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

**HCJ 5268/08**

- In the matter of:
1. \_\_\_\_\_ 'Anbar, Identity No. \_\_\_\_\_, of the Gaza Strip, a prisoner at Nafha prison
  2. \_\_\_\_\_ Al-Khatib , Identity No. \_\_\_\_\_, of the Gaza Strip
  3. \_\_\_\_\_ Al-Sawafiri, Identity No. \_\_\_\_\_, of the Gaza Strip, a prisoner at Nafha prison
  4. \_\_\_\_\_ Al-Bordini, Identity No. \_\_\_\_\_, of the Gaza Strip
  5. \_\_\_\_\_ Harez, Identity No. \_\_\_\_\_, of the Gaza Strip, a prisoner at Ramon prison
  6. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger (R.A.)**
  7. **Addameer**
  8. **B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories (R.A.)**
  9. **Gisha, the Legal Center for Freedom of Movement (R.A.)**
  10. **The Public Committee Against Torture in Israel (R.A.)**
  11. **Palestinian Centre for Human Rights**
  12. **Yesh Din - Volunteers for Human Rights (R.A.)**
  13. **The Gaza Community Mental Health Center**
  14. **Physicians for Human Rights (R.A.)**
  15. **Defence for Children International - Palestine**

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**The Petitioners**

- Versus -

1. **GOC Southern Command**
2. **The Minister of the Interior**
3. **The Minister of Defense**
4. **Coordinator of Government Operations in the Territories**
5. **The Israeli Government**
6. **The State of Israel**

Represented by the office of the State Attorney  
29 Salah El-Din, Jerusalem 91010

**The Respondents**

### **A Petition for Order Nisi**

A petition is hereby filed for an *Order Nisi* directed to the Respondents and ordering them to give reasons for why they will not allow residents of the Gaza Strip, whose family members are incarcerated in prison facilities in Israel, to visit their loved ones in prison and thus exercise their basic right to visits and to family life, in the framework of secure transportation of the ICRC, as is accepted.

### **Motion for an Urgent Hearing**

The Court is moved to order the conduct of an urgent hearing of the Petition. On June 6, 2007, over one year ago, the Respondents cancelled all of the visits of family members of incarcerated persons from the Gaza Strip to the prisons in Israel.

The Petition does not only concern the wish of the detainees to see their family members and their demand that they be allowed to do so. The Petition is also the petition of the family members of the detainees: Wives who are raising their children as single-parent families; children who are growing up without a father; parents who brought a child into this world – all yearning to see the face of their loved one and to know his fate. In view of the preclusion of other forms of communication, the short and rare visits are the only opportunity for the family members to share with their incarcerated loved ones the children's development, family celebrations or disasters, heaven forbid.

### **Set Forth Below are the Grounds of the Petition**

The prisoner's isolation from society in order to achieve the purposes of the punishment also sentences him to family isolation from his spouse, his children and his more extended family. **However, even given this restriction inherent to imprisonment, the existence of the human right to family and parenthood requires a reduction in the scope of prejudice thereto, insofar as possible, and within the necessary limits only, such as by way of issuing controlled permits for family visits to prisoners, taking vacations upon fulfillment of defined conditions,**

provision of means which allow conjugal visits, and so forth. **Thus, proportionality is preserved of the prejudice to the human right, which is inherently required by the very denial of the freedom which accompanies imprisonment.**

HCJ 2245/06 **Dovrin v. The Prison Service**, Paragraph 15 of the judgment of Justice Prokacha (not published. June 13, 2006. Hereinafter: the **Dovrin Case**. All of the emphases in the Petition are mine – Y.E.)

1. The Petition concerns the denial of the basic right of the residents of the Gaza Strip to visits to prison and to family life, as a result of a sweeping cancellation of all of the visits of residents of the Gaza Strip to members of the families of the detainees at the prisons in Israel.
2. On June 6, 2007, **over one year ago**, all visits of family members of the detainees from the Gaza Strip to the prisons in Israel were stopped. The prison visits were cancelled due to the claim that “since the military takeover by the Hamas organization of the Strip, there is no Palestinian entity with which security coordination of the traffic through the crossings, which are currently controlled by terrorists, may be performed” (see Section 10 below), despite the fact that the visits were always coordinated through the International Committee of the Red Cross, which is prepared to continue to coordinate the visits and is calling for the resumption thereof.
3. It should be emphasized that the Petition does not concern the legal status of the Gaza Strip after the disengagement plan. The prison visits of residents of the Gaza Strip continued as usual approximately two years after execution of the disengagement plan (on August 15, 2005), in the same manner in which they were made prior thereto. The Petition does not concern too the issue of the legality of the keeping of detainees from the Gaza Strip in the prisons in Israel. The Petition only concerns the grave violation of the basic rights of the detainees and their family members to prison visits and to family life, rights which are recognized both in Israeli law and in international law.

