

**At the Supreme Court**  
**Sitting as the High Court of Justice**

**H CJ 9021/23**

In the matter of:

**\_\_\_\_\_ Wadi et al.**  
Represented by counsel, Adv. Nadine Abu Arafah and/or  
Nadia Daqqa et al.  
4 Abu Obeida St., Jerusalem, 97200  
Tel: 02-6283555; Fax: 02-6276317

**The Petitioners**

**v.**

**Israel Defense Forces et al.**  
Represented by the HCJ Department,  
at the State Attorney's Office, Ministry of Justice  
31 Salah a-Din Street, Jerusalem  
Telephone: 073-3925590; Fax: 02-6467011  
email: [HCJ-dep@justice.gov.il](mailto:HCJ-dep@justice.gov.il)

**The Respondents**

**Petitioners' Reply to the Preliminary Response**

The Petitioners hereby respectfully submit a reply to the Respondents' preliminary response submitted on January 23, 2024, as follows:

1. The Petitioners wish to begin their reply by emphasizing the unprecedented distress which led to the Petition at hand, stemming from Respondent's failures, which it did not attempt to address in its response, despite the repeated extensions it received.
2. In this context it should be noted that this Petition was filed on behalf of Gazan detainees, who were arrested in different circumstances against the backdrop of the war, and whose worried families wish to know what happened to them. The only thing that the families wish to know is whether their loved ones are held by Israel, and if so – where. It is the most basic thing, the cornerstone of any modern legal system. However, four months have passed and the matter has not yet been addressed. Nowhere in its response did the Respondent acknowledge or note in a single word that the Petitioners are individuals who as a result of Israel's actions disappeared into a legal vacuum which was created by it. Until now the Honorable Court has never allowed the holding of detainees, whoever they may be, for four months *incommunicado*.
3. And it is not surprising. It is well known that mass arrests of different persons, in wartime, may open the door to severe violations of human rights. The only thing which is requested in the Petition at hand is to protect the most basic right of any detainee: that the fact of their arrest and whereabouts shall be known.

4. There is no dispute that additional basic rights depend on this basic right, such as the right for legal representation, for intervention regarding incarceration conditions and even the right to life and detainees' right not to be arbitrarily deprived of their liberty.
5. Respondents' conduct ever since the war broke out proves the connection between these rights and the detainee's right that their place of detention will be known. Unfortunately, in 2024, the Respondents do not understand the importance of such an obvious right, and continue holding the opinion that certain detainees do not have the right, only because they are Gaza Strip residents, not to be disappeared.
6. Despite the absolute isolation – imposed by the Respondents - on every Gaza Strip resident who is arrested, recently horrifying stories came out of detainees who were held in severe conditions amounting to torture which led to their death (see paragraph 18 of the Petition).
7. Moreover. Mass arrests of civilians and their later disappearance led to an absurd situation in which an 82-year-old woman with Alzheimer's was held in custody in a status of unlawful combatant for about a month and a half. This case became known accidentally, while until the last minute the state authorities refused to give any information about the elderly woman who was also denied access to a lawyer.

An affidavit describing the details of this case is attached and marked **RP/1**.

8. The current reality in Gaza is unbearable. Tens of thousands have been killed, hundreds of thousands have been displaced from their homes and thousands have been arrested. Many families do not know what happened to their loved ones, as uncertainty grows due to the damaged infrastructures and communication disruptions.

### **To the crux of the matter – Respondents' Response**

#### The Previous Proceedings

9. In the Preliminary Response the Respondents have repeatedly argued in a manner which may mislead the Honorable Court that the Petition at hand "is nothing but another link in a series of previous, similar petitions filed by HaMoked: Center for Defence of the Individual founded by Dr. Lotte Salzberger (hereinafter: **HaMoked**) during the last three months". However, by making this argument the Respondents are presenting a false reality as if HaMoked chooses to file these petitions at its own initiative, while the truth of the matter is that it is forced to do so due to Respondents' conduct and their refusal to provide information concerning the holding place of detainees, Gaza Strip residents, information which is at their disposal, unless and until the Court's interference in the matter is requested by HaMoked.
10. The Respondents, knowing that they are the ones who prevent the provision of any information concerning detainees who are Gaza Strip residents, left the families no other choice. The families contact HaMoked, and the latter, as their representative, is forced to disappoint them since for four months the Respondents have been disregarding the legal basis which obligates them to give notice of a person's arrest and of the place of detention

of a detainee held by the Israeli security forces. What else can be done in this situation? Should one sit idly by? Is applying to the High Court of Justice of the state of Israel an inconceivable act in such a situation? It seems that the tables have turned.

