

Disclaimer: The following is a non-binding translation of the original Hebrew document. It is provided by HaMoked: Center for the Defence of the Individual for information purposes only. The original Hebrew prevails in any case of discrepancy. While every effort has been made to ensure its accuracy, HaMoked is not liable for the proper and complete translation nor does it accept any liability for the use of, reliance on, or for any errors or misunderstandings that may derive from the English translation. For queries about the translation please contact site@hamoked.org.il

At the Supreme Court
Sitting as the High Court of Justice

HCJ 2254/24

_____ **Abu Musa, ID ----**

Represented by counsel, Adv. Nadia Daqqa 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 Petitioner

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, Jerusalem
Telephone: 073-3925084; Fax: 02-6467011

The Respondents

Respondents' Preliminary Response

1. According to the decision of the honorable court (the honorable Justice Y. Kasher) dated March 17, 2024, the Respondents hereby respectfully submit a preliminary response as follows.
2. This is a petition for a writ of *Habeas Corpus* directed at the Respondents ordering them to inform whether the Petitioner is in their custody and under what circumstances. The Honorable Court is also requested to order the Respondents to disclose the identity of the bodies responsible for providing information about the Petitioner and to enable him to meet with a lawyer.
3. It should already be noted at the outset that the Petition at hand is nothing but another link in a series of previous similar petitions which have been filed by or through HaMoked Center for Defence of the Individual founded by Dr. Lotte Salzberger (hereinafter: **HaMoked**) over the last five months (HCJ 7439/23 **Alwahidi v. Israel Security Forces** (October 31, 2023) (hereinafter: **Alwahidi**); HCJ 7637/23 **Kashta v.**

Israel Defense Forces (November 6, 2023) (hereinafter: **Kashta**); HCJ 7945/23 **Abu Abed v. Israel Defense Forces** (November 13, 2023) (hereinafter: **Abed**); HCJ 9021/23 **Wadi v. Israel Defense Forces** (February 18, 2024) (hereinafter: **Wadi**). These petitions, whose remedies were similar to the remedies requested in the Petition at hand, were dismissed by the Honorable Court, one by one, in reasoned and detailed judgments. As shall be explained below, Respondents' position is that the Petition at hand, like its predecessors, should also be dismissed.

4. This chain of petitions, the remedies requested thereby and the judgments of the Honorable Court which were given therein, were specified in Respondents' preliminary response to the petition in HCJ 9021/23 **Wadi v. Israel Defense Forces** (February 18, 2024) – a petition which was also dismissed since it bound together various and separate matters.
5. In addition to the aforesaid, it should be noted that two additional individual petitions are pending before the Honorable Court in which similar remedies were requested with respect to petitioners who had been arrested in the course of the security forces' activities in the Gaza Strip: HCJ 1698/24 **Kolab v. Israel Defense Forces**; HCJ 1730/24 **Lobad v. Israel Defense Forces**. On March 7, 2024 the preliminary responses to these petitions were submitted on behalf of the Respondents specifying the reasons for their dismissal *in limine*. On March 17, 2024, after Petitioners' motion to reply was accepted, Petitioners' reply to Respondents' preliminary response was submitted.

In addition, a host of additional individual petitions were submitted with similar or identical remedies which have not yet been decided: HCJ 1882/24; HCJ 1883/24; HCJ 1885/24; HCJ 1886/24; HCJ 1896/24; HCJ 1898/24; HCJ 2216/24; HCJ 2379/24.

6. We shall briefly discuss the links of the chain of petitions which were dismissed, making reference to all that which is stated in the response in HCJ 9021/23 which is attached hereto.

A copy of Respondents' preliminary response in HCJ 9021/23 is attached and marked **RS/1**.

7. 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 (hereinafter: **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 which 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.
8. In this murderous attack more than one thousand citizens 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 is involved in 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.

9. The Honorable Court has already referred in its judgments to this difficult war. See for instance, paragraph 8 of the judgment in HCJ 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."

10. 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 the 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 criminal 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.

11. The first petition on the matter was submitted to the Honorable Court only four days after the war had started (see **Alwahidi** above). In said petition, which was submitted by HaMoked (as a public petitioner) a writ of *Habeas Corpus* was requested in the matter of two petitioners. The petition alleged that the individual petitioners were ""journalists, who arrived to the Erez Checkpoint area on October 7, 2023" and that the petition was submitted following a request submitted by their "work colleague" to HaMoked requesting it to assist him to locate them.
12. On October 15, 2023 the Respondents submitted a detailed preliminary response. On October 31, 2023 the judgment of the Honorable Court in **Alwahidi** was given, dismissing the petition and obligating the petitioners to pay costs. 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 detainees 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 Al Basyouni 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 the 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 merciful kings" (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 mercy, 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 account 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. Meanwhile, it was informed that the petitioners were in the custody of the Israeli authorities: one of them was in 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 only them) to delete the petition since it became redundant so far as the first remedy there was concerned "without 'reserving the arguments' which were resolved". At the same time the Honorable Court decided to **dismiss the petition on its merit** with respect to the two additional remedies, on the basis of the court's rulings in **Alwahidi**.
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: **Abed**) on behalf of 568 Gaza Strip residents, who have allegedly stayed in Israel under permits and were arrested and held by the Israeli security bodies after the war broke out, and whose family members requested HaMoked's assistance in locating them. This petition is not as relevant to the case at hand since it does not concern detainees who were arrested during the ground maneuver in the Gaza Strip. It therefore suffices to note that said petition was stricken in the judgment of the Honorable Court on November 23, 2023.¹

¹ In a similar matter an individual petition is pending in HCJ 1608/24 **Ziara v. Israel Defence Forces**.

