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At the Supreme Court
Sitting as the High Court of Justice

HCJ 289/09

Re:

1. _____ 'Attar ID No. _____
2. _____ 'Attar ID No. _____
3. _____ 'Attar ID No. _____
4. _____ 'Attar ID No. _____
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9. _____ 'Attar
10. _____ 'Attar
11. _____ Gaba'in
12. _____ Gaba'in
13. _____ Abu Halimah
14. _____ Abu Halimah
15. _____ Abu Halimah
16. **HaMoked: Center for Defence of the Individual
founded by Dr. Lotte Salzberger - registered non
profit organization**

Represented by attorneys Sigi Ben-Ari (lic. no. 37566) and/or Abir Joubran-Dekoar (lic. No. 44346) and/or Yotam Ben Hillel (lic. No. 35418) and/or Hava Matras-Iron (lic. no 35174) and/or Ido Blum (lic. no. 44538) and/or Nirit Haim (lic. no, 48783) and/or Daniel Shenhar (lic. no. 41065)

Of HaMoked: Center for Defence of the Individual
founded by Dr. Lotte Salzberger
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The Petitioners

- Versus -

1. **The Israel Defence Forces**
2. **The Israel Prison Service**

3. **The Israel Police**
4. **The State of Israel**

Represented by the State Attorneys
29 Salah a- Din Street, Jerusalem , 91010

The Respondents

Petition for a Habeas Corpus Order

A petition for an *Order Nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause:

- a. With regard to respondent 1 - why it will not desist from the policy of not delivering information as to the fate of petitioners 1-15 (hereinafter: the “**petitioners**”) and other Palestinian residents of the Gaza Strip, which to the best of our knowledge have been detained by the forces of respondent 1.
- b. With regard to respondent 1 – why it will not inform petitioner 16 (hereinafter: “**HaMoked**” or “**HaMoked: Center for Defence of the Individual**”) whether the petitioners are being held by it or by another party acting on its behalf – where they are being held and by virtue of which law; and if they have been released or have been transferred to another factor – when, where, and by whom, and what does it know about their present whereabouts. In the event that the petitioners are being unlawfully held by an Israeli authority, the court shall be requested to order their release.
- c. With regard to respondent 1- why it does not possess updated information with respect to the place of detention of each detainee, resident of the Gaza Strip, who is being held by one of the State Authorities.
- d. With regard to respondents 1-3 – in the event that the petitioners are being held by any one of these – why will they not lawfully register, at the time of the operations, the place of detention of other detainee residents of the Gaza Strip.

Request for an Urgent Hearing

The honorable court is requested to set a date for an urgent hearing on this petition.

This petition is concerned with the most basic right of a detainee who was detained by one of Israel’s security factors, namely that his detention and the place where he is being held be made known. Dependent upon this right is the realization of the other rights of the detainee – the right to legal representation, to the court’s intervention with respect to the conditions of his detention, etc. This right also includes the right of the detainee’s family to be informed of the fate of their child, and where he or she is being held.

Pursuant to reports in the media over the recent days, and from reports from human rights activists in the Gaza Strips, dozens of Palestinians were detained by the Israeli Defence Force within the framework of the “Cast Lead” operation. HaMoked: Center for Defence of the Individual has been working for a number of days trying to locate missing Palestinians, who, according to the information that we have received were detained by the forces of respondent 1, but about whom respondent 1 refuses to divulge any information.

The passing of time merely increases the uncertainty, the worry, and the fear for the fate of the petitioners and for others in their situation. The passing of time also frustrates – each and every moment – the realization of the most basic of human rights.

In the event that it turns out that the petitioners, or some of them were not detained by respondent 1, a reasonable suspicion is then raised that they were buried beneath the rubble and/or are in need of emergency medical care so that there is therefore an urgent necessity to locate them in the field

If they are still in the custody of the State Authorities, both the family and the human rights organizations have a right to be immediately informed of their whereabouts and to appoint an attorney to represent them in detention proceedings.