### **Factual Background**

4. Approximately 930 Gaza Strip residents are currently imprisoned in Israel, including also women and minors.
5. Respondent 1, GOC Southern Command (hereinafter: the “**Military Commander**”) neither allowed residents of the Gaza Strip to come on visits by themselves nor made any visit arrangements of his own. The visits were only organized through the International Committee of the Red Cross (hereinafter: the “**ICRC**”). Visitation applications were submitted by the residents to the offices of the ICRC, which transferred the same to the Military Commander. The Military Commander transferred his response to the ICRC which notified the applicant of the response. The ICRC also organized the transportation itself – at its expense, in coordination with the Military Commander and with strict security arrangements. Thus, for example, the visitors were meticulously checked both at the Erez border crossing before entering Israel and before entering the prison, the buses on which the visitors

arrived at the prison were accompanied by the security forces from the moment they entered Israel and the visitors were not permitted to leave the bus until they had reached the prison.

6. The prison visit permits in the framework of the ICRC transportation were granted on the basis of narrow criteria and subject to security discretion. The persons entitled to participate in visits were: Spouses, parents and grandparents, sisters and daughters and brothers and sons under the age of 16 or over the age of 45 only. Sons aged between 16-45 were able to visit their incarcerated father twice a year and brothers of such ages were permitted to visit once a year only.
7. In a great deal of cases, the Respondent refused to allow visits of family members to detainees due to their being defined as “denied entry into Israel”.
8. On June 6, 2007 the Military Commander decided, as aforesaid, unilaterally, to stop all of the visits of family members from the Gaza Strip to their detained loved ones. Since the visits were stopped, many efforts have been made, both by Petitioner 6 (hereinafter: “**Hamoked**” or “**HaMoked: Center for the Defence of the Individual**”) and by the ICRC Organization, with the aim of resuming the visits. All of the efforts have failed.
9. On August 9, 2007, HaMoked: Center for the Defence of the Individual contacted Colonel Pnina Sharvit Baruch, Head of the International Law Division at the army, requesting that she order the immediate resumption of the visits.

The letter dated August 9, 2007 is attached as Exhibit **P/1**.

10. On September 2, 2007, a response was received from Lieutenant Nimrod Karin, Assistant Head of the Economic and Humanitarian Section, on behalf of the Head of the International Law Division. The letter states that “The discontinuation of detainee visits in Israel since the beginning of June is rooted in the situation of the security coordination in the crossings between the Gaza Strip and Israel. Indeed, since the military takeover by the Hamas organization of the Strip, there is no Palestinian entity with which security coordination of the traffic through the crossings, which are currently controlled by terrorists, may be performed. In view of the aforesaid, regular traffic of persons at the Erez crossing is not possible, other than in exceptional cases only”. It is further written in the letter “that the issue of detainee visits for prisoners who are residents of the Strip... is known to the competent authorities, which examine it periodically, subject to the changing circumstances and in view of the said security consideration”.

The letter dated September 2, 2007 is attached as Exhibit **P/2**.

11. On May 5, 2008 HaMoked: Center for the Defence of the Individual once again approached Colonel Pnina Sharvit Baruch (a copy was also sent to Respondent 1) requesting that she instruct resumption of the visits. This letter has still received no response.

The letter dated May 5, 2008 is attached as Exhibit **P/3**.

12. However, as described in Section 5 above, the visits were always coordinated through the ICRC which is prepared to continue to coordinate the visits now too. Thus, for example, in a press release dated May 26, 2008 under the heading: “**Gaza: ICRC calls for immediate resumption of family visits to detainees in Israel**”, Christoph Harnisch, head of the ICRC's delegation in Israel and the occupied territories, states that “It further exacerbates the daily hardship faced by the Palestinian population trapped in the Gaza Strip. **The ICRC has facilitated family visits for decades, always in line with Israeli security measures.** While we acknowledge Israel's security concerns, we strongly believe that they alone cannot justify the all-out suspension of family visits to detainees”. The press release dated May 26, 2008 is attached as Exhibit **P/4**.

13. Moreover, in a report published by IRIN, the news service of the UN Office for the Coordination of Humanitarian Affairs, concerning the call of Katharina Ritz, the head of the ICRC in Jerusalem, for resumption of the visits, which was brought for the response of Defense Ministry spokesman Shlomo Dror, who pin the reason for prevention of the visits on the government decision not to allow persons to leave the Gaza Strip, other than in humanitarian cases. The report quotes Israeli officials who recall that the captive Israeli soldier Gilad Shalit was not allowed to maintain contact with his family. It should be noted that Gilad Shalit was abducted on June 25, 2006, approximately one year before the visits were ceased.

The report dated April 22, 2008 is attached as Exhibit **P/5**.

