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At the Supreme Court
sitting as the High Court of Justice

HCJ 3278/02

- The Petitioners:**
- 1. HaMoked: Center for the Defence of the Individual**
 - 2. Adalah: The Legal Center for Arab Minority Rights in Israel**
 - 3. The Association for Civil Rights in Israel**
 - 4. B'Tselem: The Information Center for Human Rights in the Occupied Territories**
 - 5. LAW: The Palestinian Center for Protection of Human Rights and the Environment**
 - 6. Addameer: Association for the Protection of Prisoners and Human Rights**
 - 7. Al-Haq: Law in the Service of Human Rights**

all represented by attorneys Yossi Wolfson (Lic. No. 26174) and/or Tarek Ibrahim (Lic. No. 31081) and/or Hisham Shabaita (Lic. No. 17362) and/or Adi Landau (Lic. No. 29189) and/or Tamir Blank (Lic. No. 30016), of HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
4 Abu Obeidah Street, Jerusalem
Tel: 02-6283555, Fax: 02-6276317

and also by attorneys Jamil Daqwar and/or Hassan Jabareen and/or Orna Kohn and/or Marwan Dalal and/or Morad El-Sana and/or Suhad Bishara, of Adalah: The Legal Center for Arab Minority Rights in Israel,
PO Box 510, Shfara'am 20200
Tel: 04-9501610, Fax: 04-9503140, Cellular: 052-852552

v.

The Respondent: Commander of the Israel Defense Force in the West Bank
IDF Division Headquarters, Judea and Samaria, Mil. Post 01149
Tel: 02-9970200, Fax: 02-9970436

Petition for Order Nisi

A petition for an Order Nisi is hereby filed, which is directed to the Respondent and orders him to come and show cause:

A. Why minimum, humane, suitable, and dignified detention conditions are not provided to the Palestinians from the West Bank who are being held **prior to their transfer** to Ofer Camp, near Beituniya (hereinafter: **the first stage**); and more precisely:

- (1) Why the detainees are shackled in handcuffs that are too tight for prolonged periods of time, causing them severe pain and blocking the flow of blood to their hands;
- (2) Why an orderly and precise list is not made of the items taken from the detainees, including, inter alia, identity cards, cellular telephones, money, and other valuables;
- (3) Why care is not taken to hold the detainees in a proper and suitable shelter that is not exposed to the elements (cold, rain, and the sun);
- (4) Why care is not taken to enable the detainees to sleep in an orderly manner at night in the temporary facility intended for classification and interrogation (hereinafter: **the temporary facility**), when the detainees are held at the location for more than 24 hours;
- (5) Why care is not taken to provide reasonable and proper quantities of food and water;
- (6) Why the detainees are not allowed to go to the bathroom as necessary, and why care is not taken to ensure a reasonable level of cleanliness;
- (7) Why the persons in whose authority the detainees are left are not directed to refrain from using physical violence against the detainees and from humiliating them; and why implementation of this directive is not rigidly supervised;

And, in the alternative, why the detainees are not allowed to file effective complaints about the use of physical force and humiliation before they are transferred from the temporary facility to Ofer Camp;

B. Why minimum, humane, suitable, and dignified conditions of incarceration are not provided to the Palestinian detainees from the West Bank **while they are held and imprisoned** in Ofer Camp, near Beituniya (hereinafter: **the second stage**), and more particularly:

- (8) Why the detainees are not allowed to inform their relatives about the fact that they are being detained and the place they are being held in the camp;

- (9) Why the detainees are held in tents and/or thatched structures, which are exposed to the elements;
- (10) Why the detainees are held in tents and/or thatched structures in overcrowded conditions, which do not enable a reasonable range of movement for each detainee;
- (11) Why **each detainee** is not provided with a bed to sleep on;
and, in the alternative, why **each detainee** is not provided a reasonable mattress of reasonable size that can serve as a reasonable substitute for a bed;
- (12) Why **each detainee** is not provided a sufficient quantity of blankets, depending on the weather;
- (13) Why the detainees are not provided food of reasonable quantity and quality, in a manner that satisfies their minimum nutritional needs;
- (14) Why the detainees are not provided eating utensils (plate, spoon, and fork) with which to eat their food;
- (15) Why care is not taken that the bathrooms are clean and suitable for use;
- (16) Why the detainees are not provided products to meet their hygienic needs (toilet paper, soap, shampoo, towels, hot water, toothbrushes, toothpaste, shaving implements) in sufficient amount;
- (17) Why the detainees are not provided with a clean and sufficient change of regular clothes and underpants;
- (18) Why action is not taken to refrain from seating the detainees on the ground, under the sky, particularly in inclement weather (cold, rain, and heat);
- (19) Why reasonable medical care is not provided for each detainee brought to the camp who requires medical care;
- (20) Why the persons responsible for the camp are not directed to refrain from using physical violence against the detainees and from humiliating them; and why implementation of this directive is not rigidly supervised;
- (21) Why all the items that were taken from the detainees upon, and during the course of, their detention are not returned to the detainees at the time of their release,.

C. Why representatives from human rights organizations, including the Petitioners, are not allowed to enter Ofer Camp to comprehend the detention conditions in the camp.

Request for Urgent Hearing

The Honorable Court is requested to hear the petition on an *urgent basis*. According to the Petitioners' information, the Palestinian detainees and prisoners are being held in Ofer Camp in inhumane and grave detention conditions, and the longer that time passes without drastic improvement in the conditions, they will suffer irreversible physical and psychological harm.