In a number of habeas corpus petitions that were filed by petitioner 16 with the honorable court, in the case of residents of the territories who were detained by Israel’s security forces, the court held that a maximum period of **24 hours** may pass before the respondent must answer the petition. Thus, for example was the case in H CJ 10447/07 **Dabek v. Commander of the IDF Forces in the West Bank.**

The grounds for the petition are as follows

1. The petitioners are Palestinian residents of the Gaza Strip whom, to all appearances, were detained by the forces of respondent 1. The family members and friends of the petitioners approached human rights organizations and activists in Gaza to assist them with locating the petitioners. On 7 January, 2009, these organizations and activists approached the HaMoked: Center for Defence of the Individual with a request to locate the petitioners. In light of the situation in Gaza, HaMoked was unable to establish contact with the petitioners’ family members in order to clarify with them the identity document numbers and other particulars relating to them.
2. **It should be emphasized that in addition to the petitioners, HaMoked: Center for Defence of the Individual has a long list of additional names of Palestinians from the Gaza Strip, who apparently were detained by respondent 1, but the latter refuses to deliver any information in their cases.**
3. On 7 January 2009, HaMoked: Center for Defence of the Individual applied to the IDF Detentions Control Center with a request to clarify what had happened to the petitioners, and to the dozens of other residents of the Gaza Strip and at which detention facility they were being held.

4. Today HaMoked was informed by the IDF Detentions Control Center that they are not permitted to divulge any information about the petitioners or about others in their situation.
5. HaMoked: Center for Defence of the individual is a human rights organization. Amongst its other activities, it assists in the locating of detention facilities of detainees who were detained by the Israeli security forces

The legal argumentation

Notice of the detention of a person and the place where he is being held – the obligation of respondent 1.

6. There is no need to overstate the importance of the right to receive notice with respect to the detention of a person and the facility in which he is being held. This right is a basic right – both of the detainee and of his family members. This right constitutes an integral part of the basic right to human dignity. A state regime that is not scrupulous on maintaining this right, but which conceals and hides persons under their custody from their family members for significant periods of time, acts in a cruel manner and severely harms the human character of the detainee and his family.

7. In the rulings of the honorable court the aforesaid right to receive information has also been recognized as a basic right. As stated in the dicta of the Deputy Chief Justice M. Elon in H CJ 670/89 **Odeh v. Commander of the IDF Forces in the Judea and Samaria Region**, *Piskei Din* 43(4), 515, 517:

The duty to give this notice is a direct outcome of the basic right that is granted to every person who is lawfully detained by the State Authorities, and it rests upon the latter to bring the matter of the detention to the knowledge of his relatives, so that they should be informed of what had happened to their detained relative, and thus know how to extend the necessary assistance to him in order to protect his liberty. **This right is a natural right, and is derived from the right to human dignity and from the general principles of justice, and is granted to the detainee himself, as well as to his relatives.**

8. Relying on this basic right the Supreme Court sanctioned as a judgment an arrangement that had been reached by the parties within the framework of H CJ 6757/95 **Hirbaoy v. Commander of the IDF Forces in the Judea and Samaria Region** in terms of which:

A) Upon the detention of a resident of the region, a notice of his detention and of the place of his detention shall be delivered without delay through placing a telephone call to a telephone number which the detainee shall provide to a detaining officer.

The detaining officer shall deliver the notice telephonically as aforesaid, and shall register in a form that shall be prepared for this purpose, the details of this notice that is being delivered and the particulars of the person receiving the notice

In the event that the detainee so requests, a message shall be delivered telephonically also to an attorney whom the detainee has specifically named and whose particulars he has provided, the detaining officer shall notify the detainee of this right...

B) The IDF Control Center (whether it be the actual control center or whether it be another factor) **shall receive from all factors... updated information as to the detention and place of detention of the detainee once per 24 hours, in such a manner that it shall be possible to locate the detainee, following a written application by a foreign factor.**

C) The IDF Control Center shall provide details from the aforesaid information, following a written application by a public organization that is engaged in these matters, and/or following a written application by a duly authorized attorney who represents the detainee or his family.

After delivering this written application the applicant shall be able to receive the information via the telephone.