14. It transpires from the aforesaid that three reasons were raised as grounds for prevention of the family visits from the Gaza Strip to the prisons in Israel. Two were raised more or less officially – the absence of an entity with which it is possible to coordinate the visits and the government decision not to allow persons to leave the Gaza Strip – and the third unofficially – prevention of the visits to the captured soldier Gilad Shalit. According to the Petitioners, not one of these grounds justifies cancellation of the visits. Cancellation of the visits constitutes collective punishment which is prohibited both in Israeli law and in international law. In addition, even according to the narrow criteria determined by the Israeli government, the visits should be allowed to be held immediately. The Petitioners will expand thereon in the legal chapter of this Petition.

### **The Parties and Exhaustion of Proceedings**

15. Petitioner 1, Mr. \_\_\_\_\_ 'Anbar (hereinafter: “\_\_\_\_\_ **'Anbar**”), a resident of the Gaza Strip, married and father to a daughter, is serving a prison sentence at the Nafha prison.
16. Petitioner 2, Ms. \_\_\_\_\_ Al-Khatib (hereinafter: “\_\_\_\_\_ **Al-Khatib**”) resides in the Gaza Strip and is the daughter of Mr. \_\_\_\_\_ Al-Khatib who is serving a prison sentence at the Nafha prison.

17. Petitioner 3, Mr. \_\_\_\_\_ Al-Sawafiri (hereinafter: “\_\_\_\_\_ **Al-Sawafiri**”) a resident of the Gaza Strip, married and father to two sons and a daughter, is serving a prison sentence at Nafha prison.
18. Petitioner 4, Ms. \_\_\_\_\_ Al-Bordini (hereinafter: “\_\_\_\_\_ **Al-Bordini**”), resides in the Gaza Strip and is the wife of Mr. \_\_\_\_\_ Al-Bordini, who is serving a prison sentence at the Nafha prison.
19. Petitioner 5, Mr. \_\_\_\_\_ Harez (hereinafter: “\_\_\_\_\_ **Harez**”), a resident of the Gaza Strip, married and father to six children, is serving a prison sentence at Ramon prison.
20. HaMoked: Center for the Defence of the Individual is a human rights organization. For many years HaMoked has assisted detainees, residents of the territories, and their family members. In 2007, HaMoked handled over ten thousand requests of families to locate detainees and approximately one thousand requests of families to visit their loved ones in prisons.
21. Petitioner 7 is a human rights organization located in Ramallah which engages in the legal defense of Palestinian prisoners and detainees.
22. Petitioner 8 is an Israeli association which acts to promote human rights in the West Bank and the Gaza Strip through public activity, documentation and research.
23. Petitioner 9 is an Israeli association whose object is to promote human rights in Israel and the territories under its control, including the right to freedom of movement.
24. Petitioner 10 is an Israeli association for human rights which fights against the use of torture and cruel, humiliating or inhuman treatment of human beings and acts to strengthen democracy and the rule of law by protecting human rights and civil rights.
25. Petitioner 11 is a Palestinian association whose object is to protect the rights of Palestinians residing in the Gaza Strip and the West Bank.
26. Petitioner 12 is an Israeli association which engages in a variety of issues pertaining to human rights in general and human rights in the occupied territories specifically.
27. Petitioner 13 is a Palestinian not-for-profit NGO which was established in 1990 with the aim of providing community mental health services to the population of the Gaza Strip. Its actions include, *inter alia*, treatment, training and research, including the provision of assistance in the rehabilitation and integration of patients in community and family frameworks.
28. Petitioner 14 is an Israeli association which comprises physicians and medical persons for the protection of human rights, whose object is to fight for the dignity, bodily integrity and right to health and medical relief of every person in Israel and in the territories controlled thereby.

29. Petitioner 15 is a Palestinian not-for-profit NGO whose object is to promote and protect the rights of Palestinian children pursuant to the UN Convention on the Rights of the Child and other local, regional and international standards.
30. The Military Commander has effective control over the terrestrial, marine and aerial crossings from and to the Strip on behalf of the State of Israel, Respondent 6. The Military Commander is the person in charge of the issuance of permits for entry to Israel for the purpose of entering Israel. Respondent 2 holds the authority which he delegated to the Military Commander.
31. Respondent 4 is the person in charge of determination of the army's policy in the occupied territories and was appointed on behalf of Respondent 3 to monitor the humanitarian situation in the Strip.
32. Respondent 5 is the person in charge of Israel's actions and its policy, insofar as pertains to freedom of movement arrangements in general and overseas departures specifically, from the Gaza Strip by sea, air and land.