The grounds for the petition are as follows:

Introduction

1. This petition involves the grave conditions in which Palestinian detainees are being held in Ofer Camp, near Beituniya.
2. As is known, on 29 March 2002, a large military force invaded extensive areas of the West Bank that were under the control of the Palestinian Authority, and also Palestinian cities and villages (hereinafter: **the Palestinian territories**), as part of Operation Defensive Shield.
3. During the reoccupation of the Palestinian territories, the Israeli security forces detained thousand of Palestinians. Many of the detainees were transferred to Ofer Detention Camp, near Beituniya, where they have been held for a number of days.
4. In the Respondent's response, filed on 7 April 2002, to the petition in HCJ 2901/02, the Respondent contends that the detainees were captured in various fighting arenas in the Palestinian territories that were reoccupied. Some of the detainees, the Respondent believes, endanger state security and the security of the region, and some of the detainees are not included within this said group, and **are not involved in any hostile activity**, but were captured and detained in the fighting arena. The objective of their detention and of bringing them to Ofer Camp, the Respondent contends, is to conduct initial investigation into the identity of the detainees and to classify them: whoever belongs to the first group is transferred for further interrogation by the Police or by the General Security Service, or is administratively detained; whoever belongs to the second group is released.

A copy of the Respondent's response is attached hereto and marked P/1.

5. On 5 April 2002, the Respondent issued Order Regarding Detention in Time of Combat (Temporary Order) (Judea and Samaria) (No. 1500), 5762 – 2002. The order authorizes an officer holding the rank of captain or higher or a Police officer with the rank of commander or higher, to order in writing the detention of a detainee –

whoever is detained during the combat actions in the region, commencing on 29 March 2002, and the circumstances of his detention raise the fear that he endangers or is liable to endanger the security of the region, the safety of forces of the Israel Defense Force, or public safety – for a period that does not exceed 18 days. Also, the order provides that the detainee shall not meet with an attorney for the period of the detention.

The said Order Regarding Detention in Time of Combat is attached hereto and marked P/2.

6. In the said HCJ 2901/02, Petitioners 1 and 3 and a number of other human rights organizations requested, inter alia, that detainees in Camp Ofer be allowed to meet with attorneys. The Respondent opposed detainees in Camp Ofer meeting with attorneys, relying for support on the said Order Regarding Detention in Time of Combat.

A copy of the petition is attached hereto and marked P/3.

7. In a brief judgment given on 7 April 2002, this Honorable Court denied the petition.

A copy of the judgment is attached hereto and marked P/4.

8. On 16 April 2002, a petition (HCJ 3239/02) on behalf of several detainees and several human rights organizations (including some of the Petitioners) filed a petition with this Honorable Court that attacks, inter alia, the order P/2.

The parties

9. The Petitioners are human rights organizations operating in Israel and in the Occupied Territories. They give great significance to protecting the human rights of Palestinians in the West Bank and Gaza Strip, inter alia, as regards the holding and detention conditions of Palestinian detainees being held by Israel in its detention facilities. They consider the inhumane and harsh holding and detention conditions a grave violation of human rights. For this reason, they have petitioned the Court to improve the detention conditions in Ofer Camp.
10. Petitioner 1 is a human rights organization (a registered not-for-profit association), that has been involved for many years in protecting human rights in the territories occupied by Israel in the West Bank and Gaza Strip.
11. Petitioner 2 is a human rights organization registered as a not-for-profit association in Israel and is active in advancing the rights of the Arab minority through legal action.

12. Petitioner 3 is a duly registered not-for-profit association acting to protect human rights in Israel and in the territories subject to its control.
13. Petitioner 4 is a registered not-for-profit association operating to advance human rights in the Occupied Territories by means of documentation, research, and public action.
14. Petitioner 5 is a duly registered not-for-profit association operating to protect human rights and the environment in the West Bank.
15. Petitioner 6 is an organization for the protection of prisoners and human rights.
16. Petitioner 7 is a human rights organization operating in the West Bank since 1979, and holds the status of consultant to the Economic and Social Council of the United Nations.
17. The Respondent, the commander of forces of the Israel Defense Force in the West Bank, holds the region by means of belligerent occupation, and is responsible, inter alia, for the operation and management of Ofer Camp.

The facts

18. The Petitioners received information by telephone from detainees who had recently been released from Ofer Camp regarding the holding and detention conditions in the camp. After obtaining this information, the Petitioners met with several detainees who had been released and had stayed until recently in the Qalandiya refugee camp, and took their affidavits and statements regarding the conditions in which they were held in the camp. These affidavits and statements are attached to the petition and marked P/5A – P/5H.
19. Although the affidavits and statements were taken from detainees who had been released, it is almost certain that the situation has not changed and that the conditions in the camp remain as they were.
20. The affidavits and statements taken by the Petitioners paint an extremely grave picture of the conditions in which the detainees are held prior to being transferred to Ofer, and of the detention conditions in the camp, as set forth in detail below:
 - (a) When taken into detention, the detainees were required to empty their pockets and hand over the contents to the army. In many instances, the contents included items such as identity cards, cellular telephones, and cash. No record was

made of the items taken, and on release, most of the items, including identity cards, were not returned to their owners.

On this matter, see, inter alia, P/5A secs. 3, 28; P/5C, sec. 4; P/5D, sec. 6; P/5F, sec. 3; P/5G, sec. 27.

- (b) Also, the detainees' hands were tightly fastened behind them with plastic handcuffs. They were so tight that they blocked the flow of blood to the hands, turning them blue, which caused great pain.,

On this matter, see, inter alia, P/5A secs. 4-8; P/5B, secs. 2,3, 24; P/5C, sec. 3; P/5D, sec. 3; P/5E, sec. 3; P/5G, secs. 1, 8, 13.

- (c) The detainees were then taken to a temporary facility – the temporary facility mentioned in Section A (4) in the relief chapter above – generally for purposes of classification and initial interrogation. The detainees were held in the temporary facility for a period ranging from several hours to 48 hours. During their stay in the temporary facility, the detainees were required to sit on the ground, their heads bent over, their hands cuffed, and their eyes blindfolded, while waiting their turn to be classified or interrogated. Any movement or lifting of their heads exposed them to blows and curses by the soldiers guarding them.

On this matter, see, inter alia, P/5A sec. 9; P/5B, sec. 3; P/5C, sec. 3; P/5F, sec. 4.

- (d) Sitting in this position generally lasted for numerous hours, and in many cases a whole day and also for two days. The detainees were compelled to sit in that position outdoors, exposed to the weather. Detainees were also held in this way at night, making it impossible for them to sleep.

