At the Supreme Court **HCJ 2690/09**
Sitting as the High Court of Justice

In the matter of:

1. **Yesh Din – Volunteers for Human Rights (registered association – 580442622)**
2. **The Association for Civil Rights in Israel**
3. **HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger (registered association – 580163517)**

all represented by counsel, Att. Michael Sfard and/or Shlomi Zecharia, and/or Neta Patrick
all from 49 Ahad Ha'Am St., Tel Aviv 65206;
Tel: 03-6206947; Fax: 02-6206950

The Petitioners

v.

1. **Commander of the IDF Forces in the West Bank – Major General Gadi Shamni**
2. **The Minister of Defense, MK Ehud Barak**
3. **The Minister of Public Security – MK Avi Dichter**
4. **Israel Prison Service**

Represented by counsel from the State Attorney's Office, Ministry of Justice, Salah a-Din Street, Jerusalem

The Respondent

Petition for *Order Nisi*

This is a petition for an *order nisi* wherein the Honorable Court is requested to instruct the Respondents to appear and show cause, if they so wish:

1. Why they will not refrain from holding Palestinian administrative detainees as well as Palestinian criminal detainees and prisoners who are residents of the West Bank and who have been incarcerated pursuant to verdicts or orders issued under military legislation in the Area (hereinafter: "the Palestinian detainees") **in incarceration facilities outside the occupied territory.**

2. Why they will not refrain from holding proceedings for extending the detention of Palestinian residents of the West Bank in accordance with the military legislation in the Area in courts **located inside the State of Israel.**

A. Introduction

1. This petition addresses the longstanding practice of holding Palestinian detainees within the borders of the State of Israel and holding detention proceedings in courts which are also located in the territory of the State of Israel (the police station in Petah Tikva, Ketziot and the Kishon detention facility) (hereinafter: "the policy"); this in contravention of the provisions of international law.

2. The policy, we shall forthrightly state at this early stage, is entirely incompatible with three clear provisions set forth in the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: "the Convention"), which are:

   Article 76 of the Convention:

   > **"Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein…"**

   Article 66 of the Convention:

   > "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 **the Occupying Power may hand over the accused to its properly constituted, non-political military courts, <u>on condition that the said courts sit in the occupied country</u>. Courts of appeal shall preferably sit in the occupied country**."

   And Article 49 of the Convention

   > "**Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power** or to that of any other country, occupied or not, are prohibited, **regardless of their motive**…"

3. The policy, which, as noted, clearly violates the express provisions of the Convention has been <u>partially</u> reviewed and sanctioned by the Honorable Court two decades ago in the <u>Sajdiya</u> case (HCJ 253/88 <u>Ibrahim 'A/Hamid Sajdiya et al. v. Minister of Defense</u> (judgment rendered 8 November 1988) *Piskey Din* 42 (3) 801), which addressed the legality of holding Palestinian administrative detainees in the Ketziot prison (hereinafter "the Sajdiya case" or "the Sajdiya judgment").

4. The Honorable Court indeed rejected the petition and ruled, *inter alia*, that holding administrative detainees within the borders of the State of Israel was lawful. However, two decades have passed since the aforementioned judgment was rendered, a time during which far reaching changes have taken place both in the reality on the ground (particularly regarding freedom of movement from the Territories to Israel) and in the interpretation of Israel's legal obligations.

5. The <u>Sajdiya</u> judgment, the reasons to part therewith are listed in section 4 of this petition, was handed down in an age when the physical borders between the State of Israel and the Occupied Territories were murky; an age when a general permit issued by the Minister of Defense allowed Palestinians to freely enter Israel; a time when family members and Palestinian attorneys, residents of the West Bank and even of the Gaza Strip could easily arrive at the gate of the Israeli

detention facility where their relative/client was being held.

6. For better or worse, this age is now a thing of the past. In this day and age, the connections between Palestinian residents of the West Bank and the sovereign territory of the State of Israel are ruled by closure, encirclement, walls, separation fences and permit regimes.

7. The Petitioners are of the opinion that whether the rule set forth in Sajdiya judgment was justified or not (and the Petitioners criticize this rule), the current factual reality which is entirely different from the reality of the days when the judgment was given, warrants a new legal reference and even a revocation of some the determinations of the Sajdiya judgment and therefore, justifies a reconsideration and change of the aforementioned state of affairs.

8. Additionally, as stated, the Sajdiya judgment also addressed only some of the issues raised in this petition and this too only in the context of administrative detainees. To the best knowledge of the undersigned, the question of the legality of holding convicted Palestinians (prisoners) in prison facilities in Israel has never been thoroughly reviewed by the High Court of Justice in Israel (there was a limited attempt to bring the issue of the legality of implementing arrest warrants issued by a military court sitting in Israel to judicial review in HCJ 6504/95 Wajia Muhammad et al. v. State of Israel, *Takdin Elyon* 95 (3) 613, however, in that case, the issue was reviewed only with respect to Israeli law rather than international law). This, in itself, justifies and necessitates a reconsideration of the legality of the aforementioned policy.

9. Furthermore: the petition at hand is also filed following a study conducted by Petitioner No. 1, the findings of which were published in a report entitled "Backyard Proceedings" in December 2007. This study adds another dimension to the demand to uphold the provisions of international law regarding the location where detainees from an occupied territory are held, and this with respect to the right to due process.

10. The aforementioned study, conducted during 2006-7, was based, *inter alia*, on observations of close to a thousand military court sessions (at the "Ofer" camp and at "Salem") and on interviews with attorneys and personnel from the military judiciary system. It examined the extent to which due process rights are observed in military courts.

11. The study's findings revealed that at present, in addition to the violation of a clear international law norm holding Palestinian administrative detainees, criminal detainees and prisoners within the borders of the State of Israel also involves a severe infringement of a number of rights, including Palestinian detainees' rights to due process. The report uncovers that in military courts, the right to representation by a defense attorney is often only formally, rather than substantially satisfied: many Palestinian detainees who are brought before military courts do not have the opportunity to meet their defense attorneys prior to the hearing, and certainly do not have the opportunity to appropriately consult with them.

12. Furthermore, as detailed below, holding Palestinian detainees in Israel also results in a severe infringement of their basic right to family visits which derives from the constitutional right to family life. It also infringes the right of the detainees' relatives to have contact with their loved ones in prison.

13. This, in conjunction with the change of circumstances since the 1980's and particularly the closing off of the State of Israel to Palestinians, has led the Petitioners to the conclusion that it is no longer possible to accept the aforesaid policy whose infringement of the basic rights of Palestinian detainees and their relatives no longer withstands the test of objective review, and that

the time has come to change the policy to the point of revoking it.

