At The Supreme Court **HCJ 2820/07**
Sitting as the High Court of Justice

In the matter of:

1. **_____ Sliman**
   Detainee, without an identity card, of Qalqiliya
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

Represented by attorneys Sigi Ben-Ari (Lic. No. 37566) and/or Yossi Wolfson (Lic. No. 26174) and/or Yotam Ben Hillel (Lic. No. 35418) and/or Hava Matras-Iron (Lic. No. 35174) and/or Abeer Jubran (Lic. No. 44346) and/or Anat Kidron (Lic. No. 37665) and/or Ido Bloom (Lic. No. 44538)
Of HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
4 Abu Obeida Street, Jerusalem 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

Commander of the IDF Forces in the West Bank

The Respondent

Petition for Order Nisi

A petition is hereby filed for an Order Nisi directed at the Respondent and ordering him to give cause:

a. Why the Petitioner shall not be immediately released to his home in the West Bank;

b. If there is a deportation order against the Petitioner, why such order should not be canceled;

c. Alternatively, why the Respondent should not, according to his prior commitments, hold a detention court, within which the Petitioner's deportation order will be subjected to judicial review.

Application for an Interim Order

An application is hereby filed for an Interim Order, ordering the Respondent or whomever on his behalf to avoid deporting the Petitioner from the West Bank Territories pending the issuance of a decision in this petition.

Application for an Urgent Hearing

The Court is hereby moved to order an urgent hearing of the petition in view of the length of time in which the Petitioner has been held in detention – three full years – according to an administrative decision and without any judicial review.

The Arguments for the Petition are as follows:

1. This petition concerns the extended detention of the Petitioner – three consecutive years – a detention by an administrative authority, without providing the right to a hearing and without any judicial review. This detention harms the Petitioner in a fatal and disproportionate manner and requires his immediate release.

The Parties and Exhaustion of Administrative Proceedings

2. Petitioner 1 (hereinafter: the Petitioner) was born in Kuwait in 1984. His parents, residents of the village of Far'ata in the Qalqiliya district, married one

another in 1966 and immigrated to Kuwait, where all six of their children were born. In 1987, the family immigrated to Jordan. The parents and two of their children, including the Petitioner, returned to the Territories in 1998. The Petitioner's sister married a resident of the West Bank in 1990 and received a Palestinian identity card.

3. The Petitioner, who at the time was a fourteen year old minor, entered the Territories lawfully on his mother's visitor's permit. He attended a high school in Qalqiliya. Upon his graduation he worked at a Bir Zeit restaurant for approximately one year, and in 2002 began studying veterinary medicine at An-Najah National University in Nablus.

4. In his affidavit (paragraph 4) the Petitioner says as follows: **My entire life is in the territories and so is my future. My parents and all of my extended family are here. I want to continue attending the university.**

5. On 22 March 2004, for the first time in his life, the Petitioner was detained in Nablus, after being caught at one of the city's checkpoints without an identity card. He was taken to the Huwwara detention facility where he was told that a deportation order had been issued against him. The Petitioner never saw or received the deportation order.

6. After approximately one month of detention at Huwwara, the Petitioner was transferred to Ofer Prison Camp and from there to Megiddo Prison. He has been held at Ohole Qedar Prison in Be'er Sheva since the month of __ 2005.

7. In May 2005, the authorities tried to deport the Petitioner to Jordan. The Jordanian authorities refused to receive him and he was returned to detention.

8. Since his detention three years ago, the Petitioner has not been brought before any judicial instance.

9. Since his detention three years ago, the Petitioner has received no family visit.

10. Prior to his current detention, the Petitioner had never been detained, interrogated or involved in any security matter.

11. Petitioner 2 (hereinafter: "**HaMoked**" or the "**Center for the Defence of the Individual**") is a registered association that operates as a human rights organization for the protection of human rights in the Occupied Territories.

12. The Respondent holds the West Bank territories under belligerent occupation. In accordance with humanitarian international law, international human rights law and the Israeli constitutional and administrative law, he is responsible for realizing the human rights of the residents of the occupied territory under his jurisdiction.

