Proposed Laws that Seek to Deny Security Prisoners the Right to Family Visits are Unconstitutional and Inconsonant with Israeli and International Law

> **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. Reprisals against protected persons and their property are prohibited.[1]
> Fourth Geneva Convention, Article 33. Entered into force in Israel on 6 January 1952.

> The conclusion is that the establishment of special arrangements regarding security prisoners is justified… It is evident, however, that these arrangements must meet the legal tests that apply generally to administrative decisions: They must be substantive, reasonable, and proportionate. Thus, for example, **a restriction on contact with persons outside the prison is not to be imposed on security prisoners if it is not required on the basis of security considerations or other substantive considerations and is due solely to considerations of punishment or vindictiveness**, or if it injures the prisoner beyond the measure required in accordance with substantive considerations.
> PPA 1076/95 **State of Israel v Quntar** *Piskei Din* 50(4) 492, 501.

> The isolation of the prisoner from society in order to realize the purposes of punishment also imposes isolation from his partner, children, and the broader circle of his family. **Despite the presence of this inherent restriction in imprisonment, however, the existence of the human right to family and parenthood demands that the scope of the injury be limited as far as possible, and only within essential boundaries, such as by way of providing controlled permits for family visits to prisoners**, prison leave under defined conditions, the provision of means enabling conjugal visits with partners, and so forth. **This maintains the proportionality of the injury to the human right that is structurally inevitable given the denial of liberty that accompanies imprisonment**.
> High Court of Justice (HCJ) 2245/06 **Dobrin v Israel Prison Service**, para. 15 of the ruling by Justice Procaccia (unpublished, 13 June 2006, hereinafter: Dobrin).

[1] All emphases are added.

1. On 23 January 2008, the Knesset passed in a preliminary reading a bill proposed by MK Aryeh Eldad entitled "Proposed Law for the Amendment of the Prisons Ordinance (Restriction of Visit for a Security Prisoner)-2007.[2] On 11 February 2008 a similar proposal signed by 23 Members of Knesset was presented before the Knesset. This proposal is entitled "Proposed Law for the Amendment of the Prisons Ordinance (Denial of Visits to Security Prisoners Affiliated with an Organization Holding Israeli Captives)-2008." The objective of both proposals is to deny the right of security prisoners who are members of organizations that are holding Israeli civilians or captives to family visits. The goal is to apply pressure on the organizations to release the captives or to allow them to receive visits.

2. In this position paper, written by Adv. Yadin Eilam from HaMoked – Center for the Defence of the Individual, and which is presented on behalf of the following human rights organizations: B'Tselem – the Israeli Information Center for Human Rights in the Occupied Territories, The Association for Civil Rights in Israel, The Public Committee against Torture in Israel and Physicians for Human Rights – Israel, we shall demonstrate that these bills are unacceptable and contradict both Israeli and international law.

3. The wish to free Israeli captives is undoubtedly appropriate and worthy. Moreover, the State is obliged to do whatever it can, within the boundaries of law and morality, to bring about their release swiftly. However, collectively denying a basic right to some in order to put pressure on others is not a permissible means in a law abiding country.

4. In this position paper we shall begin by reviewing the existing situation regarding family visits to security prisoners. We shall clarify that the situation regarding prison visits by the relatives of security prisoners is already inconsonant with the requirements of international law; and we shall prove that the proposed laws are contrary to both Israeli and international law. Since the majority of prisoners liable to be injured if the proposed law is adopted are residents of the West Bank, we shall discuss the difficulties that are already faced by the families of prisoners from the West Bank who wish to visit their relative. **We should note that since 6 June 2007, some 900 prisoners from the Gaza Strip who are being held inside Israeli territory (contrary to international law) have not received any family visits.**

Family Visits to Prisons

5. Article 116 of the Fourth Geneva Convention establishes that:

> **Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.**

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[2] Discussion of the proposed law was forwarded to the Foreign Affairs and Security Committee in accordance with the decision of the Knesset Committee on 5 February 2008, despite the fact that the Knesset legal adviser recommended that discussion should be forwarded to the Internal Affairs Committee.

> As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

Israeli legislation has also recognized the importance of family visits. Israel Prison Service Order 04.42.00, entitled "Arrangements for Visits to Prisoners," establishes in section 1 that:

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

6. In the regrettable event that the proposed law is adopted, the sweeping denial it seeks to impose on prison visits will not be the first time that these have been denied to prisoners. Since the beginning of the second intifada in October 2000, and through March 2003 – **for a period of almost two and half years, no visits were permitted by residents of the West Bank to their imprisoned relatives**. Only after HaMoked petitioned the High Court of Justice did the military commander gradually begin to allow relatives to visit prisoners.

