

At the Supreme Court
Sitting as the High Court of Justice

HCJ 9021/23

In the matter of: **1. _____ Wadi and 61 Petitioners in the attached list**

Represented by counsel, Adv. Nadine Abu Arafah et al.
of HaMoked - Center for the Defence of the Individual founded by Dr.
Lotte Salzberger 4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

- 1. Israel Defense Forces**
- 2. Chief Military Police Officer**
- 3. Commissioner of Israel Prison Service**
- 4. National Security Council**
- 5. Attorney General**
- 6. Military Advocate General**

Represented by the State Attorney's Office
Ministry of Justice
Telephone: 073-3925084; Fax: 02-6467011

The Respondents

Respondents' Preliminary Response

Preface

1. According to the decision of the honorable court (the honorable Justice R. Ronen) dated December 25, 2023 and the extensions which were given, the Respondents hereby respectfully submit a preliminary response on their behalf, as follows.
2. The Petition concerns the request of the families of the Petitioners, 62 Gaza Strip residents, that the Honorable Court issues a writ of *Habeas Corpus* directed at the Respondents them ordering them as follows:
 - a. Inform the families of Petitioners 1-62 (hereinafter: the **Petitioners**), all registered as Gaza Strip residents, who were arrested either in Israel or in the Gaza Strip, and whose whereabouts are unknown, who holds them; where they are held and according to which law; to the extent they were released or transferred to another body – when, where and to whom and what is known about their current whereabouts. To the extent the Petitioners are unlawfully held by an Israeli authority, **including in a detention facility which is not a**

declared detention facility, the Honorable Court shall be requested to issue an order for their immediate release.

- b. Decide once and for all who is the body which is responsible for providing information about the location in which the Petitioners and others in their condition are held; disclose the identity of the bodies holding information about the location in which the Petitioners and others in their condition are held.
 - c. To the extent that the Petitioners are held in a detention facility which until now has not been used as a declared detention facility, instruct to present the order declaring it an incarceration facility.
 - d. Order the Respondents to enable the Petitioners to meet with lawyers to examine their incarceration conditions and the lawfulness of their incarceration. **(The emphases appear in the original).**
3. It should already be noted in the beginning that the Petition at hand is nothing but another link in a series of previous similar petitions filed by HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (hereinafter: **HaMoked**) over the last three months. These petitions, whose remedies were similar to the remedies requested in the Petition at hand, were rejected by the Honorable Court, one by one, in reasoned and detailed judgments. Therefore, and considering the judgments of the Honorable Court which shall be discussed in detail below, the Respondents shall argue that several significant threshold barriers stand in the way of the Petition justifying its dismissal *in limine*. At the same time, the Respondents shall argue that the Petitioners were unable to meet the burden imposed on them and support the remedies requested by them with an appropriate factual and legal infrastructure, and have also failed to point to a legal source requiring the transfer of the information requested by them.

The factual background relevant to the case at hand and previous proceedings on the matter

4. As is known, on Saturday, October 7, 2023 terror organizations in the Gaza Strip launched a murderous attack against Israel, in which about 3,000 activists of Hamas, Palestinian Islamic Jihad (PIJ) and others infiltrated the territory of Israel by land, air and sea; entered communities near the Gaza border and in southern Israel and military bases; and committed acts of murder, massacre and atrocities in the communities, shot at vehicles that were driving down the main roads, massacred party participants and committed horrendous acts of violence against them, and abducted hostages to the Gaza Strip. At the same time, massive firing of rockets and mortar bombs was carried out, which until now amounted to thousands of launches of long-range weapons.
5. In this murderous attack more than one thousands civilians lost their lives, including members of the different security forces, and thousands were injured. In addition, over 240 individuals were abducted to the Gaza Strip, including infants, women and the elderly.

In view of the above security events, the Ministerial Committee on National Security Affairs decided to take substantial military actions by virtue of the power vested in it

under Sections 40(a) and 40(a1) of the Basic Law: the Government, due to the war which was imposed on the State of Israel by said murderous terror attack from the Gaza Strip.

Since then, the state of Israel faces a difficult and multi-arena battle in the Gaza Strip, on the northern border and on other fronts. For this purpose, hundreds of thousands of reserve forces were recruited who still serve on the different fronts. Hundreds of thousands of Israelis were evacuated from their homes and stay in temporary dwellings.