13. On November 8, 2006, the Center for the Defence of the Individual addressed the office of the legal advisor to the Respondent with a request to receive the deportation order against the Petitioner, if any existed. It also sought cancellation of the order, release of the Petitioner from his detention and, alternatively, immediate judicial review of the order.

    A copy of the letter sent to the Respondent's legal advisor on November 8, 2006 is attached hereto as Annex **P/1**.

14. A reminder of the Petitioner's case was delivered to the Respondent's legal advisor on December 5, 2006.

    A copy of the reminder delivered to the Respondent's legal advisor on December 5, 2006 is attached hereto as Annex **P/2**.

15. More than four months have gone by and no response has been received.

The Legal Argumentation

The Responsibility of the Military Commander for Realization of Human Rights in the Territories

16. The military commander is the one responsible for realization of the human rights of the residents and inhabitants in the Territories:

> **In the context of his responsibility for the welfare of the region's residents, the commander must also ensure the provision of proper protection to the constitutional human rights of the region's residents, under the limitations imposed by the factual conditions and circumstances in the field… The region's commander must exercise his authorities to maintain the security and public order in the region while protecting human rights** (HCJ 10356/02 *Hass v. The Commander of the IDF Forces in the West Bank, GOC Central Command Piskei Din* 58(3) 443, 460-461, hereinafter: the "**Hass Affair**").

See also: HCJ 2056/04 *Bet Sourik Village Council et al. v. The Government of Israel et al. Piskei Din* 58(5) 805, Section 34.

17. There is no significance to whether a person's stay in the region is legal:

> **He is subject to this duty** (to ensure their well-being, safety, welfare S.B.A.) **with respect to all residents, without distinction as to their identity – Jews, Arabs <u>or foreigners</u>. <u>We are, at present, not required to decide the issue of the legality of the various population sectors' stay in the region. The duty of the region's commander to protect their safety and human rights derives from their mere presence in the region</u>** (emphasis added, S.B.A). **This corresponds with the humanitarian aspect of the military force's responsibility in belligerent occupation** (the Hass Affair, id.).

<u>The Right to Personal Liberty and the Protection thereof by Means of Judicial Review</u>

18. The right to personal liberty, along with the right to life, is a most important basic constitutional right that is established in the Basic Law: Human Dignity and Liberty, and is an essential condition for the realization of the other human rights:

> **Personal liberty is a constitutional right of the utmost importance, and as a practical matter, it is a condition for exercising other basic rights. The violation of personal liberty, like a stone hitting water, creates expanding circles of infringements of additional basic rights: not only the freedom of movement, but also the freedom of expression, the right to privacy, property rights, and other rights… For that reason, the denial of personal liberty is a particularly serious infringement** (HCJ 6055/95*, Tsemah v. The Minister of Defense, Piskei Din* 53(5) 241, 263-264 (hereinafter: the "**Tsemah Affair**").

19. The denial of liberty by means of detention or holding in custody is a harsh and harmful measure. The denial of liberty by an administrative agency is even worse and therefore requires special protection:

> **The denial of personal liberty, through imprisonment, is the harshest punishment that a well-ordered state imposes on criminals. *Detention by an administrative agent, such as a police officer, is the most serious form of infringement on personal liberty*** (emphasis added, S.B.A.)… **In principle, the level of protection accorded to a basic right must be directly proportional to the importance of the right and the degree to which it is infringed upon**... **The conclusion is that personal liberty, being a constitutional right of special importance, deserves special protection against infringement via detention at the hands of an administrative agency** (the Tsemah Affair, ibid.).

20. The special protection of personal liberty as a constitutional right of the utmost importance is achieved by judicial review of the administrative agency's decision:

> **Human liberty is too precious to be placed solely in the hands of the military commander… Judicial review is the line of defense for liberty, and it must be preserved beyond all else** (HCJ 2320/98, *Al Amaleh et al. v. IDF Commander in Judea and Samaria et al. Piskei Din* 52(3) 346, 350).
>
> **Judicial intervention is the barrier to arbitrariness; it is called for by the principle of the rule of law… The accepted basic approach is that judicial intervention is an integral part of the detention process. Judicial review is not "external" to the detention. It is an inseparable part of the actual perfection of the detention itself. At the basis of this approach lies a constitutional conception which deems judicial intervention in detention proceedings an essential condition to the protection of individual liberty. Therefore, the detainee need not "appeal" his detention before a judge. Appearing before a judge is an "internal" element of the detention process** (HCJ 3239/02 *Mar'ab v. The Commander of the IDF Forces*, Takdin Elyon 2003(1), 349, 368) (hereinafter: the Mar'ab Affair).

