ISRAEL[1]

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Military Operations — Operation Pillar of Defence

☛ Ministry of Foreign Affairs, *Legal Justification for the Operation* (19 November 2012) <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Operation_Pillar_of_Defence_Legal_points.aspx>

On 14 November 2012, Israel launched a week-long military operation in response to ongoing missile attacks by Hamas and other Palestinians armed groups from the Gaza Strip into the southern part of Israel. During the operation, Israel attacked targets in the Gaza Strip allegedly serving as missile bases, while Hamas and the rest of the organizations in the Gaza Strip continued firing missiles at Israeli cities, and for the first time, some of these missiles reached central Israeli cities such as Tel Aviv, Jerusalem and Rishon LeTzion.

[1] Information and commentaries by Adv. Shlomy Zachary. The reporter is grateful for Dr. Yaël Ronen for her comments. Responsibility for errors remains with the reporter. All websites last visited on September 2013.

According to the Ministry of Foreign Affairs (MFA), the Israeli operation was a lawful act of self-defence undertaken to protect Israel's population and territory from attack. According to the MFA brief:

> Hamas' actions are in clear violation of the most fundamental principles of international law, including the principle of distinction, which requires Hamas and other terrorist organizations not only to refrain from directing its attacks at Israeli civilians, but also to clearly distinguish itself from its own civilian population.

According to the MFA's brief, the Israeli Defence Force's (IDF) commanders received ongoing legal advice on a wide range of operational issues at various levels of the command chain (for example, regarding targeting decisions, the use of weaponry and issues regarding humanitarian efforts towards the civilian population). Furthermore, the brief states that the attacks were 'solely targeted against military targets and terrorist operatives'. However, as the MFA mentioned in its legal brief, '[C]ivilian objects such as residential buildings may constitute legitimate targets if used by terrorist operatives for military purposes.'

Additionally, the MFA's brief noted that in order to minimize the incidental harm that may be caused to civilians or civilian objects as a result of an attack on a military target, the IDF carefully chose the munitions to be used in the attacks, such as precision guided missiles; the use of advanced and precise intelligence regarding target identification and where circumstances permit, effective advance warning is given prior to attacks which may place the civilian population at risk.

However, during and after the campaign, international non-governmental organizations as well as the international community in general alleged that both sides had violated international humanitarian law. Palestinian armed groups were accused of launching indiscriminate attacks on Israel and of attacking civilians, as well as firing missiles from populated areas. Israel was accused of targeting civilian and civilian objects (such as a media center in Gaza), and of launching disproportionate attacks. In 2013, the Israeli Military Advocate General (MAG) as well as several domestic and international organizations investigated these allegations.[2]

In an overview published by the Israeli MAG in April 2013, shortly after the operation came to its end, the MAG showed that all allegations had been investigated by a special committee established by the IDF Chief of Staff and that in 65 incidents (out of a total of more than 80), the Committee had recommended that criminal investigations should not be opened. Several incidents were also re-examined after the committee's conclusions were delivered. With regard to certain events, the MAG found there was a basis for allegations that civilians not taking a direct part in hostilities had been injured or that civilian property had been damaged. However, those events and results were classified as collateral damage resulting from attacking military targets or operational mistakes caused 'directly from Palestinian terrorist organizations which chose to conduct their criminal activities under the auspices of civilian populations'.[3]

Human Rights Council Report — Israeli Response to Resolution

- Human Rights Council, Fact Finding Missions on the Settlements, Resolution 19/17, regarding Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan, 22 March 2012

[2] See Comment on *NGO Reports – Human Rights Watch* in this *YIHL* Report.
[3] 'Examining Allegations regarding Violation of the Law during Operation Pillar of Defense (An Update)' (11 April 2013) (in Hebrew) <http://www.law.idf.il/SIP_STORAGE/files/3/1363.pdf>.

☛ Human Rights Council, *Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem*, 22nd sess, Agenda Item 7 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlements.pdf>

On 22 March 2012, at its 19th session, the Human Rights Council adopted the abovementioned resolution by which the Council decided to

> dispatch an independent international fact-finding mission, to be appointed by the President of the Human Rights Council, to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem.

On 6 July 2012, the President of the Council appointed the International Fact-Finding Mission's ('Mission') members.