6. The Honorable Court has already referred in its judgments to this difficult war. See for instance, paragraph 8 of the judgment in H CJ 7439/23 **Alwahidi v. Israel Security Forces** (October 31, 2023)(hereinafter: **Alwahidi**):

"In these terrible days, the state of Israel conducts a difficult war against those seeking to destroy it, members of the Hamas organization controlling the Gaza Strip, which sent its murderers, along with a bloodthirsty mob, on the morning of October 7, 2023 (*Simchat Torah* holiday) - to destroy, kill and massacre the young and the elderly, babies and women."

7. During the war, the security forces arrested Gaza Strip residents suspected of being involved in the hostilities against the state of Israel. In the first days of the war persons who had infiltrated Israel in the murderous terror attack on October 7, 2023 were arrested, and recently suspects were arrested during combat in Gaza Strip.

These detainees are held according to Israeli law, either according to the Incarceration of Unlawful Combatants Law, 2022 (hereinafter: the "**Unlawful Combatants Law**") or pursuant to arrest warrants; in general, while initially arrested and while the need to continue holding them in custody is examined they are held in military incarceration facilities; if there is a need to continue holding them in custody they are transferred to the facilities of the Israel Prison Service.

8. In addition, following the murderous terror attack, all the stay permits of Gaza Strip residents in Israel were cancelled, and on November 2, 2023 a decision was adopted by the Ministerial Committee on National Security Affairs according to which: "The laborers who were staying in Israel on the day on which the war broke out will be returned to Gaza". Thereafter, on November 9, 2023, the Defence (Emergency) Regulations (Iron Swords) (Custody and Removal of Illegal Aliens Who Are Residents of the Gaza Strip) 2023 were promulgated by the government (hereinafter: the **Emergency Regulations** or the **Regulations**), establishing a detail arrangement regulating the custody and removal of illegal aliens who are Gaza Strip residents staying in Israel and in the Judea and Samaria Area, including transitional provisions concerning the custody and removal of illegal aliens who were held at that time by the security bodies. The Emergency Regulations were initially promulgated for a period of two months and on January 7, 2024 their validity was extended until February 9, 2024.
9. This is the place to note that on October 11, 2023, HaMoked's first petition was filed in the matter of **Alwahidi** for a writ of *Habeas Corpus* which concerned two petitioners, Gaza Strip residents. The petition was joined by HaMoked as a "public petitioner". In

said petition it was alleged that the individual petitioners were "journalists, who arrived to the Erez Checkpoint area on October 7, 2023" and that the petition was filed following a request submitted by their "work colleague" to HaMoked requesting it to assist him to locate them.

A photocopy of the petition in **Alwahidi** (without its appendices) is attached and marked **RS/1**.

10. On October 15, 2023 the Respondents submitted a preliminary response in which they referred to a response submitted by them in the course of Operation Protective Edge in 2014 in H CJ 5243/14 **HaMoked Center for the Defence of the Individual v. Israel Defense Forces** (August 4, 2014), where the state has clarified its position that the military had no obligation to give HaMoked any piece of information concerning Gaza Strip residents arrested in the framework of the ground operations of IDF Forces in the Operation Protective Edge and who are held in incarceration facilities under its responsibility. It was further clarified then that the arrangements pertaining to arrests in Israel or in the Judea and Samaria Area (hereinafter: the **Area** or **Judea and Samaria Area**) should not be applied to a state of combat in Gaza (as was also clarified by the state in a previous petition during operation "Cast Iron", H CJ 289/09 '**Attar v. Israel Defense Forces** (January 25, 2009), where it was held "that *prima facie* there is no room to hold that information concerning the identity of those who were captured in combat should be given within the same period of time which applies in days of routine").

Nevertheless, the state agreed at that time, *ex gratia*, to allow HaMoked to contact the Incarceration Control Center on behalf of the relatives of a specific Gaza Strip resident who may have been arrested and seek information about him. Following said response in 2014, the petition was deleted upon the recommendation of the honorable court.