21. Owing to the special importance of the prejudiced right, the nature of judicial review of a detention by an administrative agency is different from ordinary judicial review of administrative authority exercised. The judicial body does not stop at examining whether the exercise of the authority lies within the range of reasonableness, but also steps into the agency's shoes and may replace its considerations.

22. The following has been said of judicial review of administrative detention:

> **The judicial review is material … The Military Court and the Military Court of Appeals can question the reliability of the evidence material, and not merely examine whether a reasonable agency would have made the same decision on the basis of the said material… This judicial review is an internal part of the establishment of the legality of the administrative detention order, or of the establishment of the legality of an extension thereof** (HCJ 5784/03 *Salama v. IDF Commander in Judea and Samaria et al. Piskei Din* 57(6) 721, p. 726-727).

23. Correspondingly to this basic conception, the various instructions of the law that relate to the denial of liberty by means of detention include a clear instruction as to the obligation of performing judicial review. A review of those instructions may be found in the Mar'ab Affair, p. 368 forth:

In **criminal detention**, the detainee is to be brought before a judge within 24 hours (Section 29(a) of Hok Seder HaDin HaPlili (Samkhuyyot Akhifa – Ma'atsarim) [the Criminal Procedure (Enforcement Powers-Detentions) Law], 5756-1996). In this case, the order is issued by the judge himself.

In **administrative detention**, the administrative detention order is to be brought before the chief justice of the district court within 48 hours (Section 4(a) of Hok Samkhuyyot Sh'at Herum (Ma'atsarim) the Emergency Powers (Detentions) Law, 5739-1979).

When detaining an **Unlawful Combatant**, the detainee is to be brought before a justice of the district court within 14 days of the issuance of the imprisonment order by the Chief of Staff (Section 5 of Hok Kli'atam Shel Lohamim Bilti Hukkiyyim [the Imprisonment of Unlawful Combatants Law], 5762-2002).

With regard to the detention of **Military Soldiers**, Section 237A of Hok HaShipput HaTsva'i [the Military Justice Law], 5715-1955 provides that the

soldier is to be brought before a judge within 96 hours, henceforth the order is issued by the judge. The Supreme Court reviewed this provision, and ruled that it was unconstitutional, as it violated liberty disproportionately. Therefore, the law was amended to provide that the detainee soldier be brought before a judge within 48 hours.

A **Detained Undocumented Foreigner** is to be brought before a court as soon as possible and no later than 14 days from the commencement of his detention (Section 13N of Hok Haknisa LeIsrael [the Entry into Israel Law], 5712-1952). The law even explicitly provides (Section 13N(d)) that denying judicial review within the determined time frame constitutes grounds for discharge, even if it means that an undocumented foreigner will walk around freely and this fact may prevent the possibility of deporting him from Israel in the future.

24. The military legislation in the West Bank also provides instructions requiring that a detainee be brought before a judge:

Tsav Bidvar Hora'ot Bittahon [the **Order Regarding Defense Regulations]** (No. 378) provides that a detainee is to be brought before a judge within eight days after his arrest.

According to **Tsav Bidvar Atsurim Minhaliyyim [the Order Regarding Administrative Detainees]** (No. 1226) an administrative detainee is to be brought before a judge for judicial review within eight days after his arrest.

Among other things, the abovementioned Mar'ab Affair discussed the legality of **Tsav Bidvar Ma'atsarim Be'et Lehima [the order regarding Detention in Time of Warfare]** (Number 1500) (hereinafter: "Order 1500"), which provides that a detainee who is detained according to this order is to be brought before a judge for judicial review within eighteen days after his arrest (and within twelve days in the amended order). The judges believed that a period of eighteen or twelve days deviated from the proper standard and that the detainee should be brought before a judge for judicial intervention shortly

after the initial detention by an authorized officer. The judges cited Shamgar, Chief Justice of the Supreme Court, who said:

> **It would be proper for the authorities to act effectively to reduce the period of time between the detention and the submission of the appeal, and the judicial review** (HCJ 253/88 *Sajdiya et al. v. Minister of Defense, Piskei Din* 42 (3) 801, p. 375).