11. HaMoked noted in various proceedings that in order to solve Respondents' systematic omission it is forced to apply to the court on behalf of each family that seeks its assistance and cannot locate its loved ones.

The question of the addressee of the notice

12. Unlike Respondents' argument in H CJ 7439/23 **Alwahidi v. Israel Defense Forces** (hereinafter: **Alwahidi**), the court did not hold that the Respondents have no obligation to give information concerning detainees who are Gaza Strip residents. In fact, the court accepted Respondents' position that requests concerning detainees who are Gaza Strip residents should be made by their relatives and that thereafter HaMoked applies on their behalf to trace their loved ones.
13. Moreover, the Honorable Court re-affirmed in the above judgment the applicability of the laws of war and rules of public law in the context of detentions of Gaza Strip residents in wartime. The above was said in response to Petitioners' argument in that case that there is an obligation to provide the requested information by virtue of the Order Concerning Security Provisions and by virtue of the laws of belligerent occupation. The court held that a different legal framework applies to the case at hand and did not rule on the obligation to provide the requested information, but rather on the contrary, established guiding rules for its provision.
14. The Honorable Court has also stated that said judgment did not necessitate it to rule on the legal aspects relating to the holding in custody of Gazan detainees who took part in hostilities, and referred to the state's willingness to provide the requested information in the framework of previous proceedings such as H CJ 5226/14 **Abu Reida v. Israel Defense Forces** (July 31, 2014) (hereinafter: **Abu Reida**) and H CJ 5234/14 **HaMoked Center for the Defence of the Individual v. Israel Defense Forces** (August 4, 2014) (hereinafter: **HaMoked 2014**).
15. In said cases, detainees were not deprived of the right that the fact of their arrest and holding place shall become known, but it was held that it shall be done on the basis of an individual request in their matter, originating from detainee's family members.
16. It should be reminded that in HaMoked 2014 Case, the petitioner requested to be provided with lists specifying the names and details of all Gaza Strip residents who were arrested by the security forces. This is not the case in the Petition at hand. As is known, HaMoked is not a party to the proceeding but only represents families of detainees that contacted it and requested its assistance in finding out what had happened to their loved ones.
17. In **Alwahidi** it was also clarified by the Petitioners that the Petitioners' family members contacted HaMoked after their colleagues had contacted HaMoked and at a later stage received a power of attorney from them. To support this allegation attached are the

powers of attorney which were signed at a later stage, due to the known objective difficulties, by the family members of the detainees in said case.

A copy of the power of attorney of Mr. Soheil Alwahidi, a family member of Heitam Alwahidi is attached and marked **RP/2**; A copy of the power of attorney of Mr. Hashem Abed Alwahidi, a family member of Nidal Alwahidi is attached and marked **RP/3**.

18. Hence, the nature of the contact underlying the Petition at hand and which was clarified in paragraphs 23 and 24 of the Petition. The Petition for a writ of *Habeas Corpus* in the case at hand was filed after the family members of the Petitioners had contacted HaMoked directly, and the latter contacted the authorities of the state of Israel on the basis of their request. In addition, and as specified in the Petition, the Petition was filed on behalf of the residents with whom HaMoked succeeded to communicate despite the collapsing infrastructures in Gaza and the communication disruptions caused as a result thereof. Accordingly, all the families of the Petitioners at hand confirmed shortly before the Petition's filing date that they have not received any update concerning the whereabouts of their loved ones.

The question concerning the provision of information about the holding place of detainees who are Gaza Strip residents