7. Even now, however, the families of prisoners who are residents of the Occupied Territories are not entitled to visits "at regular intervals" as required by the Geneva Convention. In order to visit prison, any resident of the Territories is required to have a permit to enter Israel for the purpose of a prison visit. This permit is issued by the military commander. Prison visits are organized solely by the International Committee of the Red Cross (ICRC). Applications to visit a prisoner are submitted by residents to the ICRC offices, which forwards the applications to the military commander. The latter forwards its response to the ICRC which, in turn, notifies the applicant of the answer. The ICRC also organizes the transport at its own expense, in coordination with the military commander and under strict security arrangements.

8. The military commander has instituted two tracks for permits. According to the usual track, the visitor receives a permit from the military commander valid for three months. The permit is valid solely for the transportation organized by the ICRC. During the period of the permit, its holder may visit prisons on visiting days, which are held every two weeks.

9. The situation is completely different in the case of a large group of relatives of prisoners who are defined as "prevented from entering Israel." It must be recalled that from the perspective of the security authorities, the mere fact that an individual was involved in security offenses and imprisoned imposes grave suspicion against his or her relatives. Accordingly, the military commander defines a large section of the relatives of such prisoners as "persons prevented from entering Israel." An alternative procedure has been established for "persons prevented from entering Israel." In accordance with this procedure, applications from "persons prevented from entering Israel" to visit prison are submitted to the Civil Administration via the ICRC and forwarded to the Israel

Security Agency (ISA) for individual examination and assessment. If it is found that there is no impediment to permitting the applicant to visit prison, an entry permit to Israel for the purpose of a prison visit is issued. This permit, which is forwarded via the ICRC, **is valid for 45 days and permits one visit during this period**. After the visit the permit is invalidated; the visitor may then submit a new application through the same procedure. As long as the security assessment remains the same, the visitor will receive a new permit; and so forth.

10. The military commander has undertaken to ensure that the time required for the authorization of a new application by "persons prevented from entering Israel" will be between eight and ten weeks. It should be emphasized that even if the military commander were to meet this undertaking, **the maximum number of times that a person prevented from entering Israel could visit their imprisoned relative would be just three each year**. The reason for this is that, as noted, the permit is restricted to one visit during its period of validity of 45 days. After adding a further period of ten weeks during which the application for a new permit is examined, the result is a lapse of four months between each visit and, accordingly, a total of three visits over one year. In fact, however, the military commander has completely failed to meet this undertaking. HaMoked has already been obliged to submit six series of petitions to the HCJ. In some cases the relatives did not receive permits for more than one or two years. In others, prisoners are left without any relatives who receive a permit for a prison visit. In such cases, the only visits prisoners sometimes receive are from young relatives under the age of 16 who do not require an entry permit to Israel. In one of the petitions submitted by HaMoked, the parents of the prisoner live in Jordan and his wife has been unable to receive a permit. As a result, the only person who could visit him was his five-year old daughter; she visits her father irregularly, accompanied by residents from the area where she lives who are visiting other imprisoned relatives.[3]

11. The subject of prison visits is particularly important to security prisoners in view of restrictions imposed on these prisoners that are not faced by other prisoners. Thus, for example, security prisoners are not permitted to use the telephone, do not receive leave and cannot receive conjugal visits. The 45-minute visit is their sole contact with their families. Even during the visit, the visiting relatives do not sit together with the prisoner in an open space, nor can they make any physical contact. In accordance with the IPS Commission Ordinance, "the visits shall take place in such manner that a transparent screen shall totally prevent the transfer of objects between the prisoner and the visitor."[4] The sole permitted contact between a prisoner and a relative is allowed during the last ten minutes of the visit, **between a prisoner and his children under the age of six**. Once the children reach the age of six, they are considered a security risk and are no longer permitted any contact with their imprisoned parent.

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[3] HCJ 1589/08 **Nazal v Commander of Army Forces in the West Bank**.

[4] This despite the fact that visitors undergo a series of inspections of their person and belongings before beginning the visit.