On this matter, see, inter alia, P/5A sec. 10; P/5B, sec. 1; P/5D, sec. 3; P/5E, sec. 4; P/5G, sec. 6.

- (e) Throughout these long hours, the detainees did not receive any food, drink, or cigarettes. In certain instances, drinks were brought to them when they requested it, depending on the whimsy of the soldier.
- (f) In most cases in which the detainees requested to go to the bathroom, they were not allowed, and were only given permission after they asked several times.

- (g) In addition, the soldiers beat many detainees, swore at them, and called them by contemptible and degrading names, such as “terrorists...”

On this matter, see, inter alia, P/5A secs. 11-14; P/5B, secs. 1, 2, 5; P/5D, secs. 2, 4; P/5F, secs. 4-7.

- (h) After classification and initial interrogation, the detainees were taken by bus to the Ofer detention camp.

- (i) The detainees were put in tents or a kind of thatched structure that served as shelter. These tents and structures did not provide them protection against the elements.

- (j) In addition, the detainees were held in overcrowded conditions.

On this matter, see, inter alia, P/5B, secs. 7, 13; P/5C, sec. 43; P/5D, sec. 9; P/5E, sec. 10.

- (k) Furthermore, the detainees were not provided mattresses in sufficient quantity and reasonable quality. A mattress was not provided to each detainee, so several detainees did not receive a mattress, or a number of detainees had to share a mattress. Some of the mattresses were so thin that the detainees felt the ground under them.

- (l) Blankets, too, were not provided in sufficient quantity. Many detainees slept at night without a blanket, several detainees shared a blanket, and others suffered the biting cold with only one blanket, which was insufficient.

On this matter, see, inter alia, P/5A secs. 17, 19; P/5B, secs. 14-16; P/5C, secs. 7-9; P/5D, secs. 7, 8; P/5E, secs. 8, 10; P/5F, sec. 19; P/5G, secs. 11, 12, 33.

- (m) The detainees described, therefore, subhuman and extremely harsh conditions in the camp, great suffering from the cold, intolerable overcrowding, and grave breach of their dignity as human beings, which accompanied them every night of their detention.

On this matter, see, inter alia, P/5A sec. 19; P/5B, secs. 13, 17; P/5C, sec. 7; P/5F, sec. 11.

- (n) The meals provided to the detainees were meager and of poor quality. Breakfast consisted of a container of white cheese or of humus that was shared among a number of detainees, a piece of matzo for each detainee and a fruit or vegetable that was also shared among a number of detainees. This meal was insufficient and left the detainees hungry.

- (o) For lunch, each detainee received a piece of chicken breast (schnitzel) that was served frozen, matzo, and shared a fruit or vegetable. For supper, the detainees received, sequentially, the same menu that they had for breakfast and lunch.
- (p) These meals were meager in quantity and left the detainees hungry.
- (q) As far as quality is concerned, the same meager and wretched menu was served day after day. The schnitzel was always frozen, so the detainees had to wait for it to defrost.
- (r) Furthermore, the means were served (in the best of circumstances) in a small bowl, without a plate or other eating utensils; consequently, the detainees had to eat with their hands.

On this matter, see, inter alia, P/5A secs. 16, 20-22;; P/5B, secs. 8, 10-12; P/5C, secs. 11, 12, 20; P/5D, sec. 8; P/5E, sec. 12; P/5F, secs. 12-15; P/5G, sec. 14.

- (s) Hygiene was also poor. The detainees were not provided a change of clothes – regular clothes and underpants – of any kind; thus, the detainees, who were held in the camp for several days, remained in the clothes in which they were dressed at the time they were taken into detention.

On this matter, see, inter alia, P/5A sec. 24; P/5E, sec. 11.

- (t) The bathrooms were few in number in comparison with the number of detainees, and were extremely filthy. In addition, the bathrooms did not have toilet paper or other hygienic items.
- (u) Although there were showers, there was no hot water. There was not enough soap. One testimony mentioned that one towel was given once for an entire tent and had to serve all the detainees in the tent, i.e., dozens of individuals.

On this matter, see, inter alia, P/5A secs. 23, 24; P/5B, secs. 19, 20; P/5C, secs. 16, 21; P/5D, sec. 8; P/5F, secs. 17, 18.

- (v) Detainees who required medical treatment were not treated other than a pill to relieve pain.

On this matter, see, inter alia, P/5A sec. 27; P/5B, sec. 21; P/5C, sec. 17; P/5D, sec. 3, 7; P/5F, sec. 10.

- (w) When the detention ended, the detainees were taken, without explanation, by bus to some location and released. In releasing them, the authorities took no

account of where they lived, although the Respondent clearly knew that they were not able at the time to move about freely in the Palestinian territory. In addition, the detainees were not given back their possessions, not even their identity cards. Not having an identity card severely restricted the movement of the detainees, especially in these harsh times, in which much of the area has been under curfew, siege, and comprehensive closure.

Exhaustion of remedies

21. On 4 April 2002, the undersigned, Attorney Yossi Wolfson, sent a letter to the deputy legal advisor for the West Bank, Lt. Colonel Yair Lotstein, warning about the conditions in which the detainees were being held in Ofer Camp.

A copy of the letter by Attorney Wolfson is attached hereto and marked P/6.

22. On 8 April 202, Attorney Wolfson sent a second letter to Lt. Col. Lotstein, in which he again warned about the conditions in which the detainees were being held in Ofer Camp.

A copy of the second letter by Attorney Wolfson is attached hereto and marked P/7.

23. When he did not receive a reply to the letters P/6 and P/7, Attorney Wolfson sent a reminder letter on 10 April 2002.

A copy of the third letter by Attorney Wolfson is attached hereto and marked P/8.

24. Copies of the three said letters were also sent to the State Attorney's Office, High Court of Justice Division.

25. On 14 April 2002, the undersigned received a response to letters P/6, P/7, and P/8. The response was sent by the assistant to the legal advisor of the West Bank, Criminal Division, Captain Morris Hirsch. In the first paragraph of Section 2 of the response, it was contended that, from the time that the detention facility in Ofer Camp began to operate, the detention conditions were proper. As the factual description above shows, the letter sent by Cap. Hirsch is far from an accurate reflection of the reality in the camp.

