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המוקד להגנת הפרט
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Position Paper regarding the Proposal for Downgrading the Incarceration Conditions of Prisoners Associated with Hamas

The special ministerial committee's proposal for downgrading the incarceration conditions of prisoners associated with Hamas as a response to the failure of negotiations regarding Gilad Shalit's release is unacceptable and does not stand the test of law. The committee, which was established by the Israeli government in accordance with a decision dated 17 March 2009 - following the cessation of negotiations on a prisoner exchange deal with Hamas - first convened a day after the decision was passed, on 18 March 2009, and was headed by Minister of Justice, Daniel Friedman. Following that first meeting, the committee indicated that it would publish its recommendations for downgrading the incarceration conditions of Hamas affiliated prisoners held in Israel within two weeks. Minister Friedman told the media that this downgrading would include a revocation of the right to family visitations as well as other rights - "in order to match [these prisoners'] conditions of incarceration to those of Gilad Shalit."

This decision is unacceptable for four central reasons. The first reason stems from the basic fact that the **prisoners benefit from rights to which they are entitled by law – both Israeli and international**, and any violation of these rights must stand the test of proportionality and reasonableness – this is not the case here. A second reason concerns the **improper discrimination** of prisoners affiliated with Hamas, should the government's decision be implemented, which is prohibited under Israeli and international law. A third reason is that such a downgrading of conditions constitutes **collective punishment** which is prohibited under international law. The fourth and final reason is that the goal of collectively punishing Hamas affiliated prisoners is to turn them into **bargaining chips** for exerting pressure on entities over which the prisoners have no control – an inherently unlawful and immoral matter.

We will examine each of these four reasons respectively.

A. The Rights of Prisoners

> The conclusion is that there is justification for establishing special arrangements for security prisoners … nonetheless it is clear that these arrangements need to withstand the legal tests that generally apply to administrative decisions: they have to be **practical, reasonable, and proportionate**. So, for example, **one must not place a restriction upon security prisoners limiting their contacts with persons outside the prison if it is not required on the basis of security considerations or other practical considerations, but is rather motivated by**

> **punitive, vengeful considerations, or, if it harms the prisoner in a manner that is disproportionate to that which is required by practical considerations.**

PPA 1076/95, State **of Israel v. Kuntar**, *Piskei Din* 50 (4) 492, 501

The right to family visits in prison:

The right to family visits to prison facilities is a fundamental right, both of the detainees and of their family members. This is a basic right that derives from the conception of man as a social being, who exists within a framework of a family and a community. The right to family visits is enshrined in a series of legal sources, Israeli and international. It is worth noting, amongst these sources, the Fourth Geneva Convention, which establishes, in Article 116 that:

> **Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.** As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

Likewise Section 47 of the Prisons Ordinance (New version) 5732-1971 and the Prison Service Order 04.42.00, entitled "Arrangements for Visits to

Prisoners," Section 1 thereof establishes that:

> **The visit is one of the important means of contact between the prisoner and his family, friends, and acquaintances.** The visit may help the prisoner during his time in prison and encourage him in times of crisis.

The UN Standard Minimum Rules for the Treatment of Prisoners, 1955, also establishes, in Rule 37 thereof, that:

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Rule 92, which relates to untried prisoners, establishes that:

> **An untried prisoner… shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them**, subject only to restrictions and supervision as are necessary in the interests of he administration of justice and of the security and good order of the institution.

The comprehensive study on customary international law by the ICRC establishes that **the right of**

internees and prisoners to receive visits is recognized by customary international law:

> **Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable**.
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> …In a resolution adopted in 1999, the UN General Assembly demanded that Yugoslavia respect the requirement to allow detainees to receive family visits in the context of the conflict in Kosovo (UNGA Res.54/183). In the **Greek case** in 1969, the European Court of Human Rights condemned the severe limitations on family visits to detainees. In 1993, the Inter-American Commission on Human Rights recommended that Peru allow relatives to visit prisoners belonging to the Tupac Amaru Revolutionary Movement.
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> JM Henckaerts, L. Doswald-Beck, Customary International Humanitarian Law p. 448-449 (Volume I: Rules. 2005).