### **The Repercussions of Cancellation of the Visits: Several Examples**

33. \_\_\_\_\_ 'Anbar was arrested in May 2002 and sentenced to 18 years imprisonment. Whilst he was in prison, his only daughter \_\_\_\_\_ was born. Set forth below is a part of his affidavit:

I am 28 years old, married and have one daughter called \_\_\_\_\_. **My daughter is aged 5.5. She was born whilst I was in prison...**

After I was arrested I was granted two visits only by my mother. My wife and daughter were not allowed to visit. Subsequently, I was denied visits for a period of two years. **I saw my wife and daughter for the first time three years after my arrest. In total, I have seen my wife only twice since the date of my arrest.** Subsequently, they did not allow my wife to visit me. I have seen my daughter a total of 8 times, twice together with my wife and 6 times my daughter came with my mother. They allowed me to touch my daughter twice in total. **I have 6 brothers and 2 sisters. Only my younger brother \_\_\_\_\_ has visited me. My father never visited me. My father passed away two years ago.**

**In June 2007 the visits from the Gaza Strip were stopped.** I was already denied visits prior thereto. Several months ago they allowed me one telephone conversation following a report that was published about a shooting at my family. I spoke with my wife for several minutes. **In a telephone conversation it is surprising that you never remember everything that you want to say.** It is not like a visit for which you plan.

**I would very much like to see my family members. My daughter is growing and I do not see her. I miss my family very much. I cannot reconstruct in my mind what my daughter looks like. I would very much like to see her. I have an old picture of her but children at that age grow and change very fast.**

**After my father passed away, I am the eldest son. I am supposed to take care of my family. Instead, I have no contact with them. I am unable to support them.**

\_\_\_\_\_ 'Anbar's affidavit is attached hereto as **Affidavit A**.

34. \_\_\_\_\_ Al-Khatib is the daughter of \_\_\_\_\_ Al-Khatib who is serving a prison sentence at Nafha prison. Set forth below is part of her affidavit:

My father, \_\_\_\_\_ Al-Khatib, was arrested in 1997 and sentenced to life imprisonment. He is a prisoner at Nafha prison. I am his eldest daughter. I am 20 years old. When my father was arrested I was 9 years old. I have one sister and two brothers. My brother \_\_\_\_\_ is 19 years old, my brother \_\_\_\_\_ is 17 years old and my sister \_\_\_\_\_ is 16 years old. When my father was arrested she was 5 years old.

**Several years after my father was arrested, my parents divorced. Since then, my mother has remarried and moved overseas. We have no contact with her.**

**We live with my grandmother, \_\_\_\_\_, my father's mother. She is an elderly lady, aged 90. My father's brothers all live overseas (two in Canada and one in Spain).**

**We miss our father very much. Since our mother left us, we feel alone in the world. It is very difficult for us having no contact with our father.**

**Our grandmother is in a bad mental state. She is an elderly lady who has difficulty walking and walks with the help of a walker. Every day she tells us that she is afraid to die before seeing her son again.** Her husband, my father's father, died, her other sons live overseas and neither we nor she can see our father, who lives so close to her.

In June 2007, the visits of the residents of the Gaza Strip to their family members in prison were stopped. Up until the visits were stopped, we would visit my father regularly. Since then, it has been already more than one year that we have no contact with him. We do not know what is happening with him and he does not know how we are.



**The situation in Gaza is very difficult. We have no doubt that our father is very worried about our situation. We so badly want to meet with him, tell him that we are fine and see how he is. Most of our life, up until now, has passed with our father being in prison, but with all of the sorrow, at least we could meet with him, consult with him and receive his guidance. Now we have nobody to guide us apart from our grandmother.**

We would very much like our father to be released. Until then, we at least ask that we be allowed to meet with him regularly. Cancellation of the visits does not only hurt him and the other prisoners. It hurts us and the family members who have done no wrong.

\_\_\_\_\_ Al-Khatib's affidavit is attached hereto as **Affidavit B**.

35. \_\_\_\_\_ Al-Sawafiri was arrested in 1993 and sentenced to 18 years imprisonment, of which he has already served approximately 15 years. Set forth below is part of his affidavit:

I am 44 years old, a resident of the Gaza Strip. I was arrested in 1993 and sentenced to 18 years.

**I am married and a father to 3 children, two sons and one daughter. My daughter \_\_\_\_\_ was born after I was arrested. My sons \_\_\_\_\_ and \_\_\_\_\_ were two years old (\_\_\_\_\_) and five months (\_\_\_\_\_).**

**I have not seen my eldest son for three years. They have not allowed him to visit me in the past three years. I have not seen the middle son for two years. My daughter would come to visit together with my mother until the visits were stopped in June 2007. My wife would receive a permit to visit once every 4-5 months.**

**Since the visits were stopped I have had no contact with the family.** I have not spoken with them on the telephone or received letters. Three months ago I learned that my family sent me a letter. Until today I have not received the letter.

**I have 6 brothers and 5 sisters. In the 15 years since I was arrested I have received only two visits from my brothers and sisters. My mother is an elderly lady who suffers from many medical problems. High blood pressure, back and stomach problems.**

**I would very much like to see my children, who I have not seen for so long. My mother is an elderly and sick woman. I do not know for how much longer I will be able to see her. I hope that I will be able to see her while she is still**

**alive. My father passed away 20 years ago. My children grew up whilst I was in prison...**

**Every prisoner has the right to receive visits from the members of his family and I am asking to exercise my basic right to visits in prison and to family life.**

\_\_\_\_\_ Al-Sawafiri's affidavit is attached hereto as **Affidavit C**.