14. The fact that Basic Law: Human Dignity and Liberty was enacted since the Sajdiya judgment was rendered also warrants a reevaluation of the rule established therein. In light of the severe infringement of constitutional rights inherent to holding Palestinian detainees outside the occupied territory, it must now be established that the domestic law which ostensibly permits holding Palestinian detainees in Israel in null and void. Alternatively, that law must be interpreted in a manner consistent with the obligations of the State of Israel under international humanitarian law and with the principles of Israeli constitutional law.

15. Petitioners are aware of the fact that acceptance of the petition will necessitate new and complex organization involving tremendous resources. However, the State of Israel purports to abide by the provisions of international law and sometimes – as this Court has stated a number of times – the realization of rights involves allocation of resources and complex organization.

16. Prior to filing this petition, Petitioners appealed to the Respondent's legal advisor demanding Palestinian detainees be transferred to the occupied territory and Palestinians' detention proceedings no longer be held in courts located inside the State of Israel.

    The letter by the undersigned dated 1 May 2008 is attached and marked **Exhibit A**

17. On 27 May 2008, the response of the legal advisor, rejecting the demand, was received.

    The legal advisor's letter is attached and marked **Exhibit B**

18. Hence this petition.

B. The Sides

15. [*sic*] Petitioner No. 1, "Yesh Din", is an Israeli human rights organization which handles a number of issues concerning human rights in the West Bank and, *inter alia*, provides legal assistance to victims.

16. Petitioner No. 2, the Association for Civil Rights in Israel, is a human rights organization which promotes human rights in Israel and the Territories.

17. Petitioner No. 3, HaMoked: Center for the Defence of the Individual is an Israeli human rights organization promoting human rights in the Occupied Territories. Since its establishment, HaMoked has handled various aspects of detainee rights.

18. Respondent No. 1 is the commander of the IDF forces in the West Bank and holds all the administrative and legislative powers in the territory held by the State of Israel under belligerent occupation, this in accordance with the rules of international humanitarian law and the laws of belligerent occupation. In his capacity as supreme commander on the ground, the Respondent is responsible for defending the basic rights of the protected civilians and is bound to uphold the law and public order.

19. Respondent No. 2 is the Minister of Defense and the person in charge of Respondent No. 1 according to Basic Law: The Military. He also holds the authority to issue the military orders

regarding legislation in the occupied territory.

20. Respondent No. 3, the Minister of Public Security, is responsible, by virtue of his office, for holding prisoners inside Israel and, as part of his ministry, in charge of the Israel Prison Service.

21. Respondent No. 4, the Israel Prison Service, is the state authority charged with holding prisoners and detainees in Israel. In recent years, it also received responsibility for prison facilities in the occupied territory (such as the "Ofer" prison facility).

C. The Legal Argument

1. The legal framework – international humanitarian law, international human rights law, and Israeli constitutional and administrative law.

22. The legal framework regulating the Israeli occupation of the Territories is the laws of belligerent occupation which form part of international humanitarian law.

23. According to Article 49 of the IV Geneva Convention, it is prohibited to transfer civilians from the occupied territory – i.e. protected civilians – into the territory of the occupying power. In the language of the Article (emphasis added, M.S.):

> "**Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive**…"

24. Article 66 of the IV Geneva Convention empowers the occupying army, in our case the IDF, to try occupied territory civilians who have committed offences of the sort to which Article 64 refers (particularly security offences) in military courts to be established **within the occupied territory**. The phrasing of the Article leaves no room for interpretation (emphasis added, M.S.):

> "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 **the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country**".

25. Additionally, and perhaps most importantly, under Article 76 of the IV Geneva Convention, civilians from the occupied territory who are suspected of offences are to be held in detention within the occupied territory and serve their sentence, following a conviction, also within the occupied territory. The phrasing of this Article too requires no interpretation:

> "**Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein**"…

26. In effect, for many years, many of the Occupied Territories' residents have had their detention proceedings held and served their sentences inside the sovereign territory of the State of Israel, and their detention during interrogation was also carried out in Israel, i.e. outside the borders of the occupied territory and, it follows, in violation of the express provisions of international law as

detailed above.

27. In addition to the rules of humanitarian law applicable to the policy which is the subject matter of this petition, it is also subject to the fundamental principles of Israeli public law. In this context, the policy is governed by the constitutional principles of the State of Israel, *inter alia,* the norms included in the basic laws, particularly Basic Law: Human Dignity and Liberty, as well as the principles of administrative law as developed in the rulings of the Honorable Court.

28. Israeli public law applies to the policy both directly (as the governmental acts of detention, incarceration and detention hearings which make up the policy are carried out inside the sovereign borders of the State of Israel), and indirectly, inasmuch as the policy has component actions which are carried out in the Occupied Territories by way of applying to the agents of the Israeli administration.

29. This Honorable Court has established numerous times that in conjunction with international humanitarian law, Israeli public law applies to every action of the Israeli authorities, even when operating outside the borders of the State of Israel. Specifically, it has been established that military and civil administration authorities in the Occupied Territories are subject to the principles of Israeli administrative law and, therefore, all their actions shall be reviewed in accordance with these legal fields:

> "Every Israeli soldier carries with him, in his pack, the rules of international customary public law regarding the laws of war and the fundamental principles of Israeli administrative law"

(HCJ 393/82 Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area, *Piskey Din* 37(4) 785, p. 810).

30. Therefore, inasmuch as the policy, as Petitioners claim, infringes the fundamental rights of Palestinian detainees – the illegality of the policy is rooted not only in the provisions of humanitarian law, but also in Israeli administrative and constitutional law.

31. Furthermore, in conjunction with the rules of humanitarian law and Israeli constitutional and administrative law, the Respondents' policy which is the subject matter of this petition is also subject to the rules of international human rights law, both treaty and customary, by which the State of Israel is bound (for the judgments that applied international human rights law to the Occupied Territories, see *inter alia*: the statements of President Beinisch in CrimA 6659/06 John Doe v. The State of Israel (unpublished); HCJ 3239/2 Mar'ab et al. v. Commander of the IDF Forces, (*Piskey Din* 57 (2); HCJ 7957/04 Zaharan Yunis Mar'aabeh et al. v. Government of Israel et al. *Piskey Din* 60(2) 477, pp. 505-6).