19. The Petitioners wish to reiterate that contrary to Respondents' arguments, which may mislead the Honorable Court, in the proceedings referred to above it was not held that the Respondents' did not have an obligation to provide the requested information concerning detainees who are Gaza Strip residents. The only holding in this context was that "there is no room to determine that information concerning the identity of those who were captured in the course of combat shall be given within the same period of time which is required in regular times" (see HCJ 289/09 **Attar v. Israel Defense Forces**). In other words, it has never been held by the court that there is no obligation to provide the information and its only decision in this context concerned the period of time which shall be given to the Respondents for the purpose of providing the requested information. This statement was not made without understanding the urgency of the matter, and it stands to reason that a period of time which exceeds months was not regarded as justified by the Honorable Court, not even in a time of war.
20. With respect to subsequent petitions, such as HCJ 7637/23 **Kashta v. Israel Defense Forces** (hereinafter: **Kashta**) and HCJ 7946/23 **Abu Abed v. Israel Defense Forces** (hereinafter: **Abu Abed**), the Petitioners wish to emphasize that the Respondents had advised that the competent body which was authorized to provide the information about the holding place of the detainees in said proceeding was Respondent 4, the National Security Council, and accordingly the latter provided the requested information.
21. In **Abu Abed**, the Honorable Court mentioned in its judgment the fact that Respondent's notice referred to the laws by virtue of which the detainees, whose tracing was requested, were held in custody, and noted that said laws included arrangements concerning attorney visits. The above statement shows Respondents' assumption that the holding in custody of Gazan detainees is lawful since it is regulated by law – either by virtue of the Incarceration of Unlawful Combatants Law, 2022 or by virtue of the Defence

(Emergency) Regulations (Iron Swords) (Custody and Removal of Illegal Aliens Who Are Residents of the Gaza Strip) 2023 and even by virtue of the regular detainment and arrest laws - and since these laws include provisions regulating the issue of attorney visits, it should be regarded as substantiating Respondents' obligation to provide information about the detainee's holding place, to prevent said arrangements from becoming a dead letter. To conclude this point, these arrangements were established on the basis of the knowledge that the mere arrest and holding place are critical information that only upon the receipt of said information can these arrangements be implemented.

22. Moreover. Respondents' argument that ostensibly there is no obligation to provide the requested information in the Petition at hand is contrary to the words of the Honorable President (retired) A. Barak, in his opinion in the decision given by the International Court of Justice in The Hague in South Africa's application for temporary remedies against Israel dated January 26, 2024 (Application on the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)).
23. In his opinion the Honorable retired President presents the legal situation in Israel. It is expressly stated in paragraph 12 of his opinion that the High Court of Justice in Israel held that all detainees held in custody in Israel are entitled to have their basic rights protected. In this context the Honorable President referred to his judgment in HCJ 3278/02 **HaMoked for the Defence of the Individual v. The Military Commander**, IsrSC 57(1) 385 (2002) (hereinafter: **HaMoked 2002**). In that case it was held that the state of Israel considered itself bound by the humanitarian provisions of the Fourth Geneva Convention. The retired President has also clarified that the provisions pertaining to incarceration conditions are of a humanitarian nature and should therefore be followed. And hence the question, how do the Respondents regard themselves upholding, in the current state of affairs relating to detainees who are Gaza Strip residents, the provisions of Articles 27, 33, 35, 37 and 43 of the Fourth Geneva Convention, all of which concern the obligation to provide information about the identity and holding place of detainees and the prohibition against collective punishment, whose applicability in the current state of affairs in Gaza cannot be in dispute?!
24. It was also held in said judgment that for the purpose of striking a proper balance between the liberty of the individual and the needs of the public one may learn about the proper standards of reasonableness and proportionality from the Standard Minimum Rules for Treatment of Prisoners (hereinafter: the **Mandela Rules**).
25. These rules provide guidelines for inmates' minimal rights, which must not be violated under any circumstances and are meant to secure protected rights forming part of the customary law. In **HaMoked 2002** case the Honorable Court referred to these rules, as the directives which guide the Military Commander in exercising its discretion. The above was said at the height of the second *Intifada*, in a time of intense fighting. Section 68 of the Mandela Rules provides that:

Every prisoner shall have the right, and shall be given the ability and means, to inform immediately his or her family, or any other person designated as a contact person, about his or her imprisonment, about his or her transfer to another institution and about any serious illness or

injury. The sharing of prisoners' personal information shall be subject to domestic legislation.