11. Therefore, the Respondents argued, without derogating from any argument to the crux of the matter, that the **Alwahidi** petition should be dismissed *in limine*, since even the petitioners did not argue that the request was made on behalf of family members and therefore, anyway, the state's consent which had been given in Operation Protective Edge, *ex gratia*, was not relevant to this matter.
12. On October 31, 2023 the judgment of the Honorable Court in **Alwahidi** was given, dismissing the petition and obligating the petitioners to pay costs, in which the court has discussed HaMoked's reliance on the Order concerning Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 2009 which applies in Judea and Samaria and the judgments referred to by HaMoked, which were given with respect to the Judea and Samaria Area. Due to the relevancy of these holdings we shall broadly cite them:

10. HaMoked relies as aforesaid on the provisions of the Order regarding Security Provisions. However, the provisions of the Order are not relevant to the case at hand, for two reasons: first, we see that according to the Order the information is disclosed to the detainee's "relatives"...

11. Second, the Order regarding Security Provisions is not at all applicable to the case at hand. It applies only to the Judea and Samaria area and was published by virtue of the powers of the military commander in that area and the special provisions of the law applicable thereto. Hence, there is no room to discuss the provisions of the Order, without expressing an opinion on the content of its provisions on their merit. Furthermore, the judgments referred to by HaMoked to substantiate Respondents' obligation to give notice of the whereabouts of detained Palestinian residents – all concern the detention of Palestinians, residents of the Judea and Samaria area only, and are not relevant to detainee who are residents of the Gaza Strip, as aforesaid.
12. Petitioners 1-2 are the residents of the Gaza Strip (one from Tel al-Hawa neighborhood and the other from Jabalia), a foreign and hostile entity, controlled by the murderous terror organization - Hamas. The two are nationals of an enemy territory.

On several occasions this court has clarified the fundamental difference between the legal framework which applies to the Judea and Samaria area – from which the Petitioners tried to derive the right they argue for – and that which applies to the Gaza Strip. We shall remind briefly: since the IDF forces have left the Gaza Strip area in 2005, Israel no longer effectively controls it. The state of Israel no longer maintains in the Gaza Strip a permanent military presence; Israel does not exercise therein governmental powers; and there is another governmental body in the area having the ability to exercise them. Accordingly, the obligations entrenched in international law according to the laws of belligerent occupation which were assumed by Israel, have terminated. The transition from a security presence and effective control to a physical separation from the Gaza Strip was translated, on the legal level, to transition from the application of the laws of belligerent occupation to the application of the laws of war and the rules of Public Law (HCJ 9132/07 Albasioni v. Prime Minister, paragraph 12 (January 30, 2008); CA 993/19 A. v. State of Israel - Ministry of Defense, 31-30, 114 (July 5, 2022); Roy Scheindorf and Eran Shamir-Borer "(Non) applicability of the laws of belligerent occupation to the Gaza Strip", Tel-Aviv University Law Review (Iyunei Mishpat) 43, 403, 408-421 (2020)). It should also be noted that in 2007, following the violent takeover of the Gaza Strip by the terror organization Hamas, and the escalation in the hostile terror activities against Israel and its citizens, the Gaza Strip was declared an "enemy territory" by the Ministerial Committee on National Security Affairs on September 19, 2007, (decision B/34 of the Ministerial Committee on National Security Affairs "The Policy of Israel vis-a-vis Gaza (Military and Civil)"), for the purpose of section 5B(a)(1) of the Civil Wrongs (State Liability) Law, 1952.