2. Domestic Law

32. The domestic legal framework for the aforesaid policy is *The Law Amending and Extending the Validity of the Emergency Regulations (Judea and Samaria – Adjudication of Offences and Legal Aid), 5767- 2007* (hereinafter: the Law Amending and Extending the Validity of the Emergency Regulations), or, more accurately, Sections 6 and 6A of the Law which read as follows:

Implementation of penalties and arrests
6. (a) The penalty imposed on a person convicted and sentenced by a military court may be carried out in Israel in the manner in which a penalty imposed by the court is carried out in Israel, provided the penalty was not carried out in the Area.

…

(b) The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority vested pursuant to a commander's proclamation or order, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel and such person may be transferred for detention in the area in which the offence was committed.

(c) The arrest and detention of a resident of the Area against whom an order for arrest or warrant for arrest was issued in Israel may be carried out in the area of which he is a resident, in the manner in which an order for arrest or warrant for arrest is carried out in the Area.

(c) The arrest and detention of a resident of the Palestinian Council against whom an order for arrest or warrant for arrest was issued in Israel may be carried out in the Area in the manner in which an order for arrest or warrant for arrest is carried out in the Area.

Implementation of penalties and warrants in the Area
6A. (a) The penalty imposed on a resident of the Area who is not Israeli and who was convicted in a court in Israel and sentenced to a term of imprisonment, may be carried out, provided it has not been carried out in Israel, in the Area of which he is a resident, in the manner in which a term of imprisonment imposed by a military court is carried out in the Area; however, he shall continue to be subject to the provisions of Sections 45(B) and (C), 46 and 49 to 51 of the Penal Law 5737 – 1977, the provisions of Section 15, 28 to 35 and 66 of the Prison Ordinance (New Version) 5732 – 1971 and the provisions of Section 11(B) of Basic Law: The President of the State.

…

33. This law, in conjunction with the rule awarding domestic law supremacy when incompatible with international law *ostensibly* permits the policy of holding Palestinian administrative detainees, criminal detainees and prisoners in the sovereign territory of the State of Israel, thus according to the Respondents.

34. As we shall see below, this position is legally incorrect and morally inappropriate.

3. The Sajdiya case

35. The Sajdiya case concerned the legality of holding **administrative detainees** in the sovereign territory of Israel.

36. In that case it was argued, *inter alia*, that there was a violation of the provisions of the Geneva Convention according to which the occupying power must hold administrative detainees, criminal

detainees and prisoners within the occupied territory, and military courts operating under the laws of occupation must operate within the occupied territory.

37. Despite the aforementioned provisions, the HCJ ruled in its judgment that holding administrative detainees in the Ketziot detention facility in the Negev was lawful.

38. One of the central reasons for the Court's ruling that this practice was lawful was that the phrasing of Article 78 ("Protected persons accused… and if convicted") does not include (in a narrow, literal interpretation) administrative detainees who were never indicted, much less convicted (the Sajdiya judgment, p. 812).

39. In addition, the HCJ relied on domestic law which permits holding Palestinian detainees and prisoners in the territory of the State of Israel as well as the abovementioned rule, according to which, where domestic law conflicts with international law, domestic law supersedes.

4. The reasons necessitating departure from the existing policy and the Sajdiya rule:

I. Legal changes: the customary status of the IV Geneva Convention

40. Petitioners shall argue that since the decision of the Honorable Court in the Sajdiya case was published, the status of the IV Geneva Convention has undergone a substantive change. At the time the judgment was rendered, the approach that the IV Geneva Convention was not customary still prevailed in the Supreme Court:

> *"A summary of the position of learned counsel for Respondent:*
> …
> *(2)* ***The IV Geneva Convention, which is a treaty convention, cannot be enforced by the Court, since it is not presumed domestic law;***
> …
> *(5)* ***The humanitarian provisions of the Convention do not become binding legal norms in practice simply because there is a political decision to respect them.***
> …
> *We have examined the relevant provision in the law of the State of Israel and in military administration ordinances and we have not found grounds to reject the Respondent's abovementioned legal thesis."*
>
> P. 810 of the judgment (emphases added).

41. This position is no longer accepted.

42. Since the Sajdiya judgment was rendered, the international community and the many scholars in the field have conceded that the **entire** IV Geneva Convention has become customary, and therefore binding, in our legal system, as part of the law of the land.

43. Evidence of the advancement of a norm from the treaty stage to the customary stage in international legal evolution can be found directly in the conduct of states; yet, it can also be found in utterances made by their leaders, the signing of additional treaties and conventions addressing the same issues, decisions of international courts and tribunals, resolutions of the UN security council and general assembly, scholarly texts and other evidence gathered from the

arenas of law and international relations among states.

44. In our opinion, all signs point toward the Geneva Convention and its humanitarian provisions in particular, having attained customary status.

45. The clearest and most authoritative source which states that the IV Geneva Convention has long since become customary may be found in an international opinion published by the supreme international instance, that is the International Court of Justice (ICJ) in the case known as the "Legality of the Threat or Use of Nuclear Weapons case: International Court of Justice, Advisory Opinion: Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, par. 79.

46. The relationship between international humanitarian law and international human rights law was among the subjects reviewed in the framework of this case, in which the UN General Assembly posed a question to the ICJ regarding the legality of the use or threat of nuclear weapons. The ICJ ruled that humanitarian law constitutes *lex specialis* and, therefore, the issue would be decided in accordance thereto. The ICJ ruled, referring to humanitarian law:

> "75. *A large number of* ***customary*** *rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" (as they were traditionally called) were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an environmental armed conflict.* ***One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities.*** *These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.* ***The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.****"*
>
> (paragraph 75 of the opinion, emphases added)

47. If the crystal clear ruling of the international court which is "the principle judicial organ of the United Nations (Article 1 of the Court's statue and Article 92 of the Charter of the United Nations) were not enough, indeed evidence of the customary status of the Geneva Convention exists on all the other aforementioned levels, particularly in the most developing field in international law today, international criminal law.

48. In the past fifteen years, a number of international criminal tribunals (ICTY, ICTR, SCSL) and a criminal court (ICC) have been established. All include in their formative documents offences known as "war crimes" which are severe violations of the IV Geneva Convention, alongside offences based on other conventions such as the offences of genocide and crimes against humanity.

49. When the UN Security Council was discussing the establishment of a tribunal for the crimes committed in the former Yugoslavia, the UN Secretary-General was requested to submit a report

regarding the possible sources for the offences on which the tribunal would adjudicate. The legal difficulty lay in the principle that no punishment can be meted out without prior warning. Therefore, sources of a customary nature would have to be found and thus it would be legally possible to view the offences as prohibitions which were in force before the tribunal was established and before the offences were committed.