36. \_\_\_\_\_ Al-Bordini is the wife of Mr. \_\_\_\_\_ Al-Bordini, who is serving a prison sentence at Nafha prison. Set forth below is part of her affidavit:

My husband, \_\_\_\_\_ Al-Bordini, was arrested in 1993 and sentenced to 18 years imprisonment. He has already finished serving over 15 years of his prison sentence. He is a prisoner at Nafha prison.

**When my husband was arrested, our eldest son \_\_\_\_\_ was one and a half years old. I was pregnant with our second son, \_\_\_\_\_. \_\_\_\_\_ was born after my husband's arrest.**

**My husband suffers from serious health problems and has already undergone approximately 10 operations during his incarceration. I learned that approximately one month ago, my husband underwent another operation but since we have no contact with him, I could not ask him about his condition.**

**We live with my husband's mother, whose name is \_\_\_\_\_. She is an elderly woman who suffers from high blood pressure and diabetes.** She misses him tremendously. My husband's father lives abroad and has no contact with the family. My husband is the only son. He has one sister who is married and lives together with her husband.

**The children and I miss him a lot.** Up until the visits were discontinued in June 2007 the children and my husband's mother would visit my husband in prison at every opportunity. I myself did not receive a visitor's permit already a few months before the visits were discontinued and thus I have not seen him for a year and a half. Two months ago I received a surprise telephone call from my husband who had been given permission to phone me by the prison authorities. Since we were not warned in advance that he would call, the only people at home were me and my son \_\_\_\_\_. We were only able to speak to him for 5 minutes. There is no doubt that this could not serve as a substitute for a visit.

**My husband is very worried about our situation and especially the situation of the children since he does not have his own father or brothers who could be concerned**

with their welfare. I try to the best of my abilities to provide them with a proper education. \_\_\_\_\_ passed his matriculation examinations (the *tagihi*) with a 90 average. We were very happy and we really wanted to share the good news with my husband but we were unable to do so.

**I hope that my husband will be set free soon. Until then we would like to realize our right to visit him in prison and to conduct a normal family life as much as is possible taking into account my husband's present incarceration.**

**We did nothing wrong. Why are they punishing us?**

\_\_\_\_\_ Al-Bordini 's affidavit is attached hereto as **Affidavit D.** .

37. \_\_\_\_\_ Harez was arrested in 1985 and was sentenced to life imprisonment. He has already served 23 years of his prison sentence. Set forth below is part of his affidavit:

I am 54 years old. I am a resident of the Gaza Strip. I am married and the father of 6 children. I was arrested in 1985 and sentenced to life imprisonment.

**When I was arrested, my wife was in the first month of her pregnancy with my youngest daughter \_\_\_\_\_. My other children ranged in age between one to eight years.**

**They used to place my daughter \_\_\_\_\_ behind the prison bars so that I could touch her, but she was a little baby then and was frightened because she did not recognize me.**

The visits from the Gaza Strip were terminated in June 2007 but the last visit to me was about 15 months ago. Over the course of a period that lasted about four years I did not receive any visits.

**I have not seen my father for the last 15 years. He is getting older and is ailing. The Red Cross filed an application to allow him to visit me but the application was dismissed.** Before the visits were terminated I would regularly receive visits.

**I have not seen my older children for a number of years. They have allowed me to visit my daughters \_\_\_\_\_ and \_\_\_\_\_ but my children \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ have not been permitted to visit me for very many years, ranging between 7 to 10 years.**

A month ago they permitted me to speak on the telephone with my family. I spoke with my wife, my daughter in law and two of my brothers. Because permission to conduct the

conversation was given by surprise, my parents and my children were not at home and I did not speak to them.

**I have 15 grandsons and granddaughters. I have never met them. I do not even know their names. I have pictures of some of my grandsons.**

15 years ago my sister visited me alone. I hardly recognized her. I have also not seen my brother for the last 15 years.

**My son \_\_\_\_\_ was injured about two years ago. I do not know how this happened and have not seen him since. I was informed by letter about his injuries. No details were conveyed to me.**

**It is my right to receive visits and the right of my family to visit me in an orderly manner and the punishment that they have adopted, namely preventing visits is a collective punishment aimed at my family and at me, for an offense to which the family had no connection whatsoever.**

**I would really like to get to know my grandchildren. My parents are elderly and ill and I am afraid that something may happen to my parents while I am still in prison. When I was told about my son's injury, I lost my mind and was unable to do anything.**

\_\_\_\_\_ Harez' affidavit is attached hereto as Affidavit E.

38. The above as stated are just a number of examples that concretize the difficulties that are faced by prisoners from the Gaza Strip and their families, **difficulties which have been caused as the result of the flagrant and continuous violation of their basic rights by the respondents**, as shall be demonstrated below.