17. The next link in the chain of the petitions was submitted in **Wadi** on behalf of different petitioners, some of them detainees who were allegedly arrested in the framework of the ground maneuver in the Gaza Strip. Said petition, as aforesaid, was dismissed *in limine* since it involved different remedies in the matter of different petitioners who differed from each other in their circumstances.
18. Only four days later a new petition was filed on behalf of several public petitioners including HaMoked in HCJ 1537/24 **Association for Civil Rights in Israel v. the Government**. One of the two remedies which were requested there was that the Honorable Court order the respondents to provide "to the International Committee of the Red Cross information concerning all the Palestinian prisoners and detainees from the Gaza Strip and the West Bank held in the custody of the military and the Prison Service" (hereinafter: the **Petition in HCJ 1537/24**).
19. We have elaborated on all of the above proceedings only because the Petition at hand includes only a very partial description (if any) of the aforementioned previous proceedings, without discussing and dealing with the substantial rulings of this Honorable Court mentioned above.

Moreover – the Petition at hand fails to inform the Honorable Court that an additional petition is pending before it and that one of the remedies requested therein does not demand to provide information to the families of the detainees of the ground maneuver, but rather argues that the information should be provided to the ICRC. Naturally, the Petition at hand should have discussed the interrelationships between the two aforementioned proceedings, including in view of the second remedy requested therein. This was not done.

20. Hence, with all due respect, there is a flaw in Petitioners' conduct from the aspects of the disclosure obligation and the clean hands doctrine. It is Respondents' position that the Petition at hand should be dismissed *in limine* at least for this reason. And see, *mutatis mutandis*, that which is stated in paragraph 9 of the judgment in HCJ 6949/21 **Tanturi v. State of Israel** (December 19, 2021).
21. Another **reason** for dismissing the petition *in limine* is that the Petitioner was unable to meet the burden placed on him and show that there is a legal source which justifies granting the first requested remedy.
22. The Petition alleges that the Petitioner was arrested by the security forces in the Gaza Strip, and that the Petitioner's brother contacted **HaMoked** requesting it to help locate him; In addition, a request to trace the Petitioner dated March 5, 2024 which was sent on behalf of HaMoked to the email address anatot.idf@gmail.com was attached to the Petition. On that day a response was sent which stated: "Hi, He is not with us".

Letters on behalf of HaMoked "on the principled level" dated October 12, 2023 and December 13, 2023 to the Attorney General and the Military Advocate General were also attached (letters which have also been brought to the attention of the Honorable Court in some of the previous petitions mentioned above). It should be noted that these letters

preceded the date on which the Petitioner was allegedly arrested (February 15, 2024 at the earliest).

23. As explained in paragraph 10 above, the Petitioner in the case at hand was also arrested in the course of the activity of the Security Forces in Gaza and he is currently held by the authorities of the state of Israel according to the law, by virtue of legal authorization. Alongside the above, and with respect to the disclosure of information to the family members of Gazan detainees who were arrested in the course of the armed conflict, the Respondents can only refer to the holdings of the Honorable Court which were given only several months ago in **Alwahidi**:

As our ancient enemies have said: "We have heard that the kings of the house of Israel are merciful kings" (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 mercy, offered *ex gratia*, exercisable by the security forces at their absolute discretion** (emphasis added).

24. Hence, according to the judgment of the Honorable Court, the Respondents have no obligation to provide information in response to a direct request of the family members of detainees from the Gaza Strip who were arrested during and in the course of an armed conflict, as requested in the Petition. The Petition at hand does not discuss the above determination, and for this reason it should also be dismissed *in limine*.
25. With respect to Petitioner's arguments in the context of the second remedy which was requested in the Petition, it should be noted that this remedy veers from the Petitioner's individual matter and anyway overlaps the other remedies which were requested in the petition submitted in HCJ 1537/24. The state's position on these issues shall be submitted in the framework of its response in HCJ 1537/24 and should not be discussed in the context of the Petition at hand or in the context of additional similar individual petitions which have been submitted in the last few days to the Honorable Court, as specified in paragraph 5 above.
26. With respect to the third remedy which was requested concerning Petitioner's meeting with a lawyer, it should be noted that the relevant arrangements concerning Petitioner's meeting with a lawyer are found in the relevant statutes, and it has already been held in this context as follows:

"With respect to the two additional remedies – it emerges from Respondents' preliminary response that only petitioners 557 and 561 are currently held by the security forces in Israel by virtue of the statutes. The statutes include *inter alia* [...] arrangements concerning a meeting with a lawyer. To the extent the petitioners have any claims according to these statutes, their rights are reserved" (**Abed**, paragraph 3).

Moreover, it should be noted that a constitutional petition is pending before the Honorable Court which was submitted by several public petitioners including HaMoked, concerning the constitutionality of the "provisions included in the Incarceration of Unlawful Combatants (Amendment No. 4 and Temporary Order – Iron Swords) Law, 2023 which pertain to the duration of the temporary incarceration, the duration of time before judicial scrutiny, **the period of time during which a detainee may be prevented from meeting a lawyer** and the manner of the judicial scrutiny" (HCJ 1414/24 **The Public Committee against Torture in Israel v. The Knesset**, the opening paragraph of the petition; emphasis was added – the undersigned).

The above also indicates that the above captioned petition, defining itself as a petition for a writ of *Habeas Corpus*, is not the proper place to examine Petitioner's arguments concerning the third remedy.

27. On the basis of all of the above, the Respondents will argue that the Petition at hand should be dismissed *in limine*.
28. The facts specified in paragraphs 10 and 23 of this response are supported by the affidavit of Major Einav Palatin, Enemy Detainees Operations Officer.

Today, 17 Adar B 5784
March 26, 2024

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

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