50. And so wrote the Secretary-General in his report submitted to the council (emphases added, M.S.):

> "*35.The part of conventional international humanitarian law which has* ***beyond doubt become part of international customary law*** *is the law applicable in armed conflicts as embodies in:* ***the Geneva Conventions of 12 August 1949 for the Protection of War Victims****, the Hague Convention (IV) Respecting the Laws and Customs of War on Land…*
>
> *37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts"*
>
> (Report of the Secretary-General Under Security Council Resolution 808, Doc. S/2504,3 May 1993, Reprinted in 14 **Hum Rts. L. J.** 198 (1992))

51. Indeed, in accordance with the UN Secretary-General's recommendation, the international criminal tribunal for crimes committed in the former Yugoslavia was established and Article 2 of the tribunal's statute, entitled "Grave breaches of the Geneva Conventions of 1949", established that the tribunal has jurisdiction regarding war crimes which are grave breaches of the Geneva Convention against protected civilians. Dozens of Bosnians, Serbs, Croats and others have been extradited to the tribunal and prosecuted by it for such offences and **based on the assumption that the Geneva Conventions in their entirety constitute customary international law**.

52. It shall be noted that hundreds of states**, including Israel**, signed the tribunal's statute and even amended their domestic laws to allow extradition of suspects and defendants to the tribunal – see Article 1 of Part A of the Addendum to the Extradition Law 5714-1954.

53. A similar process took place upon the establishment of the criminal tribunal for Rwanda. Israel undertook to extradite suspects and defendants to this tribunal also, and it too operates on the assumption that breaches of the Geneva Conventions are offences by virtue of the former being customary international law.

54. The number of states that have signed the statutes of the criminal tribunals is particularly high, yet still does not reach the number of states that have signed and ratified the Geneva Convention itself, which is possibly the Convention with the largest number of ratifications, a number identical to the number of UN members – 194. The number of states which have ratified the IV Geneva Convention also indicates the level of "acceptance" of the Convention in international relations and in state practice of international law.

55. And, evidently, it was on the basis of the opinion which considers the Geneva Convention to be customary international law that the International Criminal Court was established. The Court's founding Convention, the Rome Statute, came into force on 1 July 2002. Article 8 of the Court's statute determines the list of war crimes in respect of which the Court has jurisdiction. The following is the first part of the Article:

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

For the purpose of this Statute, "war crimes" means:

(a) ***Grave breaches of the Geneva Conventions of 12 August 1949****, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention"*

56. The Article goes on to list 71 breaches of the Geneva Conventions, each constituting a war crime in respect of which the Court has jurisdiction.

57. Israel signed the Rome Statute but did not ratify it.

58. **The rapidly developing branch of international criminal law, which for the past ten years has been sentencing war criminals for protracted prison terms under the authority of the Geneva Convention and with the cooperation of hundreds of states which have confirmed and reaffirmed their commitment to the Geneva Convention, is the strongest evidence that the Geneva Conventions in general, and the IV Geneva Convention in particular, have become customary international law**.

59. It is impossible to cite the names of all the scholars who also support the aforesaid position and we shall mention three below:

Jean S. Pictet (ed.), **Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War** (Geneva, International Committee of the Red Cross, 1958), p. 9

T. Meron, "The Geneva Conventions as Customary International Law" **American Journal of International Law**, LXXXI, 1987, p.348

Cherif Bassiouni, "Crimes Against Humanity", **Kluwer Law International**, 1999, p. 204.

60. All of the above clearly indicates that the international community agrees that the IV Geneva Convention constitutes customary international law, and thus, its provisions are enforceable in Israeli courts.

61. To this one must add the practice of HCJ rulings in matters pertaining to the Israeli occupation through the 1990's and 2000's, which entirely relies on the provisions of the Geneva Convention, even if leaving the question of its status for further study (HCJ 7015/02 Kifah Muhammad Ahmed 'Ajuri v. Commander of the IDF Forces in the West Bank Area (judgment rendered 3 September 2002), *Piskey Din* 56 (6) 352, 364; HCj 3278/02 HaMoked: Center for the Defence of the Individual v. Commander of the IDF Forces in the West Bank Area (judgment rendered 18 December 2002) *Piskey Din* 57(1) 385, 396; HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel (judgment rendered 30 June 2004) *Piskey Din* 58 (5) 807, 827; HCJ 7957/04 Zaharan Yunis Mar'aabeh et al. v. Government of Israel et al. *Takdin Elyon* 2005 (3) 3333 (judgment rendered 15 September 2005), paragraph 14 of the opinion of then President A. Barak, as well as: M. Shamgar "The Observance of International Law in the Administered

Territories" 1 *Israel Yearbook on Human Rights* (1971) 262).

62. **The aforesaid put together indicates that, contrary to the approach which prevailed in the Court of the Sajdiya case, today one cannot avoid referring to the IV Geneva Convention and its provisions as customary law by which Israel is bound as an occupying power, and thus, one cannot avoid referring to the rule prohibiting the transfer of administrative detainees, criminal detainees and prisoners to the territories of the occupying power as a binding customary rule.**

63. Petitioners shall alternatively argue that even if the Court does not concede to acknowledge that the Geneva Convention **in its entirety** has become customary, indeed the **Articles** which are relevant to our case – 49, 66 and 76, are, beyond a doubt, customary, and this in light of the widespread agreement among states regarding their being legally binding and the widespread practice of upholding them. Petitioners also request to elaborate on this issue, inasmuch as this proves necessary for the purpose of reaching a decision on this petition, and to submit detailed supplementary arguments regarding the customary status of these Articles.

II. Legal changes: the new basic laws

64. The judgment in the Sajdiya case was handed down before the Knesset enacted Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. As known, the enactment of these two basic laws has significantly changed the constitutional structure of our legal system, so much so that it has come to be known as the "constitutional revolution". In accordance with the judgment of the Honorable Court, these basic laws have opened the door to judicial review not only of administrative acts but also of legislative acts.

65. As these matters are well known and need not be overly detailed, we shall only note that the basic laws left existing legislation intact (Section 8 [*sic*] regarding the validity of laws in Basic Law: Human Dignity and Liberty is significant for our matter), however, rulings by the Honorable Court have set an interpretive rule under which a law enacted prior to the Basic Law shall be interpreted to the extent possible in a manner that does not contradict the provisions of the Basic Law (see: CrimFH 2316/95 Ghnimat v. The State of Israel, *Piskey Din* 49 (4) 589, paragraphs 6-7 of the opinion of the Honorable President Barak).