The Judicial Review of the Detention: the International Law

25. In the Mar'ab Affair (Section 27 forth) Barak, former Chief Justice of the Supreme Court, gave an overview of international law regarding the obligation to exercise judicial review of detention procedures. We need do nothing but quote him almost entirely:

> **International law does not specify the number of days during which a detainee may be held without judicial intervention. Instead, it provides a general principle, which is to be applied to the circumstances of each and every case. This general principle, which pervades international law, is that the question of detention is to be brought promptly before a judge or other official with judiciary authority. See F. Jacobs and R. White, The European Convention On Human Rights 89 (2nd ed., 1996). Thus, for example, Article 9.3 of the Covenant on Civil and Political Rights-1966 provides:**
>
> > **"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by the law to exercise judicial power.**

This provision is perceived as part of customary international law. See N. Rodley, The Treatment of Prisoners Under International Law 340 (2nd ed., 1999). A similar provision may be found in the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which was ratified by the UN General Assembly in 1988 (hereinafter: the "Principles of Protection from Detention or Imprisonment"). Principle 1.11 provides:

> **"A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority".**

According to the interpretation of the UN Human Rights Committee, "Delays must not exceed a few days." See Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), quoted by Rodley, Id., at 335. On a similar note, Article 5(3) of the European Convention for the Protection of human Rights and Fundamental Freedoms-1950 provides:

> **"Everyone arrested or detained in accordance with the provisions of paragraph 1(C) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."**

In one of the cases in which the European Court of Human Rights interpreted this provision, it stated:

> **"The degree of flexibility attaching to the notion 'promptness' is limited, even if the**

> **attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority" (Brogan v. United Kingdom, (1988) 11 EHRR 117, 134).**

In that case, the British authorities had been holding a number of detainees, who had been detained with regard to terrorist activities in Northern Ireland. They were released after four days and six hours, without having been brought before a judge. The European court determined that in so doing, England had violated its duty to bring the detainees before a judge promptly. A number of additional cases were similarly decided…

Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter: the "Fourth Geneva Convention") includes a general provision under which:

> **"Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected**

> **especially against all acts of violence or threats thereof and against insults and public curiosity."**

The Fourth Geneva Convention does not include provisions which specify set detention periods or occasions for judicial intervention with regard to detention. It only includes provisions concerning administrative detention (internment). The first provision, Article 43, which applies to detentions carried out by the occupying state, provides:

> **"Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."**

The second provision, Article 78, which applies to detentions carried out in the Occupied Territory, provides:

> **"Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay."**

<u>The Order Regarding Prevention of Infiltration and the Absence of a Binding Judicial Review Provision</u>

26. The Order Regarding Prevention of Infiltration (Judea and Samaria) (No. 329) 5729-1969 (hereinafter: the "**Order**" or the "**Order Regarding Prevention of Infiltration**") does not include a binding provision regarding exercising judicial review of a deportation decision or a decision to hold a person in custody. For the purpose of discussing the obligation to exercise judicial review, holding a person in custody is deemed as detention for all intents and purposes. And as the Honorable Justice R. Shapira once said: **The custody proceeding constitutes, in fact, detention until completion of the proceedings**. **The proceedings are the proceedings of expulsion from Israel** (A.A. (Haifa) 379/06 *John Doe v. Ministry of the Interior*, unpublished, issued on 24 January, 2007) (hereinafter: the "**John Doe Affair**"). This, as aforesaid, is contrary to basic rights and basic principles of the legal system and contrary to international law.

A copy of the Decision in A.A. (Haifa) 379/06 is attached hereto as Annex **P/3**.

27. The Supreme Court has severely criticized the absence of a judicial review requirement in the Order, and has mentioned this on more than one occasion. The state, on its part, has committed promptly to establish a procedure for judicial review of deportation and detention within the Order.