9. The issue of tracking down detainees was also discussed in the decisions of the (then) honorable Registrar Boaz Akun in HCJ 9332/02 **Gerar v. Commander of the IDF Forces**. In his decision the honorable registrar held that:

The delivery of information constitutes a means of control and supervision, but also has humanitarian importance from the perspective of the detainee who at once loses control over his life. The report has significance, whose importance cannot be overstated from the perspective of the family members, whose relative disappeared “without explanation”. The protection afforded by the publicity constitutes a guarantee against negatively exploiting the power to detain, and prevents an unrestrained use of this power. Indeed the power of the state, regardless of the good intentions of the parties is massive. Failure to report is bound to make this power lose all sense of proportion, even if it is explained within the context of security considerations. Relinquishing this duty or modifying it contains within it clear risks. Experience has taught us

that using excessive force that is not bound to the circumstances of the time creates a new reality. This power is not like a boomerang - when you release it does not return. Therefore the authority is ordered to be very scrupulous in everything to do with exercising the powers of detention. **This scrupulousness requires an immediate report of the detention itself.**

10. This basic right also found expression in the guidelines of the Attorney General (Guideline 4.3002 dated 4 January 2004) in which it was stated: **“the obligation to give notice of a detention of a person has been recognized in the court rulings as a basic right of the detainee and his relatives, which is derived from human dignity and general principles of justice”**
11. Therefore it is one of the obligations of respondent 1 to deliver notice about the detention of each and every person by its forces and to maintain updated information as to the place of detention of each and every detainee. There is also no dispute that the State has an obligation to assist in the locating of every missing person, so long as it has information that will enable one to reveal what was his fate. What is at stake here are the most basic human rights to liberty, to life, and to physical integrity.
12. From here we may deduce the three preliminary reliefs that are being sought in the petition which are concerned with the obligation of the respondents to deliver notice of the detention and place of detention of a person, and the obligation of respondent 1 to maintain updated information with respect to the detention and place of detention of every detainee who is being held by one of the branches of the State.

Registering the petitioners in their place of detention

13. It is self understood that every detainee has a right that his place of detention be clearly and openly known to all. The registering of the detainee in his place of detention is an essential condition for realizing his rights. Only in such a case are his family and attorney able to clarify with those responsible for the place of his detention what his status is, his health situation, the conditions of his detention, and if and when it would be possible to visit him, etc. Only in such a scenario is one able to act to realize his rights as a detainee. Even the rights of a detainee to be present at legal proceedings that are being conducted against him are dependent upon his orderly registration in his place of detention.
14. The non registration of the detainee in his place of detention severely harms his basic rights, and that of his family. A state system that is not scrupulous about registering the detainee in his place of detention and on the ability to receive ongoing information on the basis of this registration, does not fulfill its obligations and is derelict in its duty.
15. The immediate registration of the detainees is laid out in legislation and in ordinances both with respect to detainees held by respondent 2 and with respect to detainees held by respondent 3.

16. This petition, by its very nature cannot be supported by affidavits and by powers of attorney of the petitioners. Attached to this petition is an affidavit and power of attorney on behalf of HaMoked: Center for Defence of the Individual which relates to the receipt of notices pertaining to the petitioner at its office and pertaining to its activities in our case.

For all these reasons the honorable court is requested, as a matter of urgency, to issue a habeas corpus order as requested at the beginning of this petition, and after receiving the respondent's response, make it absolute. The court likewise is requested to order the respondent to pay the petitioners' costs and attorney fees.

Jerusalem, 8 January, 2009

[T.S. 58892]

Adv. Sigi Ben-Ari
Counsel for the petitioners

Affidavit

I the undersigned, Orli Barmak , ID number 038254942 after being warned that I must tell the truth, and that I shall be subject to statutory punishment if I do not do so, hereby declare in writing as follows:

1. I make this affidavit in support of the petition for a habeas corpus order in the cases of the petitioners, residents of the Gaza Strip. I am petitioner 1.
2. I am the complaints coordinator at HaMoked: The Center for the Defence of the Individual, founded by Dr. Lotte Salzberger.
3. All the details pertaining to the attempts at locating the petitioners are correct and have been recorded in an accurate manner.
4. I declare that this is my name, this is my signature, and that the contents of this affidavit are true and correct.

Orli Barmak

I hereby certify that on 8 January, 2009 the aforesaid, with whom I am personally acquainted appeared before attorney Sigi Ben-Ari at the offices of HaMoked: Center for Defence of the Individual, at 4 Abu Obeidah Street, Jerusalem, and after I warned her that she must tell the truth and that she is subject to statutory punishment if she does not do so, she confirmed the accuracy of the above affidavit and signed it, before me and in my presence.

Adv. Sigi Ben-Ari