Other countries that contend with security related difficulties and problems have also faced the question of visits to security prisoners. A judgment by the Grand Chamber of the European Court of Human Rights addressed the question of the incarceration conditions of Abdallah Öcalan, who was accused by the Turkish authorities of heading the Kurdish underground movement, the PKK. Mr. Öcalan was sentenced to death, but the sentence was then commuted to life imprisonment and he is now being held, as one would expect, under maximum security conditions. Despite this, in accordance with the Grand Chamber judgment, Mr. Öcalan enjoys weekly family visits:

> 192 In the present case, it is true that the **applicant's detention posed exceptional difficulties for the Turkish authorities. The applicant, as the leader of a large, armed separatist movement, is considered in Turkey to be the most dangerous terrorist in the country...**
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> 193 The applicant's prison cell is indisputably furnished to a standard that is beyond reproach… the Court notes that the cell which the applicant occupies alone is large enough to accommodate a prisoner and furnished with a bed, table, armchair and bookshelves. It is also air-conditioned, has washing and toilet facilities and a window overlooking an inner courtyard…
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> 194 …**He sees a doctor every day and his lawyers and members of his family once a week**.

Öcalan v. Turkey (Application No. 46221/99 p. 1046-1047).

Moreover, visits are not only the prisoner's right - they are also acknowledged by international law as the right of the prisoner's family members, whose contact with the prisoner was severed due to his incarceration. A scholar summarizes this point:

> People who are sent to prison lose the right to free movement but retain other rights as human beings. One of the most important of these is the right to contact

> with their families. **As well as being a right for the prisoner, it is equally a right for the family members who are not in prison.** They retain the right of contact with their father or mother, son or daughter, brother or sister who has been sent to prison. Prison administrations have a responsibility to ensure that these relationships can be maintained and developed. Provision for all levels of communication with immediate family members should be based on this principle. It follows that the loss or restriction of family visits should not be used as a punishment under any circumstances.
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> (Coyle A. **A Human Rights approach to prison management: A handbook for prison staff** International Centre for Prison Studies (King's College, University of London and the UK Foreign and Commonwealth Office) 2002. p 95).

The prisoner's human rights persevere even during incarceration:

The right to family visits in prison facilities also stems from the prevailing concept, both in international law and in Israeli law, that the mere fact of arrest or imprisonment in and of itself is insufficient to deny the prisoner his basic rights. Prison walls restrict the prisoner's freedom of movement, for all that such a restriction entails, but they do not have the power to revoke other basic rights, excluding those that have been revoked by an explicit provision of the law:

> **We have an important rule that every human right to which a person is entitled by virtue of his humanity is maintained even if the person is subject to detention or imprisonment, and the fact of imprisonment in and of itself cannot deny him any right, except when the denial derives from the restriction of his freedom of movement, or when an explicit provision thereon appears in law**… the sources of this rule may be found in ancient Jewish tradition: based on the Biblical verse in Deuteronomy 25:3: "then your brother should be dishonored before your eyes", the Sages established an important rule in Jewish penal law: "from when he becomes 'dishonored' –he becomes 'your brother'" (Tractate *Makkot* III: 16) **And this important rule applies not only after a person has borne his penalty but also during the bearing of the penalty, since he is your brother and fellow, and his rights and human dignity are maintained and valid.**
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> HCJ 337/84 Hukama v Minister of the Interior *Piskei Din* 38(2) 826, 832;

Similarly, Article 10(1) of the Covenant on Civil and Political Rights establishes that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This article was very broadly interpreted by the Human Rights Committee, the body responsible for the implementation of the Covenant, in CCPR General Comment No. 21 dated 10 April 1992:

> [R]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. **Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment**.