28. Already in 2004 the Supreme Court judges stated:

> **We wish to emphasize what we have also said to the parties' counsel in the hearing before us: The state ought to act promptly to create an "internal" judicial review mechanism – alongside the review of this court – over the detention of persons who were expelled by virtue of the region's security legislation… As any process of freedom denial, also the detention of such expelled persons should be exercised according to clear and defined rules, and should be subject to periodic judicial review** (HCJ 2737/04, _____

Kafarna v. Commander of the Gaza Strip Region et al., Takdin-Elyon 2004(4) 2040).

29. And so the state had committed before the Supreme Court in 2005:

> **… determining judicial review procedures is appropriate and required according to the principles of customary international law… and indeed, as the Respondent has announced, the state is acting to promptly create an internal judicial review mechanism - alongside the review of this court – over the holding in custody of persons who are designated to be deported. The creation of this mechanism ought to be completed within a reasonable time frame** (HCJ 7607/05, _____ *Abdalla (Husein) v. Commander of the I.D.F. Forces in the West Bank et al., Takdin-Elyon* 2005(4), 2859, p. 2862). (Judgment dated December 14, 2005).

30. And again in July 2006:

> **The writ of response indicates that the staff work on this matter is not yet concluded, and for now the relevant legal advisors have been instructed to periodically examine the detainees' case and instruct accordingly. <u>We are repeating our hope that the establishment of a judicial review mechanism shall be completed shortly</u>** (emphasis added, S.B.A.).
>
> **Considering the complex circumstances in which the State of Israel operates with regard to the Judea and Samaria and the Gaza Strip regions, there is great importance that the procedural arrangements be the best possible, and even if there is no judicial review requirement in the Fourth Geneva Convention, as Chief Justice Barak has noted, the spirit of the international law, and moreover the principles**

> **and spirit of the Israeli law, justify such a mechanism. This is so, in my opinion, not only for the appearance of justice, which is very important, but more so for justice itself, to prevent, as much as possible, errors that may occur in a human system** (HCJ 4887/06 _____ *Oda v. Commander of the I.D.F. Forces in the West Bank et al., Takdin-Elyon* 2006(3), 709, p. 711).

Violation of the Rules of Natural Justice

31. The exercise of the authority of the military commander in the region must uphold the principles of Israeli administrative law on the exercise of the governmental authority of a civil servant, including responding within a reasonable time frame and operating according to the rules of natural justice, governmental decency and reasonable administrative practice.

> **It is a cornerstone of administrative-public law that an administrative agency, being a trustee of the public, must act with decency… the decency requirement relates to the administrative procedure, namely, the manner in which the administrative agency exercises its authority vis-à-vis the citizen. This decency is manifested by various obligations. For example, the obligation to carry out a reasonable examination of the case's circumstances, the obligation to hear out the citizen's arguments, the obligation to allow him to study the relevant documents and the obligation to give reasons for a decision. These obligations have a common denominator: the obligation to treat the citizen properly** (HCJ 164/97 *Conterm Ltd. v. Ministry of Finance – Department of Customs and VAT, Piskei Din* 52(1) 289, p. 319).

See also:

HCJ 2056/04 *Bet Sourik Village Council et al. v. The Government of Israel et al., Takdin-Elyon* 2004(2) 3035, p. 3044, Section 23 forth; HCJ 3278/02 *HaMoked: The Center for the Defence of the Individual v. Commander of the IDF Forces in the West Bank, Piskei Din* 56(1) 386, Section 23; HCJ 392/82 *Jam'iyyat Iskan Al-Mu'aliman v. Commander of IDF Forces in Judea and Samaria et al., Piskei Din* 37(4) 785, pp. 792-793; Y. Zamir, *The Administrative Authority*, Nevo Publishing Co., Jerusalem, 1996, Vol. 2, pp. 897-898.

32. The Supreme Court views the "preliminary hearing" in the administrative law discipline as one of the rules of natural justice (HCJ 3/58, *Berman v. Minister of the Interior, Piskei Din* 12, 1493, p. 1503; HCJ 290/65, *Elghar v. The Mayor of Ramat Gan, Piskei Din* 20 (1) 29, p. 33; HCJ 654/38, *Gingold v. The National Labor Court, Piskei Din* 35 (2) 649, p. 654; Cr.A. 768/80, *Shappira v. The State of Israel, Piskei Din* 36 (3) 337, p. 363).