### **The Legal Aspect**

The conclusion is that there is justification for establishing special arrangements for security prisoners ... nonetheless it is clear that these arrangements need to withstand the legal tests that generally apply to administrative decisions: **they have to be practical, reasonable, and proportionate**. So, for example, **one cannot place a restriction upon security prisoners limiting his contacts with persons outside the prison if this is not required on the basis of security considerations or other practical considerations, but which flow solely from considerations of retribution or vengeance, or if it harms the prisoner in a manner that is disproportionate to that which is required by practical considerations.**

**The right of visits by family members to prison and the obligation upon the respondent to arrange them**

39. The right of family visits to prison facilities is a fundamental right, both of the detainees and of their family members. This is a basic right that flows from the conception of man as a social being, who exists within a framework of a family and a community. The right to family visits is enshrined in a series of legal sources, Israeli and international. It is worth noting, amongst these sources, the Fourth Geneva Convention, which establishes in Article 116 that:

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

Likewise Section 47 of the Prisons Ordinance (New version) 5732-1971 and the Prison Service Order 04.42.00, entitled “Arrangements for Visits to Prisoners,” Section 1 thereof establishes 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.

40. Also the Standard Minimum Rules for the Treatment of Prisoners, 1955 established in Rule 37 thereof:

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.

And Rule 92, which relates to untried prisoners, establishes that:

**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.

41. In a comprehensive study by the ICRC on customary international law it is established that **the right of internees and prisoners to receive visits is a right that is recognized by customary international law:**

**Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.**

...In a resolution adopted in 1999, the UN General Assembly demanded that Yugoslavia respect the requirement to allow detainees to receive family visits in the context of the conflict in Kosovo (UNGA Res.54/183). In the Greek case in 1969, the European Court of Human Rights condemned the severe limitations on family visits to detainees. In 1993, the Inter-American Commission on Human Rights recommended that Peru allow relatives to visit prisoners belonging to the Tupac Amaru Revolutionary Movement.

JM Henckaerts, L. Doswald-Beck, Customary International Humanitarian Law p. 448-449 (Volume I: Rules. 2005).

42. Other countries which also have had to contend with security problems and complications have been faced with the question of visits to security prisoners. A judgment by the Grand Chamber of the European Court of Human Rights dealt with the question of the detention conditions of Abdallah Öcalan, who was accused by the Turkish Authorities of heading the Kurdish underground movement, the PKK. Mr. Öcalan was sentenced to death, but the sentence was then commuted to life imprisonment and he is now being held, as one would expect, under maximum security conditions. Despite this, in accordance with the Grand Chamber judgment, Mr. Öcalan enjoys bi-weekly family visits:

192 In the present case, it is true that the **applicant's detention posed exceptional difficulties for the Turkish authorities. The applicant, as the leader of a large, armed separatist movement, is considered in Turkey to be the most dangerous terrorist in the country...**

193 The applicant's prison cell is indisputably furnished to a standard that is beyond reproach... the Court notes that the cell which the applicant occupies alone is large enough to accommodate a prisoner and furnished with a bed, table, armchair and bookshelves. It is also air-conditioned, has washing and toilet facilities and a window overlooking an inner courtyard...

194 **...He sees a doctor every day and his lawyers and members of his family once a week.**

Öcalan v. Turkey (Application No. 46221/99 p. 1046-1047).

### **The prisoner's human rights are safeguarded even during his incarceration**

43. The rights to family visits of prison facilities also flows from the prevailing conception both in international law and in Israeli law that the mere fact of arrest or imprisonment is in and of itself insufficient to deny the prisoner his basic rights. The prison walls restrict the prisoner's freedom of movement, and all that flows from this, but they do not have the power to deprive him of other basic rights, except those that have been denied to him by an explicit provision in the law:

**We have an important rule that any of the human rights to which a person is entitled by virtue of his humanity is maintained even if the person is subject to detention or imprisonment, and the fact of imprisonment in and of 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...** the source of this rule may be found in ancient Jewish tradition: based on the Biblical verse in Deuteronomy 25:3 “then your brother should be dishonored before your eyes”, the Sages established an important rule in Jewish penal law “from when he becomes ‘dishonored’ –he becomes ‘your brother’ (Tractate *Makkot* III: 16) **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.**

H CJ 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; H CJ 114/86, Weil v State of Israel, *Piskei Din* 41(3) 477, 490.

44. Similarly article 10(1) of the Covenant on Civil and Political Rights establishes that:

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

This article was interpreted 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.**

45. 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 that :

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

And according to section 5:

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

46. The various provisions that relate to the right of prison visits provide for the impositions of restrictions on that right, *inter alia*, for security reasons. However, like any other restriction upon a basic right, restrictions of this kind need to be imposed within the framework of the principles of reasonableness and proportionality, while giving due consideration to the importance of the affected basic right.