66. Petitioners will therefore claim that inasmuch as the Law Amending and Extending the Validity of the Emergency Regulations must be interpreted as permitting to hold Palestinian detainees in Israel, indeed it infringes upon the protected fundamental rights of these detainees and does not meet the conditions set forth in the limitations clause in Basic Law: Human Dignity and Liberty, as it necessarily creates a severe infringement of the constitutional right of Palestinian detainees to due process as well as the right of the detainees and their relatives to maintain contact with their family members for no proper purpose and to an extent greater than required.

67. Indeed, it will be argued that regulations similar to those entrenched in the Law existed before the enactment of the Basic Law. However, since this is a temporary law the validity of which is periodically extended, **its extension** following the enactment of the Basic Law must meet the requirements set forth in the limitations clause.

68. It is an ingrained rule that the Court may consider whether a law meets the requirements of Basic Law: Human Dignity and Liberty even if it is an amending law and the original law was immune

from constitutional review as it was in force prior to the commencement of the Basic Law and therefore the provision regarding the validity of laws in Section 10 applies thereto. (see: HCJ 6055 Tzemach v. The Minister of Defense et al. *Piskey Din* (53) (5) 241, p. 259 c-d, g, p. 260 b).

69. Alternatively and additionally, it shall be argued that even if the section regarding the validity of laws prevents judicial review of the Law, according to the Ghnimat rule, the Law must be interpreted narrowly and in a manner which prevents infringement of the rights entrenched in the Basic Law to the extent possible.

70. This exercise was not possible in the Sajdiya case as Basic Law: Human Dignity and Liberty had not yet been enacted at the time the judgment was published. Thus, the constitutional revolution also necessitates a reexamination of the Sajdiya rule today.

III. Article 49 of the IV Geneva Convention

71. Transferring an administrative detainee, criminal detainee or prisoner to the territory of the occupying power constitutes "deportation", or at the least "forcible transfer". Both the deportation and forcible transfer of protected persons outside the occupied territory are unequivocally prohibited without exception by the Geneva Convention (the first paragraph of Article 49 of the Geneva Convention).

72. The HCJ rejected claims against deportation based on Article 49 of the IV Geneva Convention in HCJ 698/80 Qawasmeh et al. v. The Minister of Defense, *Piskey Din* 35(1) 617 and in HCJ 785/87 'Afu et al. v. Commander of the IDF Forces in the West Bank, *Piskey Din* 42 (2) 4; this due to the conception that the Geneva Convention had "merely" treaty status and in light of the interpretation that the Article refers only to mass rather than individual deportations (a virtuoso and anti-literal interpretation, it must be noted, and see the criticism of this interpretation: David Kretzmer, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (New York, SUNY Press, 2002), pp. 45-54).

73. We have already stated that it is agreed today that the IV Geneva Convention constitutes customary law. Yet in addition, in view of the fact that the policy regarding imprisonment of administrative detainees, criminal detainees and prisoners produces a transfer of thousands of Palestinians who are permanently held in the territory of the State of Israel, what is at issue is undoubtedly a mass forcible transfer – which is strictly prohibited under international law.

74. The figures on this issue, as received by Petitioner 3 are as follows:

    As of March 2009, Israeli authorities were holding **8,171** security prisoners, under the following the breakdown:

    - **548** administrative detainees;
    - **2,201** criminal detainees;
    - **5,422** convicts.

    Of the **8,171** security detainees, **1,052** are held at the Ofer camp which is located in the West Bank, all others are held in detention and prison facilities in Israel.

That is: 7,119 Palestinian prisoners, administrative detainees and criminal detainees are held in detention and prison facilities inside Israel.

IV. Changes in the reality on the ground: closure, separation and security preclusions

75. The passage of time since the Sajdiya case was ruled has also brought with it significant changes in the reality on the ground.

76. The central change relates to Israel being closed off to the Palestinian population. This has been implemented in various ways, legal and physical, but the freedom of movement between Israel and the territories under its control that Palestinians enjoyed at the time the Sajdiya judgment was rendered has disappeared and given way to curfews, closures, roadblocks, permit regimes and even internal separations and a cantonization of the West Bank.

Regarding the restrictions on freedom of movement, see:

- "Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank", **B'Tselem**, July 2007;

- The periodic "Access and movement" reports by OCHA on the organization's website: http://www.ochaopt.org//index.php?module=displaysection&sect

77. This central change has immense repercussions on the entire issue of imprisoning Palestinians in Israel, as their relatives' ability to reach them is minimal to nonexistent. Many prisoners go without seeing close relatives for many years – a familiar reality in all prisons in Israel. This is also an infringement of the right of the families to visit their loved ones.

On this issue see:

- HCJ 9437/05 HaMoked: Center for the Defence of the Individual v. Commander of the IDF Forces in the West Bank (judgment rendered 17 January 2006);

- HCJ 7681/04, 7419, 7483, 7512, 7548, 7597, 7618, 7801, 7834, 7871 'Abd el-Haj et al. v. Commander of the Military Forces in the West Bank (decision rendered 22 December 2005);

- HCJ 10428/05, 10621, 10637, 10681, 10707 'Aluya et al. v. Commander of the Military Forces in the West Bank (decision rendered 16 July 2006)

- HCJ 11198/02 Dirya et al. v. Commander of the Ofer Military Prison Facility;

- "Barred from Contact: Violation of the Right to Visit Palestinians Held by Israel", **B'Tselem**, September 2006;

- **HaMoked: Center for the Defence of the Individual**, Activity reports 2007, (pp. 43-55 [Hebrew version]), 2004 (pp. 34-39), 2005, 2006, 2002 (pp. 85-89), January - June 2001 (pp. 9-10);

Excerpts from the activity reports of HaMoked: Center for the Defence of the Individual (Petitioner No. 3) relating to family visits from 2001, 2002, 2004, 2005, 2006 and 2007 are

attached and marked Exhibits C1-C6 respectively.

78. As detailed below, this change also affects the ability of Palestinian attorneys representing persons held inside Israel to reach them. This possibility has been practically nonexistent for a number of years.

79. **This issue, with its many infringements, did not present itself to the Sajdiya Court and it derives from the new reality that developed after the judgment was rendered and has since deteriorated, particularly after the outbreak of the second intifada.**

80. The aforesaid access difficulties are also a fundamental issue in the lives of Palestinian detainees who are held in custody pending indictment or during their trial. Their being held in Israel indirectly produces infringements of a number of their fundamental rights relative to the proceedings against them. We shall focus on the impediment it causes to their ability to prepare for trial and effectively conduct their defense.