A copy of the response of Captain Hirsch is attached hereto and marked P/9.

26. It should be mentioned that, on 4 April 2002, Attorney Sharon Abraham-Weiss, of the Association for Civil Rights in Israel, sent a letter to the OC Central Command, Major General Yitzhak Eitan, in which she laid out the human rights violations of the Palestinians who were detained and held in Ofer Camp. On 15 April 2002, Attorney

Abraham-Weiss was informed by telephone that a Military Investigation Unit investigation had been opened following her letter.

A copy of the letter by Attorney Abraham-Weiss is attached hereto and marked P/10.

The legal argument

Violation of the right to a cultured life

27. **“It is the right of a person in Israel who is sentenced to imprisonment (or who is lawfully detained) to be incarcerated in conditions that allow him to live a cultured life.”** Thus held the vice-president of the Supreme Court H. Cohen in HCJ 221/80, *Darwish v. Prisons Service*, *Piskei Din* 35 (1) 536, 538. At page 539, Justice Cohen wrote:

Conditions that allow a cultured life – how? A cultured person has psychological needs that go beyond the mere need to live: he is able, for example, to exist and live by feeding himself with his hands. But a cultured person needs a plate, a spoon, and a fork with which to eat. A “cultured” person is not necessarily fraught with culture because of who he is: he is a person who lives in a period and a place marked, *inter alia*, by the said culture. Not only is a person entitled to participate in the cultural life of society in which he lives (Article 27 of the Universal Declaration of Human Rights) and to benefit from them, he is also entitled to insist that the culture of the society in which he lives is his culture. In truth, the quality of life – and would that also be cultured life – within the confines of a prison cannot possibly reach the quality of life of society that lives and acts in liberty and freedom. Hence the necessity to set minimum standards for those “conditions that enable cultured life” within the prison. Simultaneously, whoever adds to such minimum standards and improves them is to be praised – whoever detracts from them and even fails to meet them does not meet his minimum cultural duty.

“Cultured life” – is not only the right of the prisoner or detainee in Israel, but also the right of a prisoner or detainee **from the region**. (see HCJ 540/84-546, *Yosef et al. v. Director of the Central Prison in Judea and Samaria*, *Piskei Din* 40 (1) 567, 573D)

28. In *Darwish*, the question arose as to whether “security prisoners” are entitled to receive beds to sleep on. Justice Cohen responded **positively**, arguing that **a bed** to sleep in at night is among the tools necessary for a person to supply his minimal needs. In his opinion, it is not a question of comfort or discomfort, but a question of right. His opinion indeed was minority view – the majority held that certain security needs required that beds not be supplied to “security prisoners,” but only “improved mattresses of sponge interior with a cloth covering measuring 0.71 X 1.79 meters and a thickness of 8.5 centimeters” – but the majority did not disagree on the principles that Justice Cohen delineated (*Ibid.*, at page 539).

Justice Elon, who was among the majority in *Darwish*, said as regards these two points: if indeed the competent authorities preferred the security needs of the jail keepers and of the prisoners over the individual’s elementary need – notwithstanding the individual involved – to a bed on which to lay his head; and also, what is the nature of the bed substitute that is given to the petitioner, and if this substitute meets the minimal demands necessary for a cultured person created in God’s image to sleep on. He concluded that the elemental and serious considerations regarding the security of the prisoners and jail keepers require that a bed not be provided, and that the substitute offered is sufficient (*Ibid.*, at page 565. See also the opinion of Justice Cohen at pages 542-545).

To summarize this judgment: the majority and minority did not dispute the *right* of a detainee or prisoner to receive a bed to sleep on at night. However, the majority held that this right is derogated when security considerations are present, whereas the minority held that this right is not derogated in such circumstances. However, even where it is derogated, the detainees or prisoners must be provided a substitute to sleep on that meets the minimum necessary standards for a cultured person.

29. The Petitioners will argue that, in the conditions in which the detainees are held and detained in Ofer Camp, which were set forth in the facts chapter above, undoubtedly do not meet the minimum criteria of cultured life, for it is impossible to argue that sleeping on wooden boards, provision of food that is extremely poor in both quantity and quality, staying in tents exposed to the elements, use of physical violence and humiliation, and the other conditions delineated above, are part of the life of a “cultured” person. The standards, as Justice H., Cohen stated in *Darwish*, at page 539F, “**must be determined in accordance with the minimum needs of the ordinary individual,**” and conditions of this kind do not meet the minimum needs that are those of an ordinary individual.

Violation of basic constitutional rights

30. The basic assumption is that the basket of human rights of a prisoner or detainee includes all the rights and liberties given to every citizen and resident, except for the freedom of movement that is taken from him as a result of the imprisonment or detention, and except for other rights and liberties whose exercise is dependent on the freedom of movement, and except for other rights and liberties that are denied him pursuant to the explicit provision of law (see RPPA 4409/94, PPA 4463/94, *Golan v. Prisons Service*, *Piskei Din* 50 (4) 136, 153).
31. As regards several basic human needs of the detainee or prisoner, Justice Mazza held in *Golan*, at page 155A-B, that:
- As regards several basic human needs, which the prisoners require, the tendency is not to allow any breach, and these needs entail “not only the very right of the prisoner to eat, drink and sleep, but also minimum cultured arrangements of the manner in which these needs are provided.**
32. Clearly, the rights of the detainee or prisoner to conditions of minimum, humane detention, are among the fundamental rights, whose exercise is not dependent on exercise of the individual's freedom of movement: exercise of the right to receive food of reasonable quantity and quality; exercise of the right to sleep on a bed (or on a mattress); exercise of the right not be harmed physically or psychologically, and those derived from basic constitutional rights; thus, the exercise of these rights can be implemented without any connection to the freedom of movement of the detainees or prisoners. Therefore, detention or imprisonment is not a “stay” or “denial” of these rights from the detainee or prisoner, and it is **an entitlement** to exercise them, and, contrarily – **a duty** of the authority holding the detainee or prisoner to enable him to exercise them – as long as they are not explicitly denied to him by law.
33. Furthermore, following enactment of the Basic Law: Human Dignity and Liberty, these fundamental rights of the prisoner and detainee – including the rights to minimum, humane prison conditions – received a superior statutory status. Therefore, the authorities, including, or perhaps it should be said primarily, the courts, to be precise, even more than in the past, must respect the human rights of detainees and prisoners. The recognition of the constitutional status of human rights lies in fulfillment of the way in which life is lived in practice. The recognition of their function to ensure this fulfillment must inform the actions of all state authorities. In

the words of Supreme Court President Shamgar in CA 5942/92, *John Doe v. John Roe*, *Piskei Din* 48 (3) 837, 842:

The constitutional action does not focus on the declaration of the existence of the basic right, but on its substance, measure, and content of implementing the right in practice.