The Mission invited all interested persons and organizations to submit relevant information and documentation that would assist in the implementation of the Mission's mandate, and also visited Amman, Jordan, in order to listen to and collect information from a wide-range of stakeholders including people affected by the Israeli settlements; individuals and organizations working in the Occupied Palestinian Territories and in Israel; UN agencies; and Jordanian and Palestinian authorities. The report of the Mission was published in March 2013.

The report found that Israel had committed a multitude of human rights abuses and violations of international humanitarian law against the Palestinian people (for example: the right of self-determination; equality and the right for non-discrimination; and the settlements impact on Palestinian economy and businesses). The report calls on Israel to comply with Article 49 of the *Fourth Geneva Convention* and also calls for nations to abide by relevant international legal norms. In addition, the report indicates that

> private companies must assess the human rights impact of their activities and take all necessary steps — including by terminating their business interests in the settlements — to ensure they are not adversely impacting the human rights of the Palestinian People in conformity with international law as well as the Guiding Principles on Business and Human Rights.[4]

The resolution, which was described by Israel as 'surrealistic', and the establishment of the Mission, were widely criticized by Israel. In particular, the Council was accused of being flawed and biased against Israel. Israel declared it would not cooperate with the Mission and also suspended its ties with the Human Rights Council. Furthermore, Israel criticized the Palestinian Authority for approaching international bodies regarding the issues in the resolution, rather than negotiating them with Israel.[5]

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[4] Human Rights Council, *Report of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem*, para. 5.

[5] Israeli Ministry of Foreign Affairs, *Response to UNHRC Decision to Establish a Commission on Settlements* (22 March 2012) <http://www.mfa.gov.il/mfa/internatlorgs/issues/pages/response_unhrc_commission_settlements_22-mar-2012.aspx>.

Legislation — Immunity of the State in Torts Claims for Damages and Injuries during Combat Activity

- Civil Torts Law (State's Liability) (Amendment No. 8), 2012, LSI 2370, 23 July 2012, p. 522

In 2006, the Supreme Court declared that Amendment No.5 of the *Civil Tort Law (Liability of the State)* ('Tort Immunities Law'), which provided that the State was not liable for actions committed by Israeli security forces in conflict zones, including the occupied territories, was unconstitutional.[6] The Court ruled that the State could not benefit from total immunity in tort claims, and that where there are violations of human rights and humanitarian law other than during combat activity, the question whether the State is responsible or not, as well as the extent of such responsibility, should be examined by the Court.

The current amendment aims to bring the Tort Immunities Law into compliance with the Supreme Court ruling, and it repeals the article which had been declared unconstitutional. Furthermore, the amendment contains a new, modified definition of 'combat activity' which focuses not only on the risks and dangers posed to the security forces but also examines the nature of the combat activity based on the relevant circumstances, including the purpose of the activity, its geographical location and threats to the forces.

Additionally, the current amendment expands on the definition of 'residents of enemy territory' who are not able to submit a tort claim against the State. While the previous provision purported to apply to residents of an enemy state, the provision now also includes persons who are not citizens of the State of Israel and are residents of an area that has been declared by the government as 'enemy territory'. That means residents of zones that are declared by the government as 'enemy territory' (like the Palestinian territories) will not be able to file claims within Israeli Courts.

The new amendment has drawn criticism from human rights organizations and academic institutions on the basis that the new amendment tries to circumvent the limitation imposed by the Court in the *Adalah Case* from 2006, and also that it still arbitrarily bans tort claims and provides large scale immunity for the State. According to these criticisms, the territorial basis of the limitation is too broad, since it includes areas which are subject to belligerent occupation where law enforcement operations are much more common than combat activities. In addition, it has been argued that the distinction between Palestinians and Israeli citizens that reside in the same areas (i.e. settlers) regarding the right to file claims is discriminatory. These critics argue that the basis for the State's liability should be decided upon the nature of the operation and not on the basis of the injured party's citizenship.[7]

Legislation — Entry into Israel

- *Citizenship and Entry (Temporary Provision) Law 2003*
- *Citizenship and Entry (Temporary Provision) (Extension of the Law's Application) Order*, 25 January 2012, File of Regulation No. 7084 (31 January 2012) p. 704

[6] *Adalah v. The Government of Israel*, HCJ 8276/05, Judgment, 12 December 2006 ('Adalah Case'); 9 *YIHL* (2007) p. 509.

