Military Court Watch

Monitoring the treatment of children in Israeli military detention

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ANNEXURE B

SUPREME COURT SITTING AS HIGH COURT OF JUSTICE

HCJ 2690/09

Before: President D. Beinisch
Deputy President A. Rivlin
Justice A. Procaccia

Petitioners: 1. "Yesh Din" – volunteer human rights organisation
2. The Association for Civil Rights in Israel
3. The Centre for Protection of the Individual founded by Dr. Lotte Salzberger

Against

Respondents: 1. CO IDF Forces in the West Bank – Major General Gad Shamni
2. Minister of Defence – MK Ehud Barak
3. Minister for Internal Security – MK Avi Dichter
4. Prisons Service

Petition for Order Nisi

Date of hearing: 2 Nissan 5770 (17.03.2010)

For the petitioners: Advc. Michael Sfard

For the respondents: Advc. Anar Helman, Advc. Gilad Shirman

THE DECISION
President D. Beinisch

1. The petitioners, human rights organisations, petitioned this court for it to order the respondents to abstain from holding Palestinian administrative detainees, detainees and convicts (hereinafter: DETAINEES) residents of Judea and Samaria (hereinafter: the Area) in prison and detention facilities located in the area of the State of Israel. The petitioners further request that we order the respondents to desist from holding detention procedures for

residents of the Area in military courts located within the State of Israel. The petitioners' contention is that the holding of residents of the Area in prison facilities located within the State and the maintenance of procedures relative to them in Israel is contrary to the law in that it contradicts the provisions of the Geneva Convention relative to Protection of Civilian Persons in Time of War, from 1949. (hereinafter: Geneva Convention or the Convention).

2. Before we relate to the petitioners' central contention, we will briefly cover the facts in the background of the petition. For many years Palestinian residents of the Area subject to imprisonment or detention (criminal and administrative) in prison facilities located within the State of Israel. The beginnings of this holding was in the period in which military government was established in the Area. For a prolonged period two facilities in which detainees from the Area were held were in Ketziot Camp and Megiddo Prison. After the withdrawal of IDF forces from the areas currently held by the Palestinian Authority, and the evacuation from detention facilities in those same areas, the number of detainees held in imprisonment facilities located in Israel grew substantially. Currently there is one detention facility – Ofer Camp – within the Area, and according to the data elicited during the hearing, there are there 691 detainees, and the remaining Palestinian detainees, 6,594 in number, are held in various installations in Israel, and of them 1,362 are arrested, 1,104 are criminal convicts and 4,168 are security detainees. It will be noted that currently all the facilities in which Palestinians are detained – Ofer, Ketziot, Shikma, Jerusalem, Petach Tikvah, Megiddo and Kishon – are under the responsibility and maintenance of the Prisons Service.

3. The lawful framework according to which the possibility of holding detainees from the Area in Israel, was anchored in the Emergency Regulations (Judea and Samaria and Gaza District – Adjudication of Offenses and Legal Aid) 5727-1967 (hereinafter: the Regulations or Defence Regulations) instituted after the seizure of the Area by IDF Forces, in 1967. Since then the validity of the Regulations has been extended from time to time by enactment of the Knesset. The current normative frame is in force according to Clause 1 of the Law for Extension of Validity of the Emergency Regulations (Judea and Samaria and Gaza District – Adjudication of Offenses and Legal Aid) 5767-2007, in which was determined that the Regulations will remain valid until 30.6.2012. And Regulation 6 of the Regulations determines:

"6. Implementation

(a) Whosoever is tried and has imposed on him punishment in military of punishment prison, the implementation of his punishment may be in Israel in the and imprisonment manner in which punishments imposed by a court in Israel are implemented, in the event that the punishment is not implemented in the Area.

(b) Whosoever has against him an arrest warrant or detention order in the Area under the power granted by proclamation or order of a commander, his arrest and holding in detention may be implemented in Israel in the manner that an arrest warrant or detention order is implemented in Israel and he may also be transferred to detention in the Area where the offence was committed."