Human dignity will not be guaranteed by speaking about it, but by giving meaningful and concrete expression to protecting it. In accomplishing this, the courts play an important role in ensuring that its rulings give actual protection to human dignity and equality, which is one of the components of human dignity, and to protection of those who are unable to protect their dignity without the assistance of the courts.

Violation of human dignity

34. The Petitioners will argue that the conditions in which the detainees in Ofer Camp are being held severely violate their human dignity. The right of a person to dignity is enshrined in the Basic Law: Human Dignity and Liberty. The right of a person to dignity is also held by prisoners and detainees. The dignity of prisoners and detainees is not taken from them when they enter prison. The prison's walls do not separate an individual from his dignity. The duty to protect human dignity lies with the authorities, both as regards a person who is free and towards prisoners and detainees. He retains his human dignity regardless of what he does or where he goes. In this matter, the comments of Justice (as his title was at the time) A. Barak in *Yosef*, at pages 572-573, are relevant:

Life's regime in prison requires, by its nature, infringement of the liberties to which a free person is entitled... However, this infringement of liberties must result from the nature of the imprisonment and its needs, and not more than that... Furthermore, as regards this infringement of fundamental liberties, it is forbidden that it breach the minimum standard of prison conditions, below which it is not allowed to fall. Much has been written about the nature of this minimum standard, and criteria have been set by various bodies, such as the United Nations (See United Nations Standard Minimum Rules for the Treatment of

Prisoners)... Indeed, imprisonment requires, by its nature, denial of freedom, *but this denial does not justify, by its nature, violation of human dignity.* Imprisonment that protects the human dignity of the prisoner is possible. The prison's walls do not have to separate between the prisoner and humanity... A prison is forbidden to become a concentration camp, and the prison cell is forbidden to become a cage. With all the problems inherent in this, a cultured society must ensure the minimum humane standards of imprisonment. It would not be humane if we do not ensure humane standards to prisoners within our society. (our emphasis)

In HCJ 355/79, *Katlan et al. v. Prisons Service*, *Piskei Din* 34 (3) 294 at page 298:

Every person in Israel is entitled to the basic right to bodily integrity and to protection of his human dignity. These rights are included in the “list of judicial rights” – in the words of my learned colleague, the vice-president of the Supreme Court (Landau) ... which is recognized by this court. Prisoners and detainees also have the right to bodily integrity and human dignity. The prison's walls do not separate between the detainee and human dignity. Life's regime in prison requires, by its nature, infringement of the liberties to which a free person is entitled... But life's regime in prison does not require denial of the right of the detainee to bodily integrity and to protection against infringement of his right to dignity. Freedom is taken from the individual detained; his humanity is not taken from him.

These comments are even more appropriate following enactment of the Basic Law: Human Dignity and Liberty.

See also:

HCJ 114/86, *Will v. State of Israel*, *Piskei Din* 41 (3) 477, 489-493 [regarding personal relations in prison].

PPA 4/82, CrimRq 904/82, *State of Israel v. Tamir*, *Piskei Din* 37 (3) 201, 205-213 [regarding medical treatment in prison].

H CJ 144/74, *Levana v. Prisons Service Commission, Piskei Din* 28 (2) 686 [regarding bringing books into prison].

Persons detained for identification and classification

35. As stated in Section 4 above, the purpose of detaining and holding the Palestinian detainees in Ofer Camp is to identify and classify them. The Respondent, too, states that the detainees include persons who are involved in hostile activity against Israeli citizens, and some who are not involved in such activity, but were seized in the combat arena. They are detained pursuant to the decision of a military-administrative authority. Even the very essence of the basis for their detention is questionable, and, as this court said in its judgment in H CJ 2901/02 (at the end of sec. 1), when it is found that no grounds exist for their detention, they are released: that is, the “basis” for their detention is to check if there is a basis for detaining them! Thus, there is a difference between them and other detainees and prisoners, who are detained because of their involvement in committing a certain offense, and they await trial, or because they had been tried and were sentenced to punishment. The treatment is different from that given to a person who was lawfully arrested and awaits trial, or was lawfully convicted and is serving his sentence. For this reason, especial caution must be taken in ensuring the minimum detention conditions (see H CJ 253/88, *Sajidiya et al. v. Minister of Defense, Piskei Din* 42 (3) 801, 821-822 regarding prison conditions of an administrative detainee; CrimFH 3734, *State of Israel v. Azazmi, Piskei Din* 46 (5) 72, 84 regarding prison conditions of a detainee being held until the end of the criminal proceedings).

Proportionality of the right

36. The scope of the protection of the human right of a prisoner or detainee is derived from the required balance between the right and other interests, held by an individual or by the public, which, in the relevant circumstances should be taken into account. The point of departure is that it is proper to protect and respect the right. Denial of the right, or limiting or violating it is allowed only for substantive reasons enshrined in law (see *Golan*, at page 155).

When the prison authorities seek to infringe any right held by the prisoner, for reasons of balancing between a particular right given to the prisoner and the duty of the authorities to prevent his freedom of movement, and to safeguard security and the prison, the infringement will not be allowed unless the authorities can provide a reasonable

explanation and justification for the infringement, and the degree and scope of the violation are not greater than necessary and required by these reasons.