13. Hence, HaMoked failed to meet the burden to point at a legal source obligating the Respondents to provide to it information regarding the whereabouts of Gaza Strip residents detained in Israel, who were arrested in the course of an act of war, particularly that which was imposed on us in the terrible circumstances of October 7, 2023.
14. There is no need to emphasize that I do not discuss in this context other legal aspects pertaining to the holding of detainees from Gaza who took part in hostile activities against the state of Israel, which are not relevant at this time (see, for instance, the Incarceration of Unlawful Combatants Law, 2002 and the regulations promulgated thereunder).
15. Indeed, in previous proceedings (HaMoked (August 4, 2014); Abu Reida) which were discussed as aforesaid in connection with Operation Protective Edge, the state expressed willingness to enable the submission of an individual request to the Incarceration Control Center, with respect to detainees who were arrested in the course of a military operation of Israel in Gaza, solely by family members of the detainees, and subject to proving their said connection. This possibility, it was emphasized at the time, is given ex gratia, making it clear that it does not constitute any commitment for similar conduct in future military operations, in Gaza or in any other hostile territory. Even in **Attar**, which was heard in the course of Operation Cast Lead, the Respondents stated that "an effort shall be made" to give the names of detainees arrested in combat within 48 hours – namely, an effort and not an obligation, and the above – should clearly be read subject to the individual security circumstances which existed at that time. It should also be noted that in the **Attar** judgment, it was clarified by this court that "there is no room to determine that information concerning the identity of those captured in the course of combat shall be given within the same period of time which is required in regular times" (paragraph 3).
16. Despite these emphases, the Petitioners are now trying to capitalize on said willingness which was shown in completely different circumstances than those of the current situation and bind the Respondents thereto. Said willingness, it should be reminded, focused only on the detainees' relatives rather than on third parties such as HaMoked or "work colleagues". Considering my determination that it is a possibility which was offered ex gratia, in different circumstances, which is not entrenched in the law itself, I see no room to accept Petitioners' argument that the circle of the persons authorized to contact the incarceration control center should be expanded to include parties who are not family members; accepting this argument shall be like a tower floating on air.
17. As our ancient enemies have said: "We have heard that the kings of the house of Israel are kings of grace" (Kings A 20; 31); **The**

possibility given to the relatives of detainees from the Gaza Strip, in the past, in completely different circumstances, who had been detained in the course of an armed conflict, to request information about them, is nothing but an act of grace, offered ex gratia, exercisable by the security forces at their absolute discretion" (the emphasis was added).

13. On October 22, 2023 HaMoked and other public petitioners filed a second petition for a writ of *Habeas Corpus* on behalf of ten Gaza Strip residents (HCJ 7637/23 **Kashta v. Israel Defense Forces** (November 6, 2023)(hereinafter: **Kashta**)). In said second petition it was alleged that the individual petitioners were held by the Israeli security bodies and that their families requested HaMoked's assistance in locating them.

A photocopy of the **Kashta** petition is attached and marked **RS/2**.

14. In the **Kashta** proceedings and after the petitioners in said case sent an inquiry request to a specifically designated e-mail address allocated for that purpose in the course of the proceedings, a response was sent to the petitioners on behalf of the National Security Council. Said response, which was given *ex gratia* and without derogating from any of the state's arguments on the matter and without expressing any position with respect to similar future requests, included detailed information about each one of the petitioners in said case. It was informed that the petitioners were in the custody of the Israeli authorities: one of them was under the custody of the Israel Prison Service and the other nine were held by the IDF in the Ofer camp and in the Anatot camp.
15. On November 6, 2023 the judgment in **Kashta** was given, which accepted the motion of petitioners 1-10 there (and they only) to delete the petition since it became redundant so far as the first remedy there was concerned "without 'reserving the arguments' which were solved". At the same time the Honorable Court decided to reject the petition on its merit with respect to the two additional remedies, obligating the public petitioners to pay costs. Due to their importance we shall broadly cite the Honorable Court's holdings in **Kashta**:

6. Following my review I decided that the request to delete the petition while reserving all the arguments should not be accepted; instead, I found that the petition in as much as it relates to the first remedy should be deleted since it became redundant, and that it should be dismissed in as much as it relates to its two additional heads.

7. I can only join the words of Justice N. Sohlberg in his judgment in the Additional Petition (**Alwahidi**, the undersigned), as follows:

"After IDF forces left the Gaza Strip area in 2005, Israel no longer effectively controls it. The state of Israel no longer maintains in the Gaza Strip a permanent military presence; Israel does not exercise therein governmental powers; and there is another governmental body in the area, having the ability to exercise them. Accordingly, the obligations entrenched in international law according to the laws of

belligerent occupation assumed by Israel, have terminated. The transition from a security presence and effective control to a physical separation from the Gaza Strip was translated, on the legal level, to transition from the application of the laws of belligerent occupation to the application of the laws of war and the rules of Public Law." (Ibid., paragraph 12).