V. Infringement of due process rights and the right to family life

81. Thus, this reality, in which attorneys and relatives are often prevented from accessing Palestinian administrative detainees, criminal detainees and prisoners affects the realization of their other rights, such as the right to proper counsel by an attorney of their choice who may visit them freely (Article 72 of the IV Geneva Convention), as well as the right to receive visits from relatives (Article 116 of the Geneva Convention).

82. Furthermore, the infringement of the rights of Palestinian administrative detainees, criminal detainees and prisoners does not end here. Petitioner 1 has recently published a report entitled "Backyard Proceedings" which examined the extent to which due process rights are observed in military courts in the Territories.

83. **In criminal law, due process rights** form part of the 'bundle' of rights to which defendants, suspects and detainees are entitled. These rights ensure that **any defendant** standing trial – **in any court** – is granted the means to defend against the charges brought against him including, *inter alia*, the right to understand the charges brought against him, the right to prepare an effective defense, the right to assistance of counsel, the right to interrogate witnesses and other "procedural" rights relevant to the establishment of the conditions for a fair trial. In their absence, there can be no just trial and their infringement increases the risk of miscarriage of justice.

84. **The abovementioned report reveals a long list of failures to guarantee the realization of the due process rights of Palestinian administrative detainees, criminal detainees and prisoners.**

    A summary of the findings and recommendations in the report "Backyard Proceedings" by Yesh Din (Petitioner No. 1) is attached and marked Exhibit D.

85. One of the major failures – **which is a result of the new reality described above** – relates to the ability of suspects and defendants to obtain effective legal counsel and prepare their defense effectively and seriously.

86. According to Article 72 of the IV Geneva Convention –

"Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defense…"

87. According to the ICRC's authoritative interpretation of this Article, defense counsel must be allowed "to study the written evidence in the case, visit the defendant and interview him without witness, and to contact persons summoned as witnesses" (see Jean s. Pictet (ed.), **Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War** (Geneva, International Committee of the Red Cross, 1958, p. 356).

88. Similar articles are included in the International Convention on Civil and Political Rights, 1966 (ICCPR), (Article 14(c) (2), which was interpreted by the Human Rights Committee in "General Comment No. 13"); the European Convention on Human Rights (Article 6 (c) (2)); the American Convention on Human Rights (Article 8 (b)(3)); and the African Charter on Human and People's Rights (Article 7 (a) (3)).

89. **It shall be emphasized: the right to defense counsel and the right to prepare an effective defense are intertwined (and Article 72 of the IV Geneva Convention indeed draws a connection between these rights), as indeed, the right to defense counsel is meaningless if counsel has no access to his client (for the duration of the time required for preparing a defense), documents, witnesses, legislation, rulings and all other means necessary for the preparation of an effective defense. Without these, the realization of the right is merely formal.**

90. The report "Backyard Proceedings" reveals that the abovementioned provisions have no expression in the law practiced in military courts. The report reads (pp. 108-109):

> *"**This arrangement** [that most Palestinian detainees are held in prison facilities inside Israel] **severely restricts the ability of Palestinian attorneys to visit their detained clients and provide them with counsel. Israel has imposed a sweeping prohibition against entry into Israel by Palestinian residents of the OT; the provision applies equally to attorneys and includes the places of detention in which most Palestinian detainees and prisoners are held.***
>
> ***As a result, Palestinian attorneys are almost completely prevented from meeting with detainees, the vast majority of whom, as noted, are held within the territory of the State of Israel. Accordingly, attorneys who are residents of the [Occupied Territories] are forced to hire the services of Israeli colleagues to visit their clients at detention facilities on their behalf, and report to them on the content of the meeting.***
>
> *Thus, for example, Atty. Fares Abu Hassan, a resident of Nablus, states:*
>
> *The problem of all the Palestinian attorneys representing detainees in the Military Courts is that they do not have an opportunity to enter Israel and visit the person whose detention case they are handling – not during interrogation, not during the extension of detention, and not thereafter. This greatly impedes our work. We always have to send another, Israeli attorney, but he does not convey all that you want to convey to the detainee. During the hearings in court – and we work under pressure here – we [only] talk [to the clients] in the courtroom during the hearing. We stand before the judge and speak quickly and briefly – this isn't how the work of an attorney should look. You need to sit and talk to your client, consult with him about the evidence in his case, and discuss*

each point. That doesn't happen at all. This is the problem we have faced for years, since 1999 or 2000."

91. Another major failure the report reveals – **and which is related to the new reality described above** – relates to the issue of public trials.

92. The importance of the principle of holding a public trial derives from the rationale that there can be no public scrutiny of legal proceedings which are not public, and in the absence of public scrutiny there is greater risk of miscarriage of justice. This is one of the most important principles of the 'bundle" of due process rights.

93. This principle is partially expressed in Articles 71 and 74 of the IV Geneva Convention and in the ICCPR (in Article 14 (a) which was interpreted by the UN Human Rights Committee in "General Comments No. 13"); the European Convention on Human Rights (Article 6 (a) and the American Convention on Human Rights (Article 8 (5)).

94. This principle is entrenched in Article 11 (a) of the Order concerning Security Provisions which establishes:

> *"Military court sessions shall be public; however, a military court may order a hearing be held, partially or entirely, behind closed doors, if it considers this appropriate for reasons of the security of IDF forces, public safety, the defense of morality or the welfare of a minor, or if it is the opinion of the court that a public hearing may deter a witness from testifying freely or at all".*

95. However, some of the hearings on detention extensions are held in the military courts' branches located within the borders of Israel: at the Petah Tikva police station, the Ketziot prison facility in the Negev and the Kishon prison facility near Yoqneam. **As part of the policy of closure on the Territories, Israel does not permit the detainees' relatives and Palestinian defense attorneys to be present at these sessions.**

96. The aforementioned location of the courtrooms in which extension hearings are held, which are branches of the military courts inside Israel, **completely prevents relatives of Palestinian detainees from observing these hearings. Holding the hearings outside the occupied territory** contravenes the provisions of Article 66 of the IV Geneva Convention in part for this reason – that it prevents the hearings from being public.

97. It shall be noted that these branches were established **for reasons of convenience and in order to hold detention proceedings close to the interrogation facilities.** It is our understanding that these are not grounds which justify such a grave breach of due process rights, particularly when it involves a violation of an express provision of the international laws of occupation.