Comments of Justice M. Elon regarding the matter of receiving medical treatment in prison, in *Tamir*, at page 212.

37. In determining the scope of the protection given to the human right of a prisoner or detainee, the importance of the nature of the right infringed is relevant. The point of departure is that a prisoner is entitled to protection of all his human rights; infringement of prisoners' or detainees' human rights by the authority in charge of the prison is lawful only if it complies with the power granted the said authority – i.e., explicit power by statute given to the authority to infringe the fundamental rights of the prisoner or detainee – and if it complies with the proper balance between it and the legitimate interests over which the authority is charged. The greater the importance and prominence of the right infringed, the greater the weight given it in balancing between it and the conflicting interests of the authority. The reason is that:

The magnitude of the grounds necessary to justify the infringing of a right is comparable to the magnitude of the right infringed.

Comments of Justice M. Elon in *Tamir*, at page 212.

38. However, while certain fundamental rights are balanced by conflicting interests, there is a bottom line that cannot be crossed, at which the rights become absolute, or almost absolute. This is the line that we reach regarding minimum detention conditions, in which the detainee is denied his humanity if they are not met. But not only the humanity of the detainee is denied; the keeper also loses it. They are the same minimum rights the infringement of which humiliates the individual, about which Justice H. Cohen spoke in *Darwish*, at page. 539, saying: those who add to them are to be praised, and those who detract from them do not meet the minimum degree of culture and morality. Therefore, the detaining authority is not allowed – under any conditions – to infringe these rights, and they are given to the detainee absolutely.
39. In the alternative, even if it is said that the detaining authority is allowed to infringe these minimum rights, the grounds on which justification of the infringement is based – if in fact such justification exists – must be of the such great strength and weight that they are denied in face of the justification. The Petitioners will argue that such grounds do not exist in the present case: it is inconceivable that reasons depending on security considerations – let it be the strongest reason possible – will justify, for example,

provision of food that is extremely poor in quantity and quality, or would justify the failure to supply a bed – or, in the alternative, a mattress – to sleep on at night; or justify use of physical violence and humiliation against the detainees, and so forth. Security-based grounds have their place, but, in all due respect, they cannot justify such grave infringement of such fundamental and elementary rights belonging to detainees and prisoners.

40. It is true that, in *Darwish*, the majority held that “security prisoners” are entitled to receive a bed to sleep on – that entitlement comprising one of the planes of the right to minimum prison conditions – was denied in the face of “more serious reasons,” which are necessary for security. However, note that, in reaching their decision, the majority justices took into account the substitute for a bed, and whether this substitute met the minimum necessary requirements to enable a “cultured” person to sleep (see especially the position of Justice Elon, *Ibid.*, a page 546A-B). This comes to teach that, even where the right – even the most fundamental and elementary – is denied for serious security reasons, the detainee and prisoner is to be given a substitute for the infringement of his right, and is not left without rights in flagrant and absolute manner.
41. This is not the case presently under discussion: the Respondent does not even provide, for example, beds to the Palestinian detainees in Ofer Camp, it should, at least, supply a substitute for the bed; and not only a plain substitute, but one that “**meets the minimum necessary requirements for a cultured person, born in the image of God, to sleep on**” (*Darwish*, at page 546A-B). And if this is so in the case of a bed – even more so is this true about food that is very poor in both quantity and quality; and the failure to provide eating utensils, and the failure to provide closed rooms in which the detainees are held, so that they are not exposed to the elements, and the like. Moreover, the Respondent does not supply any substitute for the infringed fundamental rights of the detainees; as a result, the infringement is unjustified and manifestly illegal.

Detention conditions in international public law

42. International public law contains a long list of rules that delineate the conditions under which a state is allowed to detain persons prior to trial. The rules apply to detainees depending on their status: combatants who are entitled to the status of prisoners of war are protected by the Third Geneva Convention for the Treatment of Prisoner of War, of 1949; the rights of detained civilians are protected by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 1949

(hereinafter: **the Fourth Geneva Convention**). There is no situation in which a detainee does not fall into one of these categories. In the words of Dr. Pictet:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or against, a member of the medical personnel of the armed forces who is covered by the First Convention. There is *no* intermediate status; nobody in enemy hands can be outside the law. (emphasis added)

(Jean S., Pictet (ed.), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1958), 51 (hereinafter: Pictet))

43. Since the State of Israel does not grant detainees the status of prisoners of war, the protections given to detainees must be examined according to the rules that are set forth, inter alia, in the Fourth Geneva Convention. This convention dedicates 63 articles, about one-third of the entire convention, to the rights of detainees and the detention conditions under which they are held. The *principal* relevant rules are as the following:

- (a) **General conditions in the detention facility** The detention site must enable the basic conditions to protect the dignity and health of the detainees. It must protect against inclement weather and from moisture. They must be provided heating, as necessary, and proper ventilation. The state has a duty to supply the detainees with proper bedding and sufficient blankets, taking into account the weather, the age of the detainees, and their health. There is a duty to provide basic hygiene, including bathrooms, showers, soap, and water (Article 85 of the Fourth Geneva Convention). The Red Cross's commentary to this article states that it is forbidden to house civilian detainees in tents, and that they must be housed in buildings. The commentary adds that there is a duty to provide sufficient bathrooms and showers to meet the needs of the detainees (see Pictet, at pages 386-387).
- (b) **Food and clothing** The state has a duty to provide the detainees with a sufficient amount of food of proper quality. Drinking water must be available to them at all times. Detainees are entitled to take a change of clothes with them before being detained, and if not, the state must supply them with a

change of clothes that is suitable to the climate (articles 89 and 90 of the Fourth Geneva Convention).