8. Considering the above, it is clear that also in the case at hand, the Petitioners and the Public Petitioners were unable to point at a legal source justifying the grant of the remedies requested by them. And note well, as stated in the judgment given in the Additional Petition, orders issued by virtue of the authority vested in the military commander of the Judea and Samaria area, including the Order regarding Security Provisions and Section 53(a) thereof, do not apply in the Gaza Strip area or to its residents, and therefore they impose no obligation on the Respondents in the case at hand.
9. Nevertheless, it seems that Petitioners' matter has been resolved, considering their request to delete the petition, and the above was done, as stated in the judgment in the Additional Petition – *ex gratia*. In these circumstances, and following my decision dated October 30, 2023, I accept Petitioners' request, and their request only, to delete the petition, in as much as the first remedy is concerned, without 'reserving the arguments' which were resolved".
16. On November 2, 2023, while the **Kashta** petition was pending, HaMoked filed another petition for a writ of *Habeas Corpus* in HCJ 7946/23 **Abu Abed v. Israel Defense Forces** (November 11, 2023) (hereinafter: **Abu Abed**) on behalf of 568 Gaza Strip residents, who have allegedly stayed in Israel under permits and were arrested and held by Israeli security bodies after the war broke out, and whose family members requested HaMoked's assistance in locating them.

A photocopy of the Abu Abed petition (without its appendices) is attached and marked **RS/3**.

In this petition three remedies were requested: the first remedy is largely similar to the remedy requested in the petition at hand, in which it was essentially requested to notify the petitioners' families who holds them, where and by virtue of which law, and to the extent they are not lawfully held "instruct that they shall be released to the West Bank"; the second and third remedies which were requested are identical to the third and fourth remedies requested in the Petition at hand (towards the petitioners there).

17. On November 9, 2023 the Respondents submitted a preliminary response in **Abed**, in which they informed that according to the resolution of the Ministerial Committee on National Security Affairs dated November 2, 2023: "**The laborers who were staying in Israel when the war broke out shall be returned to Gaza**". In addition – **again ex gratia** and without derogating from any of the state's arguments on the matter and without expressing any position with respect to similar future requests – the preliminary response

included information concerning each one of the 15 individual petitioners that the honorable court instructed the respondents to specifically address in their preliminary response, since "in their matter a preliminary request was made". In this context, information was provided that some of them have been transferred back to the Gaza Strip and the Judea and Samaria Area, that one of them was held by the Israel Prison Service according to the Unlawful Combatants Law, and that another petitioner was held by the IDF in the Anatot facility according to the Emergency Regulations.

18. On November 13, 2023, the judgment of the Honorable Court was given in **Abed**, as follows:

" ... since the above information was given even if *ex gratia* concerning all the petitioners in whose matter respondents' response was requested, it is clear that the petition has been exhausted and made redundant insofar as it concerns the first remedy and should be deleted.

3. As to the other two remedies – it emerges from respondents' preliminary response that only petitioners 561 and 557 are currently held by the security forces in Israel pursuant to different laws. These laws include provisions establishing, *inter alia*, the detention places in which the detainees shall be held and arrangements concerning a meeting with a lawyer. If the petitioners have arguments according to these laws, their rights are reserved".

19. The Petition at hand is yet another link in the chain of the petitions reviewed above.

This time the Petition was filed, as alleged therein, on behalf of 48 Gaza Strip residents who according to the Petition were arrested by the security forces in the Gaza Strip (including two minors), and 14 Gaza Strip residents who were arrested in Israel or in Judea and Samaria. The Petition is premised on the allegation that during the last weeks no information was received about them, and that HaMoked had contacted their families before the Petition was filed.

20. As noted in the Petition, on November 22, 2023 the National Security Council answered the requests sent to it by HaMoked as follows (a photocopy of the answer was attached to the Petition as Appendix **P/5**):

"Following your request we wish to inform, in coordination with the relevant security bodies, that the National Security Council is no longer the appropriate body to answer your request and the e-mail account which was opened only for the purpose of providing information concerning specific petitioners in H CJ 7637/23 is about to be closed. Accordingly, and following H CJ 7637/23 and 7946/23 the lawyers representing Gaza Strip residents who were staying in Israel, lawfully or unlawfully, before Iron Swords war broke out and were therefore arrested, according to the emergency regulations... and are still held by the state authorities, should write to the IDF to the email address:

anatot.idf@gmail.com such that they may be contacted according to the regulations".

21. Subsequently, and as it emerges from Petitioners' clarification notice, HaMoked sent to the foregoing e-mail address several requests concerning different Petitioners (see requests dated November 23, 2023, November 30, 2023, December 10, 2023 and December 17, 2023), such that eventually HaMoked sent requests as aforesaid with respect to all the Petitioners. The above was done on behalf of individual Petitioners who were allegedly arrested by the security forces in the Gaza Strip, as well as on behalf of Gaza Strip Petitioners who were allegedly arrested in Israel or in Judea and Samaria.