98. **It is important to note that when the branches were established, a petition was submitted to the Honorable Court through Petitioner 2. The response submitted by the Respondents to that petition pledged to implement mechanisms that would ensure Palestinian attorneys have access to the branches and guarantee public hearings. In view of these undertakings, the Honorable Court rejected the petition (see: HCJ 2560/96 Ahmed Salhab et 4 al. v. Commander of IDF Forces et 2 al., *Takdin Elyon* 97 (1) 313). How easy it is to promise, how**

quickly promises are broken.

99. Thus, the significance of the change in reality – Israel's complete closing off to Palestinian residents of the West Bank as described above – is that holding Palestinian administrative detainees, criminal detainees and prisoners in Israel and holding hearings on the extension of Palestinians' detention in Israel does not only constitute a violation of Israel's obligations under international law, but also produces an infringement of a collection of fundamental rights which might not have been infringed to such a great extent if it were not for the aforesaid change. Among these rights are **the right to counsel** in the sense of counsel being effective rather than merely formal, **the right to prepare an appropriate defense** and **the right to family** and particularly to maintain contact with relatives.

100. We have thus far analyzed how the policy which is the subject matter of this petition violates the due process rights which are entrenched in the laws of occupation. However, the policy also (perhaps primarily) violates the rights of defendants and administrative and criminal detainees in criminal proceedings as established in Israeli constitutional law. These rights, which include the principle of holding a public trial and the right to (effective) counsel by an attorney, were substantially "upgraded" with the enactment of Basic Law: Human Dignity and Liberty. And so tells us the Honorable Court in the famed Yissacharov case:

> "*Many [...] are of the opinion that when the Basic Law: Human Dignity and Liberty was enacted, the right to a fair criminal trial obtained a constitutional super-legislative status. This position makes much sense. An illegal violation of the right to a fair trial in criminal proceedings may violate the constitutional right of the accused to liberty under s. 5 of the Basic Law. It may also harm the accused's self-image and give him a feeling of degradation and helplessness as if he is a plaything in the hands of others, to the extent of a violation of his constitutional right to dignity under ss. 2 and 4 of the Basic Law*"

(CrimA 5121/98 **Private Rephael Yissacharov v. Chief Military Prosecutor**, *Takdin Elyon* 2006 (2) 1093, paragraph 67 of the judgment.

101. The right of prisoners and detainees to receive family visits and the rights of their relatives to visit them in prison also constitutes a fundamental constitutional right which derives from their constitutional right to family life. The right to family life is an inherent part of the human right to dignity and is therefore entrenched in Basic Law: Human Dignity and Liberty.

HCJ 7052/03 Adalah v. The Minister of the Interior, *Takdin Elyon* 2006 (2) 1754
Civ. App. 7155/96 John Doe v. Attorney General, *Piskey Din* 51 (1) 160, 176.
HCJ 693/91 Efrat v. Person in Charge of the Population Administration et al., *Piskey Din* 47 (1) 749, 783;

102. This Honorable Court has only recently reiterated the importance of the prisoner's right to family life as a fundamental constitutional right which is entrenched in Basic Law: Human Dignity and Liberty (HCJ 2245/06 Dubrin et al. v. IPS et al. (unpublished; regarding the right of prisoner Yigal Amir to have children)):

> "The isolation of a prisoner from society in order to fulfill the purposes of punishment also sentences him to familial isolation from his spouse, children and extended family. However, even given this limitation which is inherent to imprisonment, the existence of the human right to family and parenthood necessitates restricting the scope of the infringement of this right to the extent possible and within the boundaries of necessity,

such as by way of granting controlled permits for family visits of prisoners, prison leaves under defined conditions, provision of means allowing for conjugal visits of spouses and the likes. In this manner, one maintains the proportionality of the infringement of the human right which is part and parcel to the denial of freedom inherently involved in imprisonment" (paragraph 15 of the opinion of Justice Procaccia).

VI. The supremacy of conflicting domestic law

103. A second foundation for the decision of the HCJ in the Sajdiya case (apart from rejecting the IV Geneva Convention and its provisions as being customary and therefore binding in domestic law) was the existence of a conflicting domestic (Israeli) law and the rule awarding supremacy to domestic law which is incompatible with international law. This is seemingly the only legal justification the State of Israel presents for holding Palestinian prisoners and detainees in Israel.

104. Indeed, holding prisoners and criminal detainees and administrative detainees in Israel is ostensibly permissible according to the powers vested by the Law Amending and Extending the Validity of the Emergency Regulations. Due to the importance of the relevant provisions in Article 6 of the Law, we shall present them once more, as written (emphases added, M.S.):

> (a) The penalty imposed on a person convicted and sentenced by a military court **may** be carried out in Israel in the manner in which a penalty imposed by the court is carried out in Israel, provided the penalty was not carried out in the Area.
>
> (b) The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority vested pursuant to a commander's proclamation or order, **may** be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel and such person may be transferred for detention in the area in which the offence was committed.

105. Thus, ostensibly, the authority to hold Palestinian detainees and prisoners in Israel pursuant to arrest orders and sentences issued in the Occupied Territories does exist, as the Article states – this "may" be done.

106. As an interim conclusion we shall say this: an article in an Israeli law ostensibly allows holding Palestinian detainees, who are protected civilians of an occupied territory, within the borders of the State of Israel. This conflicts with the following three:

- Explicit provisions of the laws of occupation;
- The human rights of protected persons which are enumerated in humanitarian law (such as the right to legal representation, the right to a public trial and the right to contact with family) which are infringed;
- Human rights entrenched in Israeli law (such as the right to counsel, other due process rights and the right to family contact), which are also infringed.

107. For the reasons listed above, Petitioners will argue that inasmuch as the Law cannot be interpreted in a manner consistent with the constitutional status of the rights to due process and

family life, these provisions of the Law must be revoked. This, since they infringe fundamental constitutional rights in contravention of the conditions set forth in the limitations clause in Basic Law: Human Dignity and Liberty. Holding Palestinian detainees in Israel does not serve any proper purpose which may justify the infringement of these fundamental rights. Alternatively and additionally, the provisions of the Law breach fundamental rights to an extent greater than required, in contravention of the principle of proportionality in the Basic Law.

108. The same result may also be achieved through a constitutional interpretation of Article 6 of the Law, and through an interpretation that upholds Israel's obligations under international law. Indeed, we must ask ourselves the following question: In view of the aforesaid conflict, does a reasonable interpretation of Article 6 of the Law Amending and Extending the Validity of the Emergency Regulations indeed allow for all this? Is there no way to reconcile the provisions of Israeli constitutional law and international humanitarian law with the aforesaid Article 6?