- (c) **Hygiene and medical care** An infirmary must be set up in every detention site, in which a physician is available around the clock. Every detainee who wishes must be allowed to go to the physician for medical examination and to obtain medicine, as necessary. The physician also has the duty to supervise the sanitary conditions in the detention site and the nutrition is provided to the detainees (articles 90 and 91 of the Fourth Geneva Convention).
- (d) **Religious activity and physical activity** The state must allow the detainees to perform their religious duties. Also, detainees must be given an opportunity for physical exercise and the state must provide them with suitable space for this purpose within the detention facility (articles 93 and 94 of the Fourth Geneva Convention).
- (e) **Detainees' property** The state has the duty to give the detainees a receipt for all the property taken from them, including identification documents. Upon release, the state must return to the detainees all the property that was taken from them (Article 97 of the Fourth Geneva Convention).
- (f) **Discipline** Discipline in the detention site must be consistent with humanitarian principles. It is forbidden to hold the detainees in conditions that endanger their health, require physical exertion, or constitute physical or moral victimization. It is absolutely forbidden to mark the body of detainees to identify them (Article 100 of the Fourth Geneva Convention).

44. Israel signed the Fourth Geneva Convention in 1951. It will be recalled that it was held in the past that the Fourth Geneva Convention has the status of treaty-based law only (see H CJ 392/82 *Jam'iyat Iskan Al-Mualiman v. Commander of IDF Forces in Judea and Samaria*, *Piskei Din* 37 (4) 785, 793; H CJ 785/87, *Affo et al. v. Commander of IDF Forces in the West Bank*, *Piskei Din* 42 (2) 4, 39). However, this conception has changed, both in international public law and in the judgments of this Court. Now, it is almost indisputable that the Fourth Geneva Convention is part of international customary law, and thus binding on all states – even those that have not signed it – because it enshrines basic principles agreed upon by all countries worldwide.

45. In CrimFH 7048/97, *John Does v. Minister of Defense*, *Piskei Din* 54 (1) 721, 742, Supreme Court President Barak quotes Article 34 of the Fourth Geneva Convention – which prohibits the taking of hostages – and leaves the question open as to whether this provision is a rule of international treaty-based law or is part of international

customary law. Justice Dorner, on the other hand, expressly mentions (*Ibid.*, at page 766D) that:

There are also some who believe that the grave prohibition in the Geneva Convention, stated in Article 146 of the Convention, among them the prohibition on holding hostages, has attained with the passing of the years the status of international customary law.

See the references that the justice brings (*Ibid.*).

46. Pictet writes, at page 9, as follows:

The Convention does not, strictly speaking, introduce any innovations in this sphere of international law. It does not put forward any new ideas. But it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war – a principle of which too many cases of unfair treatment during the Second World War appeared to have cast doubt.

The International Court of Justice held that all the Geneva Conventions of 1949 are customary law:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’... that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they gave ratified the conventions that contain them, because they constitute intransgressible principles of international customary law. (International Court of Justice, Advisory Opinion: *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, par. 79)

In 1993, the secretary general of the United Nations submitted a report in which he presented the statute of the International Court on Yugoslavia, which was approved by the Security Council in Resolution No. 827. The report states, in part:

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law... The part of conventional humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in the Geneva Conventions of 12 August 1949 for the Protection of War Victims... (Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993))

The International Red Cross, which is charged with implementing the Geneva Conventions, held that Israel is required to comply with the Fourth Geneva Convention. This is true also since the recent events in the region that began in September 2000:

In accordance with a number of resolutions adopted by the General Assembly and the Security Council of the United Nations, the International Committee of the Red Cross, and the Red Crescent, which reflect the position of the international community, the International Committee of the Red Cross always confirmed the *de jure* application of the Fourth Geneva Convention over the territories occupied by the State of Israel since 1967, including East Jerusalem. This convention, which Israel ratified in 1951, continues to apply in its entirety, and is relevant also as regards the current violence. (Statement of the International Committee of the Red Cross before the Contracting Parties to the Fourth Geneva Convention, 5 December 2001, par. 2)

And recently, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 held that the Fourth Geneva Convention is part of international customary law. The tribunal's statutes empowered it, inter alia, to hear indictments regarding grave breaches of the Fourth Geneva Convention. The tribunal's judgment in *Prosecutor v. Dusko Tadic aka Dule*, given on 7 May 1997, held several times that these are breaches of international customary law. For example, in Section 4 of its decision, the tribunal delineates the kinds of offenses within its subject-matter

jurisdiction, among them the grave breaches of the Fourth Geneva Convention, and holds that they all are

beyond any doubt part of customary international law.

Similar statements can be found in paragraphs 558 and 559 of the judgment.

In Paragraph 577, the Tribunal explains that:

Article 2 of the Statute provides that the ‘International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949,’ and there follows a list of the specific crimes proscribed. Implicit in the Appeals Chamber Decision is the conclusion that the Geneva Conventions are part of customary international law, and as such their application in the present case does not violate the principle of *nullum crimen sine lege*.

47. The conception that the Fourth Geneva Convention is part of international customary law also appears in the writings of international law experts. For example, Meron writes that:

There is considerable judicial and scholarly support, which is also endorsed by the International Committee of the Red Cross (ICRC), that the rules contained in the four Geneva Conventions of 1949 for the Protection of Victims of War and in the Hague Convention (IV) of 1907 on the Laws and Customs of War on Land (except for administrative, technical, and logical provisions) reflect customary law. (T. Meron, “Customary Law,” in Roy Gutman and David Rieff (eds.), *Crimes of War: What the Public should Know*, (New York, W. W. Norton & Company, 1999) 113-115)

See also:

F. Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (New York, Rowman & Littlefield Publishers, Inc., 2002) 65

F. Kalshoven & L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva, International Committee of the Red Cross, 2001) 16.

48. Even were it not for the minimum detention conditions required by the Fourth Geneva Convention as part of international customary law, Israel made a commitment to fulfill the humanitarian provisions included in this convention; if it does not, this Honorable Court will compel it to do so.

See opinion of the Honorable Justice Bach in *Affo*, at pages 77-78, and in H CJ 253/88 *Sajidiya et al. v. Minister of Defense, Piskei Din* 42 (3) 801, 803.

Therefore, it is indisputable that the principles enshrined in the Fourth Geneva Convention regarding the conditions in which detainees are held apply to the detainees in Ofer Camp, including the detainees who were involved in the fighting.