[7] The Israeli Democracy Institute, *Terrorism and Democracy* (Issue no. 43, July 2012) <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-43/amendment-gives-government-more-leeway-to-deny-tort-damages-to-palestinians>.

Following a judgment dismissing petitions which challenged the constitutionality of the *Citizenship and Entry (Temporary Provision) Law 2003*,[8] the government, with the approval of parliament, extended the application of the Law by one year, until 31 January 2013.

Military Legislation — Minors in Military Courts

- *Military Order regarding Security Provisions (Amendment No. 18) (Judea and Samaria) (No. 1693) 2012*, of 14 April 2012.
  <http://www.law.idf.il/SIP_STORAGE/files/3/1213.pdf> (in Hebrew)

Following the crucial changes of military legislation regarding sentencing and imprisonment of minors during recent years,[9] Amendment 18 of the *Military Order regarding Security Provisions (Amendment No. 18) (Judea and Samaria) (No. 1693) 2012* stipulates that imprisoned or detained minors may not be held in the same cells as adults. This amendment is another significant change to the military criminal law system in recent years, brought about by mass criticism of the ways the Military Commander and the Military Courts treat minors. [10]

Military Legislation — Due Process in the Military Courts (Translations)

- *Military Order regarding Security Provisions (Amendment no. 24) (Judea and Samaria) (No. 1710) 2012*, of 28 November 2012
  <http://www.law.idf.il/SIP_STORAGE/files/5/1285.pdf> (in Hebrew)

In a 2007 report, the Israeli human rights organization Yesh Din[11] argued that the fact that indictments in the military courts in the West Bank are produced only in Hebrew and not in the defendants' language (Arabic) violates the defendants' right to due process. Specifically, the organisation argued that the lack of translation violates Article 71 of the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, which states that '[a]ccused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them'.

In 2011, several Palestinian lawyers filed a petition in the Supreme Court demanding the full translation into Arabic of indictments filed by the military prosecutor, translation of all judgments and decisions given by the military courts, and the translation of all other relevant material, so defendants are accorded all due process rights in accordance international law, especially the international law of belligerent occupation.[12] Shortly after the hearing in the lawyers' petition, the Military Commander in the West Bank issued the new military order that ensures the defendants will receive the indictment in Arabic, unless the defendants or their attorneys waive this right. Following these changes, the petition was dismissed.

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[8] See Comment on *Cases — Family Unification* in this *YIHL* Report.

[9] See Yaël Ronen, 'Israel', 14 *YIHL* (2011) pp. 1–2, available from <www.asser.nl/YIHL/correspondentsreports>.

[10] See, eg, B'Tselem, *No Minor Matter: Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone Throwing* (2011) <http://www.btselem.org/publications/summaries/2011-no-minor-matter>; Yaël Ronen, 'Israel', 14 *YIHL* (2011) p. 14, available from <www.asser.nl/YIHL/correspondentsreports>; *Comment* on *NGO Reports — B'Tselem* in this *YIHL* Report.

[11] See 10 *YIHL* (2008) p. 356.

[12] *Adv, Khaled El Araj et al. v. The Military Commander in the West Bank*, HCJ 2775/11, Judgment, February 2013.

The Levy Report — Status of the West Bank and the Settlements and the Illegal Construction in the West Bank

- *Report of the Commission to Examine the Status of Building in Judea and Samaria* (21 June 2012)
  <http://www.pmo.gov.il/Documents/doch090712.pdf> (full report in Hebrew)
  <http://www.pmo.gov.il/English/MediaCenter/Spokesman/Documents/edmundENG100712.pdf> (conclusions and recommendations in English)

In February 2012, the Prime Minister and the Ministry of Justice nominated a Commission, headed by Justice (Ret.) Edmond E Levy, to undertake the following tasks: to examine, where possible, the actions needed to legalize illegal building in the West Bank; to bring about proceedings to examine and decide on issues relating to lands and their status in the West Bank; and to deal with any other related issues. All conclusions and recommendations of the Commission are subject to the General Attorney's approval before they can become official government policy.[13]

As a preliminary matter, the Commission decided to elaborate on the legal status of the West