109. Of course there is. Both in cases of conflict between domestic and international law, and certainly in cases of conflict between a law and a constitutional principle, there are interpretation rules which are designed to resolve the conflict or, at the least, minimize it to the extent possible.

110. The legal rule which applies in cases of conflict between domestic and international law is the interpretive rule according to which **where the domestic law may be interpreted in a number of ways, the interpretation which is consistent with international law and prevents the violation thereof shall be preferred:**

> "*It is our common law that an Israeli court shall interpret our written law in a manner which prevents, to the extent possible, conflict between internal law and the known precepts of international law, in order for the internal law to be consistent with the obligations of the State under international law*."
>
> (CrimA 131/67 Kamiar v. The State of Israel (judgment rendered 9 June 1968), *Piskey Din* 22(2) 85, 112).

111. On this issue, see also: CrimA 336/61 Eichmann v. Attorney General (judgment rendered 29 May 1962), *Piskey Din* 16 2032, 2040-2041; CrimFH 7048/97 John Does v. Defense Minister (judgment rendered 12 April 2000), *Piskey Din* 44 (1) 721, 767; HCJ 2599/00 Yated – Association of Parents of Down Syndrome Children v. Ministry of Education (judgment rendered 14 August 2002), *Piskey Din* 56 (5) 834, 846.

112. **This interpretive presumption according to which the interpretation which is consistent with the provisions of international law is to prevail may be contradicted only when the language of the law or the particular explicit purpose of the domestic law is incongruent with the general values of the system or with the international norm.**

(HCJ 2599/00 Yated – Association of Parents of Down Syndrome Children v. Ministry of Education (judgment rendered 14 August 2002), *Piskey Din* 56 (5) 834, 846).

113. On this issue, see also: HCJ 953/87 Poraz v. Mayor of Tel Aviv Yaffo (judgment rendered 23 May 1988), *Piskey Din* 42(2) 309, 329-330; CrimA 131/67 Kamiar v. The State of Israel (judgment rendered 9 June 1968, cited above), *Piskey Din* 22(2) 85, 112).

114. In our matter, it is clear that the language of the internal law does not negate the possibility that detention and sentencing will be carried out in the occupied territory. Article 6 of the Law merely *allows* holding prisoners, administrative detainees and criminal detainees in Israel. Or, in other words: the authorities have **discretion** as to whether to transfer administrative detainees, criminal detainees and prisoners to custody within the State of Israel.

115. Our position is that in this state of affairs, and noting the interpretive principle which gives preference to an interpretation that prevents a violation of international law, one must interpret this discretion most narrowly. This shall be done by determining that reasonable discretion requires establishing a policy which minimizes as much as possible the violation of the rule established in international law and makes such violations rare exceptions.

116. **In other words: Even if, in conflict with international law, domestic law allows holding Palestinian detainees and prisoners within the borders of Israel, an appropriate interpretation of the violating authority would be as narrow an interpretation as possible, one that favors respecting the provisions of the IV Geneva Convention. Such an interpretation is available and it determines that the aforesaid Article 6 which refers to –** "a person convicted and sentenced by a military court" **applies only to persons convicted in military courts and who are not protected civilians** (Israeli citizens, tourists etc.)

117. Alternatively, another possible interpretation which is restrictive and will not lead to a violation of the clear provisions set forth in the Convention is that **Palestinian detainees will generally be held in the occupied territory and use of the authority granted by the aforesaid Article 6 shall be made as an exception where there really is no other choice.**

118. Thus for example, we can consider a situation wherein reasons connected with the identity or the circumstances of a prisoner may necessitate transferring him to Israel (for instance, a patient who needs to be in a medical prison facility, if such does not exist in the occupied territory). Another example may be a case where defending a detainee's rights may necessitate holding him in Israel, or when his family is already in Israel. We are of the opinion that in any one of the abovementioned scenarios, the detainee's consent is a necessary component of the exception to the clear rule which forbids holding protected civilians outside the occupied territory. In any event, such interpretation, which is, to our understanding, the only reasonable interpretation, does not tolerate constant and far reaching use of the authority.

119. The same holds true for the conflict between Israeli law and Israeli constitutional principles. On this matter, the interpretive rule seeking to always uphold rather than restrict the fundamental rights of the person shall apply.

120. As recalled, and as determined in the aforementioned Yissacharov case, the rights of detainees, suspects and defendants in criminal proceedings derive from Article 5 of Basic Law: Human Dignity and Liberty. The right to attorney's counsel, the right to a public trial and the detainees' rights to contact with their families are all constitutional rights. Therefore, any interpretation of Article 6 must be done whilst selecting the option which minimizes as much as possible the infringement of these rights. This is the interpretation that we suggested above – the option that Article 6 applies to persons whose rights would not be undermined by their being transferred to Israel, such as tourists, Israelis, or persons who have family in Israel and who have, in any event, given their consent to the transfer.

5. Unlawfulness of Military Court Sessions held inside Israel

121. As stated, military courts hold some detention hearings in courtrooms designated for this purpose in police stations inside Israel.

122. Petitioners will argue that this practice is unlawful and contravenes Basic Law: The Judiciary which establishes, in Article 1, a closed list of courts in which "judicial power is vested". These are the Supreme Court, a District Court, a Magistrate's Court; and "another court designated by Law as a court".

123. Since there is no "other Law" authorizing military courts to hold detention proceedings or any other sessions **in Israel** – the operation of military courts in police stations inside Israel, aside from contravening principles of both international law and Israeli constitutional and administrative law (as argued above), also contravenes Basic Law: The Judiciary.

D. Conclusion

124. In light of all the above, and noting the clear and ongoing violation of international law and the rights of protected persons entrenched therein and the violation of Israeli law and the fundamental rights entrenched therein, and in light of the legal and factual changes which have occurred over the years and which have been detailed in this petition, Petitioners demand that all Palestinian detainees: administrative detainees, criminal detainees and prisoners be transferred to the occupied territory as required under the Geneva Convention. Additionally and consequently, Petitioners demand Palestinians' detention proceedings cease to be held in courts located within the borders of the State of Israel.

In light of all the above, the Honorable Court is requested to issue an *order nisi* as requested and render it absolute after receiving Respondent's response and holding a hearing.

The Honorable Court is also requested to order Respondent to pay for Petitioners' costs and attorney fees, all including VAT and interest as required by law.

Date:

_____
Michael Sfard, Atty.
Counsel for the Petitioners