Sections 1 and 5 of the Basic Rules for the Treatment of Prisoners, which were adopted by the UN General Assembly (in Resolution 45/111 dated 14 December 1990), also establish the principle that prisoners are entitled to all human rights except those denied by the inherent nature of imprisonment.

Section 1 establishes that:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to Section 5:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, **all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights**, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

The various provisions concerning the right to prison visits allow for the imposition of restrictions on this right, *inter alia*, for security reasons. However, like any other limitation of a basic right, such restrictions must only be imposed in accordance with the principles of reasonableness and proportionality, while the importance of the affected basic right is given due consideration. In the matter here in question, the decision to limit or cancel the prisoners' right to visitations - or any other right to which their status as prisoners entitles them - only because of their ostensible membership in Hamas, does not stand the test of reasonableness and proportionality as established in the rulings of the Supreme Court.

Moreover, prisoners whose families reside in Gaza have not been receiving family visits for almost two years, due to a deliberate decision by the Israeli authorities. Adding all manner of restrictions – which contradict all the rules and precepts we have listed above - to an already disproportionate and unreasonable limitation, is adding insult to injury.

B. Improper Discrimination

The ministerial committee's decision constitutes improper discrimination of prisoners affiliated with Hamas. The decision is to downgrade the incarceration conditions of all prisoners associated with this group – and not of other "security prisoners" - due only to their organizational and political affiliation.

It is a well known rule in Israeli law that equality is supreme and foremost among legal rules. Upon the legislation of Basic Law: Human Dignity and Liberty, the right to equality was acknowledged as part of a person's right to dignity, according to an interim model which includes within the limit of human dignity not only psychological injury or humiliation and slander which harm the core dignity of a person (see Justice D. Dorner in HCJ 4541/94 **Miller v. Minister of Defense**, *Piskei-Din* 49(4) 94, 131-133), but also discrimination which does not involve humiliation, so long as it is closely and objectively connected to human dignity (see HCJ 7052/03 **Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior**, *Takdin-Elyon* 2006(2), 1754, paragraph 39 of President A. Barak's judgment).

The obligation not to discriminate – a mirror image of the right to equality – is incumbent chiefly upon governmental authorities. "An authority is prohibited from discrimination, which is: unequal and unfair treatment of equals." (HCJ 1703/92 **CAL Cargo Airlines v. Prime Minister**, *Piskei Din* 52(4) 193, 204 as well as HCJ 803, 678/88 **Kfar Vradim v. Minister of Finance**, *Piskei Din* 43(2) 501, 507-508, hereinafter: the Kfar Vradim case).

In the Kfar Vradim case the Court ruled that equals must be treated equally and non-equals must be treated differentially relative to the difference between them (Ibid, 507). Thus, clearly, the differential treatment of a particular group within the general population of so called "security prisoners", which is differentiated only by the ostensible political and organizational affiliation of its members, constitutes improper discrimination which is prohibited by the rulings of the Supreme Court. In this spirit, President Barak cites Justice Chaim Cohen, who established that:

> … the dignity that may not be infringed on and which merits protection is not only the person's good name, but also his status as one among equals. The harm to his dignity is not only a result of slander or insults and vilification, but also discrimination and oppression, prejudicial and racist or degrading treatment. The protection of human dignity means not only a prohibition on slander, but also the guarantee to equality of rights and opportunity, and the prevention of discrimination based on sex, religion, race, language, opinion, **political or social identity**, family lineage, ethnic origin, property, or education (H. H. Cohen, "The Values of a **Jewish and Democratic State**: Reflections on the Basic Law: Human Dignity and Liberty," page 32).

> HCJ 6472/02 **Movement for Quality Government in Israel v. the Knesset**, *Takdin Elyon* 2006(2), 1559, p 1578.

Furthermore, such discrimination in strictly prohibited by international law. Article 14 of the European Convention on Human Rights explicitly states that:

> **The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**

Article 26 of the International Covenant on Civil and Political Rights, which specifically addresses the prohibition of discrimination on grounds of political affiliation, states that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

> discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion**, political or other opinion**, national or social origin, property, birth or other status.