According to the clarification notice, in response to all the requests it was informed that the Petitioners were not held in the Anatot facility (the requests and the answers were attached as Appendices C/1 – C/8 to Petitioners' clarification notice).

22. This is the place to note that according to an examination conducted by the military bodies the Petitioners differ from one another, including with respect to the set of laws governing their arrest, to the extent they were arrested. Accordingly, the Petitioners include Gaza Strip residents who were held in the past by virtue of emergency regulations but have long been returned to Gaza and are no longer in the custody of the security forces; the Petitioners also include persons who are lawfully held in Israel according to the Unlawful Combatants Law or as detainees pursuant to an arrest warrant.

Respondents' position – the Petition should be dismissed *in limine*

23. The Respondents shall argue that the Petition should be **dismissed** *in limine* due to its comprehensiveness and the fact that it concerns different Petitioners whose matters differ from one another. Accordingly, for instance, the Petition concerns different and separate matters which are under the responsibility of different Respondents, and which are premised on different factual and legal infrastructures. As held by the Honorable Court in its judgments, mixing different bodies and matters as was done by the Petitioners in the Petition at hand, makes it difficult to adjudicate the Petition and the matters arising thereunder, and therefore it should be dismissed *in limine*.

It should be reminded that the Honorable Court has repeatedly held with respect to petitions which include several different matters that "the examination of each one of them may be different, as well the decision given in them and its reasoning. Therefore, grouping them together under one roof cannot stand" (HCJ 2336/05 **Halifa v. Ministry of the Interior** (given on November 17, 2005)).

Also see and compare *mutatis mutandis*: HCJ 8155/06 **The Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria** (decision dated August 1, 2007); HCJ 1530/21 **Kohelet Policy Forum (RA) v. Ministry of Agriculture and Rural Development**, paragraph 13 (June 17, 2021); HCJ 7741/19 **Three Sycamores - The Association for the Promotion of Life and the Environment in the Western Galilee v. the National Infrastructures Committee**, paragraph 12 (July 4, 2021); HCJ 1469/22 **Eli Ben Ayun v. Ministry of Agriculture**, paragraphs 8-10 of the judgment of the Honorable Justice Stein (May 17, 2022); HCJ 2864/20 **Regional Council Bustan**

Almarej v. Ministry of the Interior, paragraph 4 of the judgment of the Honorable Justice Karra (September 10, 2020).

The Respondents are of the opinion that the above apply, *mutatis mutandis*, to the Petition at hand. We shall demonstrate.

24. The first and second remedies requesting that notice of Petitioners' whereabouts shall be provided to their families and that information concerning the identity of the body responsible for providing such information shall be given, seek to apply the same rule to (at least) the two groups of the Petitioners who were arrested "either in Israel or from Gaza". The above, although each group is held in custody by virtue of different laws – Gaza Strip residents who were arrested in Gaza are held according to the Unlawful Combatants Law or pursuant to arrest warrants issued according to the penal code; while Gaza Strip residents who were arrested in the territory of Israel or in Judea and Samaria and who are not involved in hostile activities, are held by virtue of the Emergency Regulations; and accordingly, are governed by totally different provisions.

In addition, it is clear that the factual circumstances surrounding the arrest of Petitioners who are members of these two groups are totally different. Attesting to that is the fact that some of the Petitioners who filed the Petition at hand and had been held in custody in Israel have long been released and sent back to the Gaza Strip – **some even before the Petition was filed** – without advising the Honorable Court of same.

Accordingly, for instance, the Respondents shall provide updated information about several Petitioners who were held in custody as illegal aliens, and have long been sent back to the Gaza Strip: Petitioner No. 50 – _____ Juma'a – returned to Gaza on November 1, 2023 (almost two months before the Petition was filed on December 22, 2023); Petitioner No. 53 – _____ Shahin – returned to Gaza on November 28, 2023; Petitioner No. 54 – _____ Jaser - returned to Gaza on November 14, 2023; Petitioner No. 59 – _____ Alnajar - returned to Gaza on November 28, 2023; Petitioner No. 60 – _____ Mansur - returned to Gaza on November 3, 2023; Petitioner No. 61 – _____ Shahin - returned to Gaza on December 14, 2023 (it should be noted that the same ID number was provided for Petitioner No. 62 and Petitioner No. 61). For the sake of good order it should be clarified that the above information has no bearing on the status of any of the other Petitioners, and the above is brought only to demonstrate the Petition's flaws as they relate to its comprehensiveness and the fact that it ties together the matters of Petitioners who differ from one another.