In parallel, as a mirror image, the security legislation for the Area determined that the basis for holding of residents of the Area in detention on criminal imprisonment in facilities in Israel is in Clauses 5(a)(1) and 5(b)(1) of the Order Regarding Means of Punishment (Judea and Samaria) (No. 322), 5729 - 1969:

> "5. Implementation
>
> (a)(1) Whosoever has against him an arrest warrant or detention order of detention, under defence legislation, his arrest and holding in detention may be imprisonment may be implemented in Israel in the manner that an arrest warrant or and juvenile orders detention order is implemented in Israel.
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> ......
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> (b)(1) Whosoever has been sentenced and has imposed punishment from a military court, his punishment may be implemented in Israel in the manner in which punishment imposed by a court in Israel is implemented provided that the punishment was not implemented in the Area and subject to all the security legislation."

In its response to the petition before us, the State announced that this legislation was rephrased in Security Orders (Integrated Text) (Judea and Samaria) (No. 1651) 5770-2009, which will come into force on 1 May 2010, and will replace the said instructions by Clauses 265(a) and 266(a) of the Order, as appropriate.

It will also be noted that the basis according to the laws of the area for the holding of residents in administrative detention in prison facilities in Israel is to be found in Clause 2(b) of the Order Regarding Administrative Detentions (Emergency Regulations) (Integrated Text) (Judea and Samaria) (No. 1591), 5767-2007, in which it is determined that a detainee may be held for safekeeping, *inter alia*, in a prison as defined in the Prisons Order (New Text), 5732-1971.

4. The question of lawfulness of holding in Israel as aforesaid is not new and it has been discussed in this Court in HCJ 253/88 Sejadia v. Minister of Defence, Verdicts 32(3) 301 (1988) (hereinafter: Sejadia Case), a petition attacking the legality of the holding of residents of the area in prison facilities in Israel, and the conditions of holding of the detainees in those facilities was also discussed. It will be noted that, in the same petition, was discussed in concrete fashion the matter of detainees that were held at the time in the prison facilities at Ketziot. In the verdict that was given in the Sejadia Case there was extensive discussion of the legality of the holding in consideration of the instructions of the Geneva Convention, and interpretation was given to a part of the relevant instructions of the Convention, and especially Article 49 of the Convention, that forbids the forced deportation and transfer of populations from an occupied area to the territory of the occupying power. The judges were divided in their opinions regarding interpretation of Article 49, but the overriding reasoning for determining legality of the holding rested on Regulation 6 of the Emergency Regulations, which in their status as primary Israeli legislation override the provisions of international law.

The Petitioners are in practice requesting to change that procedure. In their view, in the changing times, and primarily in the change of legal attitudes to the status of the Geneva Convention, justifies reexamination of the procedure that was ruled in the Sejadia Case. Firstly, the Petitioners contend that the holding of Palestinian detainees in the territory of the occupying power is inconsistent with the provisions of Articles 76 and 49 of the Geneva Convention. The Petitioners do contend that this holding detracts from the rights of the Palestinian detainees because of distancing from their families, especially in the light of restrictions on movement that have been imposed on residents of the Area in recent years. The Petitioners attempt to test the Sejadia Case verdict, *inter alia*, on the background of the fact that the verdict discusses the holding of administrative detainees and there was not before the Court the question of criminal convicts and the provisions of Article 76 of the Convention, which deals with the place of imprisonment of accused who have been found guilty. On this matter we hasten to say that there is essentially no difference in speaking of administrative detainees or criminal convicts because, as the Court noted in the Sejadia Case, Regulations 6(a) and 6(b) refer to detainees and convicts as the same (pp. 816-17).

5. The Respondents, on their part, contend that the time which has elapsed since the giving of Sejadia verdict has not detracted from the validity of the procedure, and that the Petitioners have not raised the heavy burden imposed on the requester of “new examination” of the procedure rooted in verdict such as that in the Sejadia Case. Also contended, that even from practical reasons it is not desirable to stray from this procedure, for it may drag in damage to the rights of the Palestinian detainees, *inter alia* in the light of the need that has arisen to impound lands for the building of new prison facilities in the Area since the facilities that functioned there in the past are no longer in Israeli control. Finally, it was contended that as long as the Petitioners have individual contentions, regarding harm to the rights of a detainee resident in the area, it would be possible to submit an appropriate petition on the individual question, and this would have been dealt with in concrete fashion.