Prison Visits by Relatives and the Treatment of Prisoners under International Law

12. In addition to the Fourth Geneva Convention which, as noted, establishes the right of every internee to visits at regular intervals, both the rules of war and international human rights law include numerous references to the subject of prison visits. Some of these references are direct, such as Article 116 of the Fourth Geneva Convention as quoted above, while others address the manner in which prisoners are to be treated. We shall now review some of the more important provisions.

13. The Standard Minimum Rules for the Treatment of Prisoners, 1995 establish 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**.

Rule 92 addresses detainees who have not been tried, and establishes:

> **An untried prisoner… shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them**, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

14. As a general rule, the approach in both international law and Israeli law is that a prisoner is entitled to all the rights to which persons who are not prisoners are entitled, except rights whose denial is inherent to the imprisonment:

> **We have an important rule that any of the human rights to which a person is entitled by virtue of their humanity is maintained even if the person is subject to detention of imprisonment, and the fact of imprisonment in itself cannot deny him any right, except when this is inherent and derives from the denial of his freedom of movement, or when an explicit provision thereon appears in law… And this important rule applies not only after a person has borne his penalty but also during the bearing of the penalty, since he is your brother and fellow, and his rights and human dignity are maintained and valid.**
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> HCJ 337/84 **Hukama v Minister of the Interior** *Piskei Din* 38(2) 826, 832; see also: Dobrin, para. 14 of the opinion of Justice Procaccia; PPA 4463/94 **Golan v Israel Prison Service** *Piskei Din* 50(4) 136, 152-3; PPA 4/82 **State of Israel v Tamir** *Piskei Din* 37(3) 201, 207; HCJ 114/86, **Weil v State of Israel**, *Piskei Din* 41(3) 477, 490.

15. Article 10(1) of the International Covenant on Civil and Political Rights establishes:

> 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 in an extremely broad manner by the Human Rights Committee, the body responsible for the implementation of the covenant, in CCPR General Comment No. 21 dated 10 April 1992:

> [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**.

16. Sections 1 and 5 of the Basic Rules for the Treatment of Prisoners, which were adopted by the UN General Assembly (in Resolution 45/111 dated 14 December 1990), also establish the principle that prisoners are entitled to all human rights except those denied by the inherent nature of imprisonment. Section 1 establishes:

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

Section 5 determines:

> 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 International Covenant on Civil and Political 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

17. The right to family life has been recognized as a supreme right in all periods and in all cultures. Denying relatives the right to visit their imprisoned love ones does not injure only the basic rights of the prisoners. **Denying family visits also gravely injures the basic right to family life of the prisoner's relatives, who have not committed any offense and some of whom are children and toddlers whose sole contact with the imprisoned parent as they grow up is during prison visits**. This basic reality is particularly true in the case of security prisoners who, as already noted, are subject to various restrictions in their contacts with their relatives that are not imposed on other prisoners.

18. The Supreme Court has repeatedly emphasized the great importance of the right to family life in numerous rulings, and particularly in the ruling in the Adalah case (HCJ 7052/03 **Adalah v Minister of the Interior**, unpublished, 14 May, 2006).

Thus, for example, President Barak (according to his title at the time) notes in para. 25 of his ruling:

> It is our elementary and basic obligation to maintain, nurture, and protect the **most fundamental and ancient social cell of human**

> **history, which has been, is, and shall remain the foundation that preserves and ensures the existence of human society – the natural family…**
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> The familial connection… lies at the foundation of Israeli law. The family plays a vital and central function in the life of the individual and in the life of society. The familial bonds that are protected by law and which it seeks to develop are among the strongest and most meaningful in the individual's life.

In Dobrin, Justice Procaccia writes (in para. 12 of her ruling):

> In the ranking of constitutional rights, **after protection of the right to life and physical integrity comes the constitutional protection of the right to parenthood and family**. The right to life and physical integrity is intended to protect life; the right to family gives meaning and purpose to life…
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> **Accordingly, this right enjoys a high ranking among the constitutional human rights. In its importance, it precedes the right to property, to freedom of vocation, and even to personal privacy. "It reflects the essence of the human's existence, the embodiment of the realization of the human's self."**

19. Family rights are also recognized and protected in accordance with international public law. Article 46 of the Hague Convention establishes:

> **Family honor and rights**, the lives of persons, and private property, as well as religious convictions and practice, **must be respected**.

In Stamka, the HCJ ruled:

> Israel is required to protect the family cell under the terms of international conventions.
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> (HCJ 3648/97 **Stamka v Minister of the Interior**, *Piskei Din* 53(2) 728, 787).