This article was interpreted by the Human Rights Committee , in CCPR General Comment No. 21, thus:

> This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Articles 1 and 5 of the Basic Principles for the Treatment of Prisoners, which were espoused by the UN General Assembly (in decision 45/111 dated 14 December 1990), also establish the principle that prisoners are entitled to all human rights, except those which are denied due to the fact of their incarceration. Article 1 states that:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to Article 5:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, **all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights**, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

Article 29 of the Basic Principles for the Treatment of Prisoners, which addresses discipline and punishment, states unequivocally that prisoners may only be punished in accordance with the law, and based on actions for which the prisoner himself bears responsibility:

> **Discipline and punishment**
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> 29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
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> (a) Conduct constituting a disciplinary offence;
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> (b) The types and duration of punishment which may be inflicted;
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> (c) The authority competent to impose such punishment.
>
> **30. (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.**
>
> **(2) No prisoner shall be punished unless he has been informed of the offence alleged against him** and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.

C. Collective Punishment

The ministerial committee's decision constitutes collective punishment of Hamas affiliated prisoners, since this punishment is imposed on all of them merely because of their organizational affiliation. Moreover, the reason for the imposition of the punishment in this case, according to Israel's position, is the conduct of the heads of the organizations during negotiations with representatives of the Israeli government - conduct to which the prisoners have no connection and which they cannot influence.

Collective punishment is prohibited by international law, in the framework of the laws of war as well as in international human rights law. The fundamental principle prohibiting the use of sweeping and arbitrary punitive measures which harm whole groups of people also forms an important part of the rules of customary international law.

Since the matter in question concerns prisoners who are residents of territories that are being held under belligerent occupation, the laws of war may be applied herein. In this respect, Regulation 50 of the Hague Regulations states:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Article 33 of the Fourth Geneva Convention states:

> No protected person may be punished for an offence he or she has not personally committed. **Collective penalties and likewise all measures of intimidation or of terrorism are prohibited**. Pillage is prohibited.

The ICRC's interpretation clarifies the difference between the Hague Regulations and the Fourth Geneva convention:

> The Provision is very clear. If it is compared with Article 50 of the Hague Regulations, it will be noted that that Article could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility.
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> Thus, a great step forward has been taken. **Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of.**
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> J.S. Pictet, Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War, p. 225 (Geneva, 1958).

It is interesting to note that Pictet interprets the prohibition on the use of "measures of intimidation or of terrorism," not only as aimed at defending protected persons under occupation, but also as a prohibition that accords with the interests of the occupier:

> During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. **Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance**. **They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be**.
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> Pictet, Commentary, p. 225-226.

Article 75(2)(d) of Protocol I Additional to the Geneva Convention also states that:

> (2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents…
>
> **(d) collective punishments**

The ICRC's interpretation of this article clarifies that:

> 3055. **The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise**.
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> Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. p. 874 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Eds. ICRC, Geneva, 1987).

Downgrading the already harsh incarceration conditions of Palestinian "security" prisoners solely due to their ostensible affiliation with Hamas constitutes unlawful collective punishment. For clearly, the decision to downgrade the conditions is not intended to address any security related necessity.

D. The Use of Hamas-Affiliated Prisoners as "Bargaining Chips"

As stated above, the official reason for the imposition of sanctions against Hamas affiliated prisoners is that Gilad Shalit is being held in conditions which contravene the rules of international law, by Palestinian organizations in the Gaza Strip. The demand that Gilad Shalit receive the conditions to which he is entitled by law is indisputably legitimate; however, collectively depriving individuals of their basic rights is not among the permissible measures in a law-abiding state.