6. It must be said, first of all, that we did not find sufficient existing reason to change the procedure that was laid down in the Sajadia Case regarding the status of Regulation 6 that overrides the provisions of the Convention. As for the validity of the provisions of the Geneva Convention, since the imposition of the occupation laws on the Area in 1967, the State has contended before the Court that the reference is to a contractual convention, and according to its judicial critical attitude to the implementation of the provisions of the Convention, by virtue of the commitment, the State accepted, as a matter of policy, to respect the humanistic provisions in the Convention. Accordingly, the Court examined in extensive rulings the maintenance of those same provisions over the years. Now the Petitioners contend that there has been a change in attitude, and it is accepted that the provisions of the Convention are a part of the prevailing justice, and as such they have a binding status. Whatever the status of the Geneva Convention will be, we are prepared to accept the contention that the actions of the military commander in the area are to be examined according to the provisions of the Convention, as the Court has done over the years, and to respect the behavioral provisions as a part of the practiced law (see for example: HCJ 3278/02 Centre for Defence of the Individual v. the commander of IDF forces in the area of the West Bank, Verdict 37(1) 385, 396-97 (2002), hereinafter: Centre for the Defence of the Individual Case; HCJ 5591/02 Yassin v. Commander of Ketziot Military Camp, Verdict 37(1) 403, 413 (2002), hereinafter: Yassin Case).

Nevertheless, there is no dispute that when a provision of specific law in the internal Israeli law stands against the rules of international law, including when the reference is to customary law, the Israeli law prevails (see: Sejidia Case, p. 815; 336/61 Eichmann v. Attorney General, Verdict 17 2033, 2040-41 (1962); and, for example: HCJ 256/0 Rabah v. Court for Local Affairs in Jerusalem, Verdict 56(2) 930, 934 (2002); HCJ 591/88 Taha v. Minister of Defence, Verdict 35(2) 45, 52-3 (1991). In the light of the fact that this is the central reason standing, as aforesaid as the basis for the decision in the Sajadia Case, we did not see need to discuss the Petitioners' contention regarding interpretation of the provisions of Articles 76 and 49 of the Convention.

7. In summary, from the ruling of this Court and from the collection of data, it arises that the interpretation given to the provisions of the Geneva Convention for the purpose of their application to the Area, must be done in accordance with circumstances and the special characteristics obligated by the need to apply the laws of the occupation in conditions appropriate to the nature of holding of the Area; this considering the prolonged period of the holding, the geographic conditions and the possibility of maintaining contact between Israel and the Area. The appropriate purposeful interpretation of the provisions of the Convention in the Israeli reality and the conditions of the Area primarily obligate the giving of considerable weight to the rights of the protected population, and within that to the rights of the detainees. This Court has dealt many times with the question of ensuring decent conditions for Palestinian detainees, whether detained in Israel or whether at Camp Ofer, according to the essential scales determined in international conventions. Thus, the Court deliberated on the obligation to maintain the international standards for detainees, according to the principles of Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988), which was accepted by the UN General Assembly in 1988, and of course according to the Geneva Convention, and thus also applied the principles determined in Article 10(1) of the International Convention Regarding Civil and Political Rights, 1966 (Yassin Case, pp. 412-13; Centre for Protection of the Individual, pp. 397-99). The court also recommended in its verdicts the establishment of a follow-up committee on the conditions of convicts (see: Sajidia Case, pp. 825-26; Yassin Case, pp. 417-18); and discussed questions involved in density, hygienic conditions, food, etc. And the following was determined in the Centre for Protection of the Individual Case:
"Therefore the arrest obligates, from its very nature, negation of freedom, however there is nothing in it to justify, from its nature, harm to human respect. Detention can be maintained and the security of the State and the public peace guaranteed in a manner that will preserve human respect of the detainee" (ibid, p.397. Also see in this matter: Yassin Case, p. 411; HCJ 221/80 Darvish v. Prison Service, Verdict 25(1) 536, 438 (1980)).

The judicial critique of verdicts that discuss the rights of detainees and the conditions under which they are held centered, therefore, on the maintenance of the relevant provisions determined in international law.