49. In addition to the rules set forth in the Fourth Geneva Convention, rules regarding the conditions in which detainees may be held are found in the United Nations Standard Minimum Rules for the Treatment of Prisoners. These rules were drafted in the first Congress for the Prevention of Crime and Treatment of Offenders, in 1955. They were approved by the formal decisions of the United Nations Economic and Social Council, in 1957 and 1977 (see *Darwish*, at pages 539G – 540A; *Yosef*, at page 573A-B), and were also adopted in additional resolutions of the United Nations General Assembly (see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly Resolution 43/173, 9 December 1988); Basic Principles for the Treatment of Prisoners (United Nations General Assembly Resolution 45/111)). The principles state, inter alia, the following principles:

- (a) The detention site must meet basic requirements in order to ensure the health of the detainees, including ventilation, a minimum space in which to sleep, lighting, heating, and sanitary installations in sufficient supply to meet the needs of all the detainees, including bathrooms and showers and hot water. The detention site must provide shelter from the weather conditions (sections 9-14).
- (b) The living conditions in the detention facility must protect the detainees' basic dignity; thus, there is a duty to enable the detainees to shower and wash their clothes. The detaining state must supply a change of clothes to the detainees who do not have their own clothes. A separate bed must be provided to each detainee together with sufficient space to sleep. The detainees are to be supplied with food and drink in adequate quantity and quality. Detainees are to be allowed at least one hour of suitable exercise a day (sections 15-21).

- (c) Medical services and medicine are to be provided, and when necessary, the detainees must be taken to hospitals outside the detention facility. The physician at the detention site must also check the prison conditions in which the detainees are being held and the sanitary conditions in the facility (sections 22-26).

A copy of the Rules is attached hereto and marked P/11.

50. These rules are a repetition of the recognized and agreed rules, and reflect minimum principles. Although they were adopted pursuant to resolutions of the United Nations General Assembly, which generally are not binding in judicial terms, the rules in this case are part of customary law that is accepted by all liberal democracies, and therefore bind Israel in its actions in the region (see, inter alia, F. Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (New York: Rowman & Littlefield Publishers, Inc., 2002) 65).

Status of human rights organizations

51. As mentioned, in the second relief sought in this petition, the Petitioners request that the Respondent enable representatives of human rights organizations to visit Ofer Camp.
52. The protection of human rights is one of the fundamental elements of a democracy. Exercise of human rights depends on the existence of a number of social safety belts. First and foremost is a judicial system that protects and defends these rights and grants effective relief in cases of breach. However, human rights cannot be fully exercised without additional systems of protection. Among these are, for example, inculcating human rights in the educational system; creating a political culture that fully accepts the principle of human liberty; and a free press. However, one of the most important elements in ensuring human rights is the existence of active, effective, and efficient human rights organizations.
53. Indeed, human rights organizations are an important element in ensuring human rights in Israel. The state and the general public have a clear interest in the unrestricted activity and advancement of human rights organizations. In its 1998 report to the United Nations Human Rights Committee, the State of Israel extolled the important function that human rights organizations play in the country and the complete freedom of action given to them. The report states, in Section 588:

The State of Israel places no legal restrictions on the right of organizations to engage in activities for the promotion and

observance of human rights [...] human rights organizations fully enjoy the freedom to associate and to pursue their various aims. There are dozens of organizations in Israel which work freely and fruitfully in all areas of human rights, including the Association for Civil Rights in Israel, several organizations which promote the rights of Arabs, a coalition of 53 different organizations working in the area of children's rights, over 100 organizations involved in women's rights issues, the Religious Action Center of the Movement for Progressive Judaism and other organizations involved in issues related to freedom of religion, organizations working to promote the rights of the disabled, homosexuals, minorities, organizations working to promote freedom of information and speech, and many more. These groups have played a crucial role in the development of human rights law in Israel. They have filed petitions and acted as legal counsel in a great number of landmark Supreme Court cases related to human rights. They also are significantly involved in legislative lobbying and, through elected representatives, in the initiation of legislation bearing on human rights. Their reports and conferences are generally widely covered in the media, and their publications are freely circulated in Israel and abroad. They cooperate with international human rights organizations, and conduct varied publicity and fund-raising activities abroad. The activities of human rights organizations have not been curtailed in any way by government authorities.

54. One of the principal activities of human rights organizations is gathering information. This activity is necessary to enable the organizations to provide the information to the public, the authorities, and the courts. This activity enables public monitoring of actions taken by state authorities. Therefore, it is vital – for the persons incarcerated and also for the Israeli public and the international community – to enable human rights organizations to enter the various detention facilities – including Ofer Camp – to learn about the conditions in which the detainees and the prisoners are being held.

Request for visit to the camp

The Petitioners request the Honorable Court to visit Ofer Camp to enable the Honorable Justices to see the conditions in the camp with their own eyes.

The living conditions in Ofer Camp, as delineated in the factual part of the petition, are grave and subhuman. In such circumstances, it would be just and proper for the Court to visit the site and learn *directly* about the conditions in the camp. The request is especially relevant because all the detainees in the camp are not allowed, pursuant to the sweeping order issued by the Respondent, to meet with their attorneys; thus, it is impossible to learn first-hand about the conditions there, making it vital that the Court see for itself, independently, the conditions in the camp.

In a case from the late 1980s that dealt, inter alia, with the conditions in the military detention facility at Ketziot (HCJ 253/88, *Sajidiya et al. v. Minister of Defense, Piskei Din* 42 (3) 801), this Honorable Court held, **notwithstanding the great amount of written material on the conditions of detention that was submitted to it**, it would be proper for the Court to learn about the conditions directly by visiting the site. Indeed, it did so, and the visit enabled it to form an independent impression of the conditions prevailing in the camp. As a result, the Honorable Court ordered that the state make the necessary improvements.

For these reasons, the Honorable Court is requested to issue an Order Nisi as requested at the beginning of the petition, and after hearing the response of the Respondent, to make the order absolute.

Jerusalem, 18 April 2002

[signed]
Yossi Wolfson, Attorney
representing the Petitioners

[signed]
Jamil Daqwar, Attorney
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[signed]
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