33. The more grave and irreversible are the consequences of the governmental decision, the more it is essential that the relevant person be able to voice his objections and present his response to the claims made against him, so he can try to refute them (HCJ 5973/92 *The Association for Civil Rights in Israel v. Minister of Defense, Piskei Din* 47(1) 267, pp. 285-286).

34. Such, of course, is the case regarding the administrative decisions of the Respondent:

> **Conversely, in the view of this Court, an office holder does not generally fulfill his duty by merely abiding by what the rules of international law require of him. Since more is demanded of him as an Israeli agent in the area of Military Government, he must also act in accordance with principles that constitute fair and orderly administration. Thus, for instance, the Laws of War do not reveal any firmly embodied rule about the right to be heard, but an Israeli authority will not have discharged its duty when its acts are**

> **judicially reviewed by this Court for not respecting that right in those cases where it arises under the norms of our own Administrative Law** (HCJ 69/81 _____ *Abu 'Ita v. The Regional Commander of Judea and Samaria*, *Piskei Din* 37(2) 197, pp. 226-227).

From the General to the Particular

35. The Petitioner's constitutional right to personal liberty and his right to due process have been denied from him by the Respondent. This is the same Respondent that is obligated to defend the rights of the Petitioner as a resident of a region under belligerent occupation.

36. The Petitioner's liberty was denied by way of detention – the harshest and most destructive means of liberty denial. Moreover, the detention was carried out by an administrative agency, a fact that aggravates the degree of harm inflicted upon the Petitioner's right and therefore requires special protection in the form of broad and significant judicial review.

37. The Petitioner never saw or received the deportation order, which apparently has been issued against him and serves as the basis for his detention, nor, consequently, has he been given an opportunity to argue against it. In so doing the Respondent blatantly violated the rules of natural justice and the Petitioner's right to voice his arguments before the violating administrative agency.

38. The special protection that must be provided to a person detained by an administrative agency has been denied from the Petitioner. No judicial review of the detention was exercised – *a detention lasting three whole years*. The reasonableness and the proportionality of the detention were not examined. The justification to the deportation was not reviewed. The possibility of deporting the Petitioner or releasing him on bail was not examined as well. Thus the violation of the Petitioner's basic rights, which was fatal in the first place, was aggravated many times over. Thus were prevented the perfection of

the Petitioner's detention and the establishment of the legality of the order issued against him. In this fashion, the Respondent acted contrary to the basic principles of Israeli law and contrary to international law.

39. It is fitting to mention again that in the Mar'ab Affair, a temporary order that enabled to hold a person in detention for eighteen days without judicial review was nullified, and this under circumstances of warfare in the territories (Operation Defensive Wall), in which thousands of Palestinians were detained and the Respondent asserted great difficulty in coping with so many detainees and limited interrogation resources.

40. Contrary to the requirement of the HCJ and the commitment made by the Respondent's representatives before the court, no arrangements were made for judicial review of detention by virtue of the Order Regarding Prevention of Infiltration. Despite the HCJ's demand that a review mechanism be completed shortly and despite the Respondent's commitment to do so within reasonable time, the Petitioner has been held in detention for three full years without any judicial instance having reviewed his case.

Balancing the Petitioner's Right to Liberty Against Other Interests

41. The Respondent will claim that his obligation to protect the Petitioner's rights is not absolute, and must be balanced against opposite interests that are also within his responsibility. A case of denial of a person's right to liberty by means of detention exercised by an administrative agency concerns the case law on the need to protect the interest of preserving the public's safety from nearly certain danger:

> **Sometimes this protection** (of the region's inhabitants' human rights, S.B.A.) **requires ruling between opposing human rights. This kind of ruling requires a balance that withstands the constitutional test, i.e.: the existence of a worthy purpose and proportionality in the violation of the one right in order to allow the relative fulfillment of the**

> **other… The protection of life's safety is a condition for fulfillment of the rights of the individual, and therefore the importance of this protection prevails over the constitutional right,** ***where there is proper probability, in the sense of "near certainty", that the fulfillment of the right may severely prejudice public safety*** (The Hass Affair, pp. 460-461, emphasis added, S.B.A.).
>
> See also:
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> ADA 8607/04 ____*Fahima v. State of Israel*, *Piskei Din* 59(3) 258, pp. 262-264; HCJ 6358/05 _____*Vanunu v. the Commander of Homefront Command Yair Neve et al., Takdin Elyon* 2006 (1) 320; HCJ 448/85, *Daher v. Minister of the Interior, Piskei Din* 40(2) 701; HCJ 253/88 *Sajadia et al v. Minister of Defense, Piskei Din* 42 (3) 801, p. 821.