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

20. Since the right to family life is a constitutional right, a law injuring this right must meet the conditions of the restriction clause in the Basic Law: Human Dignity and Liberty. According to the restriction clause:

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a **proper purpose**, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.

21. The purpose of the improper proposed laws is to use the Palestinian prisoners as bargaining chips with the goal of applying pressure that will lead to the release of the captives or to the granting of permission to visit the captives. Such use is a grave violation of the constitutional right to dignity. Such a violation does not conform to the conditions set forth in the limitations clause. The use of human beings as bargaining chips for this purpose has been unequivocally disqualified by the Supreme Court. The comments of President Barak (according to his title at the time) are also pertinent to our subject:

> I am aware of the suffering of the families of the IDF captives and MIAs. It is great as a mountain. The passing years and the uncertainty injure man's very soul. Still more painful is the condition of a captive, held in secret and in hiding, torn apart from his home and his homeland. This pain, alongside the supreme interest of the State of Israel in bringing its sons back within its borders, has not escaped my attention. It was in my heart as I gave my decision in ADA 10/94. It has not dwindled since then. **We bear the human and social tragedy of captivity and absence every day. However, as important as the goal of freeing the captives and MIAs is, it cannot – within the framework of the law subject to discussion in this petition – justify all means. It is not possible – in the legal situation before us – to use one wrong to right another wrong.** I am certain that the State of Israel will leave no stone unturned until it finds a way to solve this painful issue. As a state and as a society, our consolation shall be that the solution shall be consonant with our basic values.
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> ACH 7048/97 **Anonymous v Minister of Defense**, *Piskei Din* 54(1) 721, 744.

22. It is important to note that according to the Fourth Geneva Convention, the violation of the convention by one party has no bearing on the obligation of the other party to respect the conditions of the convention. The undertakings Israel assumed when it ratified the Fourth Geneva Convention are not affected by the fact that the other side is unwilling to permit visits to the captives it holds.[5] The absence of reciprocity was also recognized in the `Obeid case, in which the Supreme Court ruled:

> **One might ask: Could it be that the Petitioners are 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. Do the Petitioners deserve to have humanitarian considerations taken into account in their matter, while Israeli soldiers and civilians are held by the**

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[5] "It (the Fourth Geneva Convention – Y.A.) 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.". J.S. Pictet, *Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War*, p. 15 (Geneva, 1958).

> **organizations to which the Petitioners belong, which pay no heed to humanitarian considerations and refuse to provide any information about those of our men they are holding? Our reply to these questions is this: 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 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 component in our security and our strength. At the end of the day, this is our advantage.
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> HCJ 794/98 **`Obeid v Minister of Defense**, *Piskei Din* 55(5) 769, 775.

Conclusion

23. Many thousands of Palestinian prisoners are held in Israeli prisons – many of them for extremely protracted periods. Many will never leave the confines of the prison. Others, when they leave, will return to a changed world in which many of their relatives have already passed on. Alongside the population of prisoners there are the families: Women raising their children as single-parent families; children growing up and maturing without a father; parents who have brought a child into the world and, whatever his or her actions, long to see their face and know what has become of them. In view of the denial of other forms of communication, short and infrequent visits form the sole opportunity for the relatives to share with their imprisoned loved ones news of the development of children, of family celebrations or of disasters. This is the opportunity for parents and children, partners, and siblings to reaffirm to one another their mutual feelings and their mutual sense of concern. These are also vital opportunities to defuse the pressure and pain that come from protracted separation. These short and infrequent visits are unique and essential opportunities to consult on family matters; to make decisions regarding the future of the children or family property; and, perhaps, to resolve disputes that develop in families that have been torn apart for years. The visits are also necessary in order to enable the relatives to assess the prisoner's physical or emotional state of health; to ascertain needs requiring external intervention; and, perhaps, to seek legal assistance and hear the prisoner's opinion of the quality of the legal (or other) services the family has hired on his behalf. These few, precious moments are all that parents, partners, children, and others can look forward to; to deny such meager comfort is an unparalleled act of cruelty.

24. The wish to free Israeli captives is appropriate and worthy. Moreover, the State is obliged to do whatever it can, within the boundaries of law and morality, to bring about their release swiftly. However, collectively denying a

basic right to some in order to put pressure on others is not a permissible means in a law abiding country. The bills contradict both Israeli constitutional law and international law – to Israel is bound – and undermine Israel's foundations as a democratic State.

Jerusalem, 30 March 2008