

103. Article 26 of the International Covenant on Civil and Political Rights, which specifically addresses the prohibition of discrimination based on political affiliation, states that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion**, political or other opinion**, national or social origin, property, birth or other status.

This Article was interpreted by the Human Rights Committee , in CCPR General Comment No. 21, as follows:

> This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, **political or other opinion**, national or social origin, property, birth or other status.

104. The bottom line is clear – the ill-treatment and discrimination of one group of prisoners solely on the basis of the organizational-ideological-political affiliation of the group members cannot be upheld, even before we mention the practical non-negligible difficulties arising from the implementation of such discrimination in practice, but this discussion exceeds the scope of this petition.

Collective Punishment is Prohibited

105. Respondents' decision to sever the relations between the petitioners and all other family members of the Palestinian prisoners who are affiliated with certain organizations, and their loved ones who are incarcerated in Israel, constitutes collective punishment of the prisoners affiliated with said organizations, and of their family members, since this punishment is imposed on all

members of a group of people which consists of tens of thousands of people, without an individual examination.

106. Collective punishment is prohibited by international law, in the framework of the laws of war as well as by international human rights law. The governing principle which prohibits the use of sweeping and arbitrary punitive measures which harm entire groups of people also forms an important part of the rules of customary international law, by which the state of Israel is bound.

107. Since the matter in question concerns prisoners and their family members who are residents of occupied territories, who are defined as "protected residents", Regulation 50 of the Hague Regulations applies:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Article 33 of the Fourth Geneva Convention states:

> No protected person may be punished for an offence he or she has not personally committed. **Collective penalties and likewise all measures of intimidation or of terrorism are prohibited**. Pillage is prohibited.

108. The ICRC's interpretation clarifies the difference between the Hague Regulations and the provisions of the Fourth Geneva Convention:

> The Provision is very clear. If it is compared with Article 50 of the Hague Regulations, it will be noted that that Article could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility.
>
> Thus, a great step forward has been taken. **Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of.** (J.S. Pictet, **Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War**, p. 225 (Geneva, 1958).

109. It is interesting to note that Pictet interprets the prohibition on the use of "measures of intimidation or of terrorism," not only as aimed at defending protected persons under occupation, but also as a prohibition that accords with the interests of the occupier:

> During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorize the population, the belligerents hoped to prevent hostile acts. **Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance**. **They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be** (Pictet, Commentary, p. 225-226).

110. Article 75(2)(d) of Protocol I Additional to the Geneva Convention also states that:

> (2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents…
>
> **(d) collective punishments**

The ICRC's interpretation of this Article clarifies that:

> 3055. **The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.(Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949**. p. 874 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Eds. ICRC, Geneva, 1987)).

111. Section 29 of the Basic Principles for the Treatment of Prisoners, which concerns discipline and punishment, provides unequivocally that a prisoner may not be punished except in accordance with the law, and for an offense committed by the prisoner himself:

> **Discipline and punishment**
>
> 29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
>
> (a) Conduct constituting a disciplinary offence;
> (b) The types and duration of punishment which may be inflicted;
> (c) The authority competent to impose such punishment.
>
> 30. (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.
>
> (2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.

112. Hence, downgrading the already harsh incarceration conditions of Palestinian "security" prisoners solely due to their affiliation with certain organizations, and their total severance from tens of thousands of family members, constitute unlawful collective punishment, as it is clear that the collective downgrade of the conditions is not intended to address any security need related to any one of the punished individuals.

The Use of Organizations-Affiliated Prisoners and their Family Members as "Bargaining Chips"

113. As stated above, the reason for the imposition of sanctions against the petitioners, against all other family members of the prisoners and against the prisoners who are identified as affiliated

with certain organizations, is "punishment" for the abduction of the youths (or at least this was the initial rational). With all due respect, collectively depriving individuals of their basic rights, for punitive purposes, is not among the permissible measures in a law-abiding state.

114. Family members of the Palestinian prisoners, such as the petitioners, and the prisoners themselves, who are denied visits, or other rights, as the case may be, are used, in fact, as "bargaining chips" for the purpose of exerting pressure on organizations which are separate and distinct from the prisoners and their family members. The use of human beings as bargaining chips for this purpose was unequivocally disqualified by the Supreme Court, as stated by (then) President Barak, whose comments apply equally to our case:

> I am aware of the suffering of the families of IDF soldiers who are missing or held captive. It is heavy as a stone. Even more painful is the condition of the captive who is held in secret and in hiding, ripped from his home and homeland. Indeed, I am not oblivious to this pain, along with the prime interest of the State of Israel to return its sons back home. It did not escape me when I rendered my decision in ADA 10/94. It has not lessened from then until this day. **We carry with us the human and social tragedy of captive and missing persons day in and day out. However, as important as the purpose of the release of prisoners and missing persons may be, it cannot – in the context of the law being the subject matter of the petition before us – legitimize all means. It is not possible – in the legal situation before us – to right a wrong with a wrong.** I am confident and certain that the State of Israel will not rest until it finds a way to solve this painful problem. As a state and a society, our comfort is in the fact that the way to the solution will suit our foundational values (CrimFH 7048/97 **A v. Minister of Defence**, IsrSC 54(1) 721, 744).

115. It is important to note that according to the Fourth Geneva Convention, violations of the Convention by one party have no bearing on the obligation of the other party to uphold the provisions of the Convention. The undertakings which Israel assumed upon itself when it ratified the Fourth Geneva Convention should be affected by the fact that the other party does not abide by its provisions.

As Pictet wrote:

> It (the Fourth Geneva Convention – D.S.) is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations.
> (**Pictet, Commentary** p.15).

116. This principle was also recognized by Israeli case law, as stated by the Supreme Court:

> **One might ask: are the petitioners entitled to have humanitarian considerations taken into account in their matter? They are members of terror organizations that have no truck with humanitarianism, and for whom attacks on the innocent are a way of life.… Our reply to these questions is: The State of Israel is a state of law; the State of Israel is a democracy that respects human rights, and which gives serious attention to humanitarian considerations**. We give attention to

> these considerations because compassion and humanity are ingrained in our character as a Jewish and democratic state; we give attention to these considerations because the dignity of every person is dear to us, even if he is one of our enemies… We are aware of the fact that this approach ostensibly grants an "advantage" to the terror organizations that have no truck for humanity. However, this is a transient "advantage." Our moral approach, the humanity of our position, the rule of law that guides us – all these constitute an important part of our security and strength. Eventually, this is our advantage. (HCJ 794/98 **`Obeid v Minister of Defence**, IsrSC 55(5). 769, 775).

117. In view of all of the above, it is clear why respondents' policy, which prevents the petitioners and others like them from maintaining family relations with their incarcerated loved ones, based solely on the prisoners' organizational affiliation, cannot be upheld.

118. Due to travel limitations between the OPT and Israel, petitioners' affidavits were signed before an attorney in their place of residence. The affidavits and the powers of attorney were sent to HaMoked's offices by facsimile, and are attached to this petition as such.

Therefore, the honorable court is hereby requested to order the respondents as requested in the beginning of the petition and obligate them to pay trial costs and legal fees.

Jerusalem. September 23, 2014.

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Daniel Shenhar, Advocate
Counsel to the petitioners

(File No. 83040)