42. Yet, in our matter, there is no security suspicion against the Petitioner. As far as we know, the Respondent is not claiming that the detention of the Petitioner was intended to prevent nearly certain danger of harming the public's safety, and the harsh infringement of the Petitioner's right to personal liberty and due process cannot be balanced against the security interest. With regard to this issue the following was stated:

> **Detentions which are not based upon the suspicion that the detainee endangers, or may be a danger to public peace or security, are arbitrary. The military commander does not have the authority to order such detentions** (The Mar'ab Affair, p. 366).

43. If judicial review of the Petitioner's case had been exercised, the question of how, if at all, it is possible to detain the Petitioner in the absence of any decisive security grounds, would have been examined.

44. The Respondent may claim that even if there are no essential security grounds in the Petitioner's case, there are grounds of preserving the public order, one of the components of which is expelling persons with no status from the Territories.

45. Will the expulsion of the Petitioner indeed serve the interests of safekeeping orderly public life in the Territories? The Petitioner is a normative individual who grew up and was educated at the schools in the Territories. He is involved in the Territories' society and culture and is studying a profession that is needed there. There is no claim that his stay or the stay of similar individuals in the Territories leads to any negative results in the employment market, a burden to the welfare and healthcare systems, etc. For these matters, before the Petitioner's case is decided, the position of the Palestinian Council, to which the Respondent has entrusted the civilian issues, ought also to be heard.

46. Nevertheless, even if we assume that the expulsion of the Petitioner passes the test of existence of a worthy purpose, there is still a need to examine whether the violation of the Petitioner's right to personal liberty is proportionate, relative to the interest of expelling persons of no status in the Territories:

> **…both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing between the authority of the military commander in the area and the needs of the local population… This sense of the principle of proportionality also applies to the exercise of authority by the military commander in an area under belligerent occupation** (HCJ 2056/04 *Bet Sourik Village Council et al. v. The Government of Israel et al., Piskei Din* 58(5) 807, p. 838) (hereinafter: the "**Beit Sourik Affair**").

47. The question of proportionality is examined in light of the following secondary tests: (a) Is the means that was selected suitable for achieving the goal; (b) Is there another means that can achieve the desired purpose while

causing less harm; (c) Is the means selected harmful to the point that the benefit it generates is lesser than the harm it portrays (the Beit Sourik Affair, Sections 40-41; HCJ 6358/05 *Mordechai Vanunu v. the Commander of Homefront Command Yair Neve et al., Takdin-Elyon* 2006 (1) 320, p. 326; HCJ 6336/04 *Mousa et al. v. The Prime Minister et al., Takdin-Elyon* 2006(1) 283, p. 285). Only if these three tests are met, can it be said that the means exercised by the administrative agency is proportionate.

48. The question that must be asked within the first proportionality test – the test of the means that is fitting to the goal – is whether there is a rational correlation between keeping the Petitioner in detention and the purpose that this detention is intended to fulfill, i.e., ensuring the expulsion of the Petitioner from the Territories:

> **The purpose of the detention… is to ensure the departure of a person against whom an order of deportation from Israel has been issued, or until his deportation from Israel. The authority to detain under these circumstances is an auxiliary authority which is intended to ensure the purpose of the deportation order, namely, the departure or deportation of the detainee from Israel. The detention does not exist for serving a punitive purpose… nor does it exist to serve a compulsory purpose. Its sole purpose is to ensure the nearby presence of whoever had a deportation order issued against him for the fulfillment of the order, if this individual has not already left the country of his own will, and to prevent his escape for fear of deportation, when such deportation is about to be carried out** (HCJ 1468/90 *Gid'on Ben Israel v. Minister of Interior et al., Piskei Din* 44(4) 149, pp. 151-152 (emphasis added, S.B.A.), (hereinafter: the "**Ben Israel Affair**").