The denial of visits and other rights constitutes the effective use of Palestinian prisoners as bargaining chips with the aim of exerting pressure that would lead to Gilad Shalit's release. The use of human beings as bargaining chips for this aim has been unambiguously disqualified by the Supreme Court, as stated by (then) President Barak, and his dicta apply equally to our case:

> I am aware of the suffering of the families of prisoners and missing persons from the IDF. It is heavy as a stone. The passage of years and the uncertainty wound the human spirit. Even more painful than this is the situation of the prisoner who is held in secret and in hiding, ripped from his home and homeland. Indeed, I am not oblivious to this pain, together with the prime interest of the State of Israel in returning its sons to its borders. It did not lift from my heart when I handed down my decision in ADA 10/94 [1]. It has not lessened from then to today. T**he human and societal tragedy of prisoners and missing persons is carried daily on our shoulders. However, as important as the purpose is of the release of prisoners and missing persons, it is not sufficient – in the framework of the petition before us – to legitimize all means. It is not possible – in the legal situation before us – to right a wrong with a wrong.** I am confident and certain that the State of Israel will not be still and will not rest until it finds a way to solve this painful problem. As a state and a society, our comfort is in the fact that the way to the solution will suit our foundational values

Cr.F.H 7048/97 **John Doe v. Minister of Defense**, *Piskei Din* 54(1) 721, 744.

It must be noted that according to the Fourth Geneva Convention, violations of the Convention by one party have no bearing on the obligation of the other party to uphold the provisions of the Convention. The undertakings which Israel assumed upon ratifying the Fourth Geneva Convention are not affected by the fact that the other side does not abide by its provisions.

As Pictet wrote:

> It (the Fourth Geneva Convention – Y.E.) is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations.
>
> Pictet, Commentary p.15.

The absence of reciprocity was also acknowledged in Israeli court rulings. Thus the Supreme Court:

> **One might ask: Could it be that the Petitioners are entitled to have humanitarian considerations taken into account in their matter? They are members of terror organizations that have no truck with humanitarianism, and for whom attacks on the innocent are a way of life. Do the Petitioners deserve to have humanitarian considerations taken into account in their matter, while Israeli soldiers and civilians are held by the organizations to which the Petitioners belong, which pay no heed to humanitarian considerations and refuse to provide any information about those of our men they are holding? Our reply to these questions is this: The State of Israel is a state of law; the State of Israel is a democracy that respects human rights, and which gives serious attention to humanitarian considerations**. We give attention to these considerations because compassion and humanity are ingrained in our character as a Jewish and democratic state; we give attention to these considerations because the dignity of every person is dear to us, even if he is one of our enemies… We are aware that this approach ostensibly grants an "advantage" to the terror organizations that have no truck for humanity. However, this is a transient "advantage." Our moral approach, the humanity of our position, the rule of law that guides us – all these constitute an important component in our security and our strength. At the end of the day, this is our advantage.
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> HCJ 794/98 **`Obeid v Minister of Defense**, *Piskei Din* 55(5). 769, 775

Conclusion:

The special ministerial committee's decision concerning the downgrading of the incarceration conditions of Hamas affiliated prisoners does not withstand the basic legal tests established in Israeli and international law.

Inter alia, the decision constitutes a grave, unreasonable and disproportionate violation of the basic rights to which prisoners held in Israel and their family members are entitled. Note well: as we elaborated above, the issue is not one of privileges, which the prisoners are granted due to the kindness of the Israeli authorities. The basic human rights of prisoners held in the custody of the State are at issue. Any other perception of this matter inherently contradicts the rulings of the Supreme Court, as well as international law.

Furthermore, this decision severely violates the principle of equality among so called "security" prisoners, and constitutes improper discrimination on grounds of political and organizational affiliation. Moreover, the decision calls for collective punishment of a large population of prisoners, a measure which is entirely unlawful, by every legal standard. Finally, the decision establishes the use of a large group of prisoners as "bargaining chips," until the resolution of a matter to which they have no connection and which they cannot influence.

All of the above indicates that the ministerial committee's decision is radically unreasonable, and must be struck down and cancelled.