### **The right to a family life**

47. **Denying family visits to imprisoned loved ones gravely injures the basic right to family life of the family members and of the prisoners.** Society has, and continues to view the right to family life, in all periods and in all cultures, as a supreme right
48. The Supreme Court has repeatedly emphasized the great importance of the right to family life in numerous judgments, and particularly in the judgment that was delivered in the Adalah case (HCJ 7052/03 Adalah v Minister of the Interior, Takdin Elyon 2006(2), 1754)).

Thus, for example, (the then) President Barak notes in paragraph 25 of his judgment:

It is our elementary and basic obligation to maintain, nurture, and protect **the most fundamental and ancient social unit of human history, which has been, is, and shall remain the foundation that preserves and ensures the existence of human society –the natural family...**

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 the Dobrin case, Justice Procaccia writes (in paragraph. 12 of her judgment):

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 physical integrity is intended to protect life; the right to family gives meaning and purpose to life...

**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.”**

49. Family rights are also recognized and protected by public international 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 unit by virtue of international conventions. (HCJ 3648/97 Stamka v Minister of the Interior, *Piskei Din* 53(2) 728, 787).

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

### **The decision to cancel visits is collective punishment**

50. The sweeping cancellation of all family visits by residents of the Gaza Strip to the general prisoner population from the Gaza Strip who are being detained in prisons in Israel constitutes “collective punishment”. Collective punishment is forbidden in international law.

51. Regulation 50 of the Hague Regulations establishes:

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

52. In article 33 of the Fourth Geneva Convention it is established that:

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.

53. The ICRC's Commentary makes it clear that the difference between what is stated in the Hague Regulations to that which is stated in the Fourth Geneva Convention may basically be pinned down, inter alia, to the following:

The Provision is very clear. If it is compared with Article 50 of the Hague Regulations, it will be noted that that Article could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility.

Thus, a great step forward has been taken. Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of.

J.S. Pictet, Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War. P. 225 (Geneva, 1958) [Hereinafter: **Pictet, Commentary**].

54. It is interesting to see how Pictet interprets the reason for the prohibition on using measures of intimidation or of terrorism not only as something that comes to protect protected persons under occupation, but also as a prohibition that conforms with the interests of the Occupying Party:

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

**Pictet, Commentary** p. 225-226.

55. Article 75(2)(d) of the First **Protocol** Additional to the Geneva Conventions also establishes that:

(2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents...

(d) **collective punishments**

The ICRC's Commentary to this article makes it clear that:

**3055. The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.**

Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. p. 874 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Eds. ICRC, Geneva, 1987).

56. We have also found that in Jewish Law there is opposition to collective punishment, in that it contravenes the principles of law and justice. So for example it was ruled that imposing a monetary fine on the general public because of the sine of two or three individuals from that public, is classified as “complete theft”

A fortiori, when the king’s budget that has been imposed upon the Jewish public is considered by us to be complete theft. And because of X or Y who counterfeited the coinage should there be such anger against all the Jews and with a mighty hand shall he expel them from his country until it becomes necessary to reach a compromise by paying a few thousand gold coins!?

And similarly the Patriarch Abraham, may he rest in peace said to the Almighty, Blessed be He: Far be it from thee (etc.) [to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, far be it from thee: Shall not the Judge of all the earth do right? Genesis XVIII: 25. In the *Responsa of the Ribash* only the beginning of the verses appear – Y. E]; and also Moses Our Teacher, may he rest in peace said: “Shall one man sin (etc.) [and wilt thou be angry with all the congregation” Numbers XVI: 22];

And this may also be justified by reference to the Aramaic folk saying: “Tuviah sinned and Zigud receives lashes?” [Babylonian Talmud, *Pesachim* 113b] this being the case here, this allocation is complete theft.

*The New Responsa of the Ribash*, IX.

57. Cancelling these visits falls within the scope of improper collective punishment upon all the family members of the prisoners, against whom there is no claim that they constitute any type of security risk and against the prisoners themselves who are serving their sentences and who, as was shown above, are entitled to every right of their human rights, even during their incarceration (except for those that have been denied them in accordance with an explicit provision in the law).

**There is an entity with which it is possible to coordinate visits**

58. As stated in paragraph 10 above, the respondents claim that the visits were cancelled since “there is no Palestinian entity with which security coordination of the traffic through the crossings, which are currently controlled by terrorists, may be performed. **This utterance has no substance.** As was explained in paragraph 12 above, the International Committee of the Red Cross, which coordinated the visits in the past, is willing and prepared to continue to do so.
59. Moreover the Civil Liaison Administration at the Erez Crossing routinely refers those applicants wishing to leave the Gaza Strip to the Civilian Committee of the Palestinian Authority as a condition for dealing with them. According to the Civil Liaison Administration “the request is transferred by the Palestinian Committee to liaison entities from the Erez CLA in order that it be examined by the Israeli side and the decision in the matter is relayed to representatives of the Palestinian Authority and through it to the applicant resident” and indeed “the abovementioned policy was established in the Interim Accords is enhanced in light of the implementation of the Gaza Strip Disengagement Plan”.