49. Case law repeatedly prescribes that when expulsion is not achievable, the person against whom a deportation order has been issued cannot be held in continued detention:

> **When it does not appear that an expulsion procedure is being carried out, when the expulsion procedure has failed the basis for keeping a person in custody collapses** (the John Doe Affair, Annex P/3, p. 2).

50. The Ben Israel Affair concerned a petitioner who was an undocumented foreigner, against whom a deportation order had been issued and who had been held in detention for nine months. The petitioner had no citizenship and no country was able to take him in. In the past, the petitioner had renounced his American citizenship and the United States was not willing to take him in unless he expressed his consent thereto, which he was not prepared to do. Despite his refusal to be deported to the United States, the judge ordered his release from detention for the reason that the means of detention does not serve the purpose:

> **In our matter, the Petitioner repeatedly declares that he does not intend to give his consent for deportation to the United States, and according to the facts we have before us, the deportation of the Petitioner against his will does not seem possible in the near future, for the reason that there is no country willing to take him in. The practical meaning of keeping the Petitioner in detention under these circumstances is detention for an indefinite period of time, with no foreseeable solution that will bring an end to the detention.**
>
> **… Once we have concluded that the continued detention of the Petitioner does not serve the purpose for which the detention had been allowed… then there is no justification to continue his detention** (the Ben Israel Affair, id).

51. In the Tai Affair (H.C.J. 4702/94, _____ *Al-Tai et al. v. Minister of Interior Piskei Din* 49(3) 843), it was determined that the rule that was established in the Ben Israel Affair also applies to whomever enters Israel unlawfully, and in this case Iraqi citizens who had infiltrated Israel.

52. In the case of the Petitioner, an attempt was made approximately two years ago to deport him to Jordan, which failed due to the Jordanian authorities' refusal to take him in. Currently, there is no estimation or forecast of a possibility to exercise his deportation in the foreseeable future, and for two years no steps were taken to advance his expulsion. Therefore, since no solution that will bring an end to the detention by way of expulsion is foreseeable, the means selected does not aid in fulfilling the goal.

53. That being the case, the first test of proportionality is not met, and that is sufficient for determining that the means of extended detention, which the Respondent has carried out, is not proportionate.

54. Furthermore, also the third test of proportionality – the benefit produced by the detention being greater than the harm caused to the Petitioner – is not met. On one side of the scales stands the right to personal liberty, a constitutional right of the utmost importance in the hierarchy of human rights, a fact that increases its weight in the total balance. Adjacent thereto stand also the right to family life, the right to an education and the right to dignity and personal expression that are denied from the Petitioner. The weight of all these rights is multiplied by the fact that the Petitioner has been held in detention for three full years. Opposite, on the other side of the scales, stands the Respondent's interest in expelling residents with no status from the Territories.

And so, even if the Petitioner's detention produces the benefit that the Respondent wishes to achieve, namely the expulsion of the Petitioner from the Territories, which is highly doubtful as aforesaid, this would only be a drop in the ocean in view of the fatal, inconceivable and unbearable harm that the detention is causing the Petitioner, whose only sin was to enter the Territories with his mother when he was a minor, without being asked his opinion, and to

continue living a normative life among his family members and acquaintances.

In this manner the Respondent has failed the third test of proportionality as well.

55. In conclusion, the Petitioner's detention of three years, without providing a right to a hearing and without exercising any judicial review, when there is no security suspicion against the Petitioner and under circumstances where using detention does not lead to the desired goal and harms the Petitioner in a fatal and disproportionate manner – all these and each on its own constitute causes for the immediate release of the Petitioner from his detention.

This Petition is supported by the Petitioner's affidavit which was signed before an attorney at the prison where the Petitioner is detained.

For all of these reasons, the Honorable Court is moved to issue an Order Nisi as requested, and after hearing the Respondent's response, to make it absolute. The Court is further moved to order the Respondent to pay the Petitioners' costs and legal fees.

March 26, 2007

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Adv. Sigi Ben-Ari
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[T.S 46921]