Similarly, the fourth remedy which is requested in the Petition disregards different relevant legal infrastructures, and the fact that with respect to each one of the alleged groups of Petitioners different legal provisions apply to lawyers' visits. In addition, the third remedy which is requested in the Petition concerning a "declared detention place" is not supported by any relevant factual infrastructure, as also emerges from its wording ("to the extent that... "). Finally, it should be noted that each one of the remedies challenges a different concrete aspect, veering in nature from the scope of the additional remedies which were requested, while the Petition groups all four of them together.

25. Therefore, the fact that the Petition refers to separate and different matters, some of which are not supported by any relevant factual and legal infrastructure to the Petition, justifies its dismissal *in limine*, and as stated by the Honorable Court: "As a general rule, the court shall not hear petitions involving different matters, even if they have a common subject matter" (HCJ 5584/21 **Liran-Shaked v. Ministry of Health**, paragraph 4 [reported in Nevo] (August 17, 2021))" (HCJ 7753/23 **The Association for Civil Rights in Israel v. The Minister of National Security** (November 23, 2023) which concerned allegations regarding the incarceration conditions of security prisoners, paragraph 21).
26. **Another reason** which justifies the dismissal of the Petition *in limine* is that the Petition does not refer at all to the recent judgments of the Honorable Court, on the same exact matters, and does not deal with them on their merit.

Without discussing now the question of whether *res judicata* applies to the individual Petitioners in the case at hand who were not parties to the previous petitions, it is clear that the substantial holdings of the Honorable Court are in full force and effect, even if currently HaMoked itself is not a party to the Petition as was the case in **Alwahidi** and in **Kashta**. Moreover, as it emerges from the description of the proceedings in **Alwahidi**, **Kashta** and **Abed**, some of the remedies which were requested in said petitions are highly similar and even identical to the remedies which were requested in the Petition at hand.

In addition, some of the Petitioners in the Petition at hand were also parties to the previous petitions and **HaMoked** has also represented the petitioners in each one of these petitions. Accordingly, for instance, Petitioners 51 and 52 in the Petition at hand were petitioners 2 and 1 (respectively) in **Alwahidi**, such that in fact *res judicata* clearly applies to their matter, and in the words of the Honorable Court: "an argument which was raised in a previous proceeding in this court and was not accepted and an argument which could have been raised but was not raised, should not be raised again" (HCJ 20/64 **Hamesayer Ltd. v. Commissioner of Transportation**, IsrSC 18(3) 245, 251 (1964). This fact also illustrates the defect which was explained earlier that arises from binding the matters of different petitioners in one comprehensive petition.

27. Despite these many similarities, the Petition at hand includes only a partial description of the previous proceedings, without discussing and dealing with the substantial holdings of this Honorable Court, which were given as aforesaid in the last few weeks, and without noting that **a prior petition has already been filed on behalf of two of the Petitioners in the case at hand** – a petition which was dismissed by the court in a detailed judgment.
28. Hence, with all due respect, there is a flaw in Petitioners' conduct from the aspects of the disclosure obligation and the clean hands doctrine: and see in that respect paragraph 9 of the judgment in HCJ 6949/21 **Tanturi v. State of Israel** (December 19, 2021, *mutatis mutandis*).
29. Moreover – a comparison of the petitions clearly shows that Petitioners' claims repeat themselves in most part, while in some of them the same exact arguments are made (see for instance paragraphs 32-34, 36, 38-44, 46-47, 49-51, 53-56, 58-59 in **Abed** and paragraphs 46-48, 51, 53-58, 66-67, 70-72, 74-80 in the Petition at hand). It also emerges

from a review of the Petition at hand that reference to the substantial holdings of the Honorable Court in the previous proceedings is exhausted by referring to the **Alwahidi** judgment, with respect of which the Petition states as follows: "their family members contacted Israeli lawyers and requested them to assist in locating their loved ones, unlike the situation which is described in the judgment in HCJ 7439/23 **Alwahidi v. Israel Defense Forces**... Anyway, a situation in which there is a "legal vacuum" is not possible and since we are concerned with Gaza Strip residents, different rules apply".