Three examples of letters of this type that were written in recent months are attached hereto as appendices **p/6 a - c.**

**The Government’s decision to impose restrictions on the Gaza Strip does not support discontinuing visits**

60. On 19 September, 2007 the Security Cabinet of the Government of Israel released their decision, which stated:

Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity.

In light of the foregoing, it has been decided to adopt the recommendations that have been presented by the security establishment, including the continuation of military and counter-terrorist operations against the terrorist organizations. **Additional sanctions will be placed on the Hamas regime** in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. **Restrictions will also be placed on the movement of people to and from the Gaza Strip.**

**The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis.**

The announcement released by the spokesperson for the Prime Minister’s Office of September 19, 2007 is attached hereto as appendix **p/7.**

61. The above decision places as stated a “restriction on the movement of people to and from the Gaza Strip... following a legal examination, while taking into account the humanitarian aspect”.
62. As stated above, prison visits are a basic right both of the prisoners and of their families and are recognized as such by both Israeli law and by international law. The Government of Israel also views, and rightly so, the demand to allow visits of Israeli soldiers in captivity, as a humanitarian issue of the first degree.

Therefore even if the petitioners were to recognize, which they do not, the right of the Government of Israel to place harsh restrictions of the type that it places upon residents of the Gaza Strip, there is no doubt that prison visits fall within the category of a humanitarian exception.

### **Preventing visits with the aim of placing pressure in the other side – is illegal**

63. As stated in paragraphs 13-14 above, one of the reasons that were unofficially quoted for preventing visits to the general prison population from the Gaza Strip is the fact that the captive soldier Gilad Shalit does not receive visits. With all the desire to see Gilad Shalit receive visits and to be freed from his captivity as soon as possible, the denial of basic rights from a human being in a collective fashion, in order to place pressure upon other people is not one of the permitted means that may be used in a law abiding country.
64. Denying these visits means in practice that you are using the Palestinian prisoners as bargaining chips with the aim of exerting pressure that will lead to the liberation of Gilad Shalit or to the approval of visits to him. Using human beings as bargaining chips for this aim has been unambiguously censured by the Supreme Court, as written by the then President Barak, and his dicta apply equally to our case:

I am aware of the suffering of families of missing and captive soldiers. Their suffering is manifold. The years have passed and the uncertainty wounds the soul of man. Even more painful is the situation of the captive, held in secret and concealed from the world, torn away from his home and homeland. Indeed, this pain, alongside the supreme interest of the State of Israel to return its children to its borders has not disappeared from my eyes. It did not bidge from my heart when I handed down my decision in Adm.D.A 10/94. It has not diminished since then and remained there up until this day. **The human and societal tragedy in captivity and disappearance is borne by our shoulders every day. Nonetheless, however important the goal of freeing captives and missing persons, it is not enough –within the framework of the Law and within the scope of what may be discussed in this petition – to authorize all means necessary. One may not – in the legal situation before us – rectify evil with evil.** I am absolutely certain that the State of Israel will not remain silent and will not rest until it finds a

way to solve this painful episode. As a state and as a society, we may be comforted by the fact that the path to finding a solution will always comply with our basic values.

Cr.F.H 7048/97 **John Doe v. Minister of Defense**, Piskei Din 54(1) 721, 744.

65. It is important to note that according to the Fourth Geneva Convention, a 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 upon ratifying the Fourth Geneva Convention are not affected by the fact that the other side is unprepared to permit visits to the captives that it holds.

As Pictet wrote:

It (the Fourth Geneva Convention – Y.E.) is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations.

Pictet, Commentary p.15.

66. The absence of reciprocity was also recognized in the Obeid case where the Supreme Court ruled that:

**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 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.

67. Because of restrictions on movement between the Gaza Strip and Israel and because of the security situation that prevails in the Gaza Strip, the signing of the affidavits and powers of attorney by the female relatives of the imprisoned families, petitioners 2 and 4, was not done before an attorney. The above affidavits and powers of attorney were sent by fax after coordinating matters between the petitioners and an attorney on behalf of the Center for the Defence of the Individual. It is in this form that they are attached to the petition. The powers of attorney of petitioners 11 and 13, which are organizations that are based in the Gaza Strip, were also sent by fax.
68. Because of time constraints the honorable court is hereby requested to accept the powers of attorney of petitioners 8-12, 14 and 15 which were sent to the undersigned by fax, after arranging to do so via the telephone. The petitioners undertake to produce the original and lawfully signed powers of attorney to the honorable court, as soon as possible.

**For all these reasons the honorable court is requested to issue an order nisi as requested at the beginning of this petition, and after receiving the respondent's response, make it absolute. Likewise the court is requested to order the Respondent to pay the petitioners' costs and attorney fees.**

Jerusalem, 12 June 2008

[T.S. 55992]

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