8. As a result of pressures deriving from reduction of deployment of IDF forces in the Area and the withdrawal of the army from the centre of cities in which were located the prison facilities in the Area, a system of prison installations was built in Israel. As mentioned above, all the facilities in Israel in which Palestinian detainees are held are no longer held by

the IDF but are managed by the Prison Service, with all that is obligated thereby regarding comparison of detention and imprisonment conditions of residents of the Area with residents of Israel. There is no dispute before us that in the installations of the Prison Service in Israel, and in the imprisonment facility at Ofer Camp located in the Seam Zone there has been a considerable improvement in the conditions of detainees, and also the possibility of maintaining inspection of the conditions, complain about them, or and improve is much greater than it was in the imprisonment facilities that were under military control and those that were in the Area. The move to transfer control from the IDF to the responsibility of the Prison Service was influenced by this Court in the Yassin Case:

"...there is room to weigh whether it is desirable that the responsibility for conditions of imprisonment of administrative detainees from the Area will be placed in the hands of the army. In our opinion, it is desirable to weigh placing the responsibility for this in the hands of the Prison Service. Thereby a number of advantages will be attained: firstly, the responsibility for imprisonment and its conditions will be in the hands of a professional body with expertise in this; secondly, there is an intricate system of laws within which the Prison Service functions, and which ensure desirable balance between the needs of security and the rights of the detainee. Thus, for example, there will be at the disposal of the detainees the possibility to make "prisoners' petitions," and thereby guarantee judicial critique of the conditions of imprisonment (ibid, p. 418. emphases in the original - D.B.)

As aforesaid, in all these the Prison Service authorities are today obligated to respect the provisions of international law and standards therein determined in the matter of conditions of detention and imprisonment in general and conditions of detainees who are protected residents under international law in particular.

9. In his argumentation before us the representative of the petitioners did not ignore the fact that there was point to not erecting prison facilities in the area in the period in which the IDF left the central cities in the area in which there were installations up to that stage. The petitioners even agreed in their contentions that the question of conditions of imprisonment, including the question of possible family visits, in as much as it obligates judicial critique, is a matter for separate petition. The petitioners' contention, in so far as it rests on the concrete conditions, to differentiate from the provisions of the Convention, centers on the need of the detainees more than anything else for contact with their families, and in their contention closures and restrictions on movement from the area to Israel, which are many in the recent period because of the demands of security, prevent the maintenance of this essential contact, because of the location of the prison facilities in Israeli territory. The representative of the State responded to the concrete contentions that detainee visits carry on regularly, within the obligated limits, according to arrangements determined and inspected by this Court; arrangements which are similar in the forcefulness of critique to those of Israeli convicts. The State representative did note that even within the area there are restrictions on the freedom of movement, and there too accessibility is not easy although, in his contention, in the recent period there is a change to the good in the policy regarding the movement of Palestinians in the area and even in Israel by comparison to the period of the *intifada* of earlier years. Accordingly, the State contends that there is no basis to the petition to copy prison facilities into the area, on the foundation of the argument of prevention of visits by kin. The crossing arrangements for visits in Israel obligate, of course, coordination and

transport, and this matter has been discussed before us more than once, in the awareness of the importance of visits by relatives as a part of the right to implement contact with family (see, for example, on this matter: HCJ 7615/07 BARGOUTI V. COMMANDER OF ARMY FORCES IN THE WEST BANK (unpublished, 25.5.2009)). It may be that the subject of accessibility of family members to visits to their detained kin obligates treatment to improve and coordinate suitable arrangements. However, as aforesaid, this matter does not bear the requested aid in the petition before us.

10. An additional contention of the petitioners touched on the matter of existence of detention hearings and remand extensions by military courts within the territory of Israel, which is contrary, in their opinion, to provisions of Article 66 of the Geneva Convention. This subject arose in the ruling of this Court in HCJ 6504/95 WAJIA V. STATE OF ISRAEL (not published, 1.11.1995) hereinafter: WAJIA CASE), where it was determined that the basis for the possibility of the military courts discussing the arrest of residents of the area is in Regulation 6(b) of Emergency Regulations, although this does not relate to the location of the court ordering the arrest, but essentially permits its activity. We did not see to change from the procedure determined in the Wajia Case, over which this Court returned on additional occasions (see, for example: HCJ 1622/96 Ahmed v. General Security Service, Verdict 40(2) 749, 751 (1996)). This for the reasons detailed above in the matter of relationship between the provision of internal law and international law.