30. The Respondents will argue that Petitioners' said course of argument should be rejected, for several reasons.

First, it seems that the "legal vacuum" argument is essentially an "appellate" argument, wishing to veer from the judgments of the Honorable Court by bringing the exact same issues before a new panel. It is clear that this procedural maneuver has no legal grounds.

Second, even if the Petitioners wanted to have the judgments of the Honorable Court revisited; and even if the appropriate legal route to do so was found; it is clear that the Petitioners should have directly and frontally dealt with the substantial holdings of this Honorable Court – first, by specifying the reasons which justify this irregular course of action wishing to veer from such clear and current judgments; and thereafter – by dealing with the decisions on their merit which concerned families that have contacted HaMoked like in the Petition at hand. The Petitioners failed to do so – which also justifies the dismissal of the Petition (and see the judgment in HCJ 536/22 **Axelrod v. Government of Israel**, paragraph 8 (May 24, 2022)).

31. In addition, the Respondents shall argue that the Petition should also be dismissed *in limine* since the Petitioners were unable to satisfy the burden imposed on them and support the remedies requested by them by an appropriate factual and legal infrastructure.

The remedies requested on Petitioners' behalf, including the transfer of information to their family members, were requested from the Honorable Court on the basis of requests submitted to HaMoked by the Petitioners' families. These requests are supported by the affidavit of HaMoked's complaints coordinator, according to which "all the details specified with respect to the Petitioners were received by their families and collected in HaMoked's offices by an experienced team". However, it should be noted that these requests are not documented and no power of attorney was attached to the Petition on behalf of the families. Hence, from a formal legal standpoint HaMoked has no power to act on behalf of Petitioners' families (see in that regard, the judgment in HCJ 1288/09 **Lukovsky v. Ministry of the Interior – Population Administration** (June 16, 2009); It should also be noted that in the case at hand, considering the ongoing war, and without doubting the truthfulness of the affidavit of HaMoked's complaints coordinator, we are not concerned with a mere formal-procedural limitation, since on the basis of the data brought in the Petition, Respondents' officials – and in fact HaMoked's itself – have no ability to ascertain who stands behind each one of these requests, with all that it entails.

32. The Respondents shall argue further, as was also emphasized in the state's response to the previous petitions (including the petitions in the "Protective Edge"(2014) and "Cast Iron" (2009) periods which were mentioned above), that the military has no obligation

to give HaMoked any information concerning Gaza Strip residents who were arrested in the course of the war, and that such consent was given in the past *ex gratia*.

Accordingly, in the circumstances of the difficult war we are currently conducting, it was decided that no such information shall be given to private applicants or public petitioners addressing the military bodies through the email address or the Incarceration Control Center of the Military Police (see paragraph 17 of the judgment in *Alwahidi*).

33. The Respondents are of the opinion that these reasons – the comprehensiveness of the Petition; the fact that it involves many and different petitioners and concerns substantially different matters some of which lack relevant factual and legal infrastructure; and the fact that the Petition does not discuss the recent holdings of the Honorable Court in the very same matters, and does not satisfy the burden lying on the Petitioners to support the requested remedies – suffice to dismiss the Petition at hand *in limine*.
34. If the Honorable Court does not find that the Petition at hand should be dismissed *in limine* at this procedural stage on the basis of each one of the reasons specified above, and all the more so in view of their cumulative weight, the Respondents shall request to enable them to submit a supplementary response within 21 days, considering the circumstances of the matter.
35. The facts specified in the Response in paragraphs 4-5, 7-9, 22, 24, and 32 shall be supported by the affidavit of Colonel Meital Shushan serving as the Head of Policing and Incarceration Department at the Military Police, who has read and confirmed the truthfulness of the facts. However, due to technical difficulties she could not sign the affidavit before the submission of the Response. Her affidavit shall be submitted tomorrow, January 24, 2024.

Today, 13 Shvat 5784
January 23, 2024

Ran Rosenberg, Adv.
Senior Deputy A, HCJ Department
State Attorney's Office

Matan Steinbuch, Adv.
Chief Assistant, HCJ Department
State Attorney's Office