26. Section 69 of the Mandela Rules refers to the same obligation to inform a detainee's or prisoner's family of their illness or death.
27. Since the war broke out, Respondents' treatment of detainees, residents of the Gaza Strip, those arrested in Gaza and those arrested in Israel, and their position as presented in their response, is far from complying with the acceptable minimal standards according to international customary law, and is completely contrary to the opinion of the Honorable President (retired) Barak in the decision of the International Court which was given a few weeks ago, in the course of the current war and only three days after Respondents' response to the Petition at hand had been submitted.
28. In **HaMoked 2002** case, the court held that the provisions of Article 10 of the International Covenant on Civil and Political Rights from 1966 reflect international customary law:

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

29. The translation of this obligation in Israeli law is manifested in the holding of the Honorable Court in HCJ 221/80 **Darwish v. Israel Prison Service**, IsrSC 35(1) 538:

Any person in Israel, who has been sentenced to imprisonment (or lawfully detained), is entitled to be held under humane and civilized conditions. **It is not significant that this right has yet to be explicitly stated in legislation: this is one of the fundamental human rights, and in a law-abiding democratic state it is so self-evident that it need not be written or legislated** [The emphases were added].

30. It is further clarified by the court in **HaMoked 2002** case:

Prisoners should not be crammed like animals into inadequate spaces. Even those suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of humane treatment and ensure basic human necessities. How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody? Such is the duty of the commander of the area under international law, and such is his duty under our administrative law. Such is the duty of the Israeli government, in accord with its fundamental character: Jewish, democratic and humane.

31. These legal arguments are brought here in addition to the arguments specified in paragraphs 45-65 of the Petition and for the sake of efficiency we shall not repeat them.

32. Hence, many judgments and numerous provisions in international law, including recent ones, reaffirm time and again that the Respondents cannot cause persons to disappear, and that they are obligated to notify of the mere arrest and holding place of the Gazan detainees.

#### The Petitioners in the Petition at hand

33. All of the above substantiates the argument that there is no room for denying detainees one of their basic rights: that their incarceration place shall be known.
34. In their response which disregards this substantial issue, the Respondents focused on the cases of five of the Petitioners, disregarding 55 others, wishing to show that the Petition was not sufficiently substantiated and that said individuals have been released before the Petition was filed. However, these data only prove the extreme implications of Respondents' conduct and the way it affects these individuals. An inquiry which was conducted with the families of the five Petitioners has shown that in some cases the applying family member had no knowledge of the release of their loved one until the Petition was filed and that they learnt about it only later due to the difficult conditions and inability to communicate. In other cases the family members learnt of the release only from the preliminary response. The above only demonstrates the harsh implications of Respondents' policy.

#### Conclusion

35. It is for good reason that the Respondents delayed the submission of their response to the Petition, notwithstanding its urgency. After numerous extensions, a response was submitted which avoids the substantial issue and raises only threshold arguments lacking any legal basis. The Respondents well understand that we are concerned here with a severe and unprecedented deviation from the legal obligations by which they are bound.
36. Moreover. Instead of dealing with the substantial arguments, the Respondents leave themselves an opening to keep requesting more extensions by asking the court to enable them to submit a supplementary response within 21 days should the court decide not to dismiss the Petition *in limine*. The above is yet more proof of their attempts to extend the proceeding at hand, or, in the less desirable situation, to cause it to be dismissed *in limine*, leaving the Gazan detainees and their family members in a legal vacuum.
37. As we have shown in the Petition and presented above, regulating the custody issue of Gazan detainees, did not manage to guarantee until now that they are held in appropriate conditions in a manner which maintains their dignity and even their life. These laws become meaningless due to Respondents' policy which prevents the provision of the basic information about the detainees' holding place, information which is critical for acting according to the numerous arrangements included therein, such as, legal representation, judicial review of the mere arrest and securing basic incarceration conditions, thus denying said detainees the ability to exercise their rights under said laws.

38. This contradiction, between the laws and Respondents' policy, leads to the obvious conclusion, namely, that the Respondents understand that information of the mere arrest and the place of detention must be provided to comply with the arrangements included in the laws that they refer to.
39. Considering the aforesaid, it seems that Respondents' argument that the detainees are held by virtue of different laws is meaningless in terms of the obligation to provide information about their holding place according to the law referred to by the Petitioners, and even according to the laws referred to by the Respondents as broadly discussed above.
40. In view of the above, the Honorable Court is requested to schedule a hearing in the Petition as soon as possible, to order the Respondents to give notice of the Petitioners' holding place as described in the beginning of the Petition and put an end to the Respondents' systematic violation of the obligations to which they are bound.

February 13, 2024

---

Nadine Abu Arafah, Adv.  
Counsel for the Petitioners

---

Nadia Daqqa, Adv.  
Counsel for the Petitioners