11. From the factual viewpoint the State's notice said that hearings of the military court on extension of remand and also hearings of periodic critique of administrative detention, take place in special halls that are located adjacent to prisons in Israel since the first *intifada*, that is more than 20 years, while the hearings and appeals are located in the military courts in the area. Of course, with the holding of most of the detainees in Israel, there was also multiplication of detention hearings held in the State. This decision was taken while paying attention to the logistic difficulties involved in transferring thousands of detainees to military courts in the area for the purpose of detention hearings. This situation is not optimal for the holding of such hearings. But in the frame of balances between the security interest in holding in detention, the necessity of which the provisions of the Convention also recognise, and the need for transport to the area which will burden not only the responsible elements for implementing transfer of detainees but also the detainees themselves, it seems that the solution found, which corresponds with the arrangement determined in Emergency Regulations and with the essential conditions required for the protection of the rights of the detainees, is the required solution, as long as the detainees are held in Israel.

12. The petitioners also contend that within the existing arrangement, of remand extensions in military courts operating in Israeli territory, harm is done to the rights of the Palestinian detainees for a fair procedure because of the lack of possibility of lawyers from the area to appear and represent them in the procedure. This contention rests on a report published by Petitioner 1 with regard the behaviour of military courts in the area. The representatives of the State argued in response to the petition that this sweeping contention is not anchored in factual infrastructure, and therefore they disagree with the conclusions of the report and their validity. This matter is not before us and in the absence of individual contentions is also not given to examination in the current procedure. We will only comment that in this context of desirable and fair possibility of representation by lawyers in the process of the detention,

there is an obligation imposed on the State to maintain appropriate arrangements to ensure decent representation of the detainees, and we assume that this contention will be examined by the respondents in an individual manner whenever requests will be submitted to them on this matter.

CONCLUSION

13. For the reasons detailed above, we did not see that a justification arose for renewed examination of the procedures of SAJIDIA and WAJIA. We reiterate and reemphasize that in everything connected with conditions of detention and the relevant provisions of the Geneva Convention and even of additional international laws regarding the holding of detainees, this Court determined clearly and unequivocally that Israel must respect the provisions of international law, and that every detainee is entitled to conditions of detention appropriate to his human self respect. This Court did not w3ithhold criticism as to the determination of physical conditions and personal welfare needed by the detainee, and in this matter, as aforesaid, there has been considerable improvement, precisely because the detainees are held in Israel. As we noted, the provisions of the Convention must be interpreted as bearing on the special conditions of holding of the area in the hands of Israel, and in consideration of its principled initial point, as laid down in Article 27 of the Convention, which instructs as follows:

"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity... However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

In this the Respondents are observing the relevant provisions of the Geneva Convention regarding conditions of of holding of detainees, In this matter, with adaptation, the words of Justice Bach in the Sajidia Case are good in that he felt that the Convention must be observed according to the proper interpretation, and he said:

"It cannot be understood from these words that all the provisions included in the Convention, and relating to the detention of administrative detainees must be observed blindly; each provision must be examined according to its importance, vitality and appropriateness to the special circumstances of the detainees camp that is the subject of our discussion" (ibid, p.832).

14. In the circumstances created thought must be given to the practical implication of erecting new prison facilities in the area in the required scope after withdrawal of IDF forces from the cities in which were facilities in the past, erection in the course of which there may be harm to detainees from the viewpoint of conditions of holding and to the local residents on whose land the facilities will be built. In application of the provisions of the Geneva Convention they must be implemented in adaptation to the reality that was not foreseen by the drafters of

the Convention; the geographic proximity of the area to Israel must also be taken into account and the fact that there is nothing in the holding of detainees in Israel to necessarily deprive them of family visits or legal aid. There must, therefore, be separation between the obligation to observe the humanitarian provisions of the Convention and the maintenance of conditions of detention of detainees and between the argumentation as to the location of detention; in consideration that the question of location of the detention was arranged years ago in enactments of the Knesset, and its legality was approved in verdict of this Court, and in consideration that the conditions of Israel's holding of the area and the reality prevailing between Israel and the area, the holding in prison facilities in Israel does not strike at the essential provisions of international law.

In these circumstances, we did not find cause to change the procedures determined in Sajidia and Wajia. That being the case, the petition before us is denied without order of expenses.

PRESIDENT
DEPUTY PRESIDENT A. RIVLIN
I agree
JUSTICE A PROCACCIA
I agree
Decided as aforesaid in verdict of the President D. Beinisch
Given this day, 13 Nissan 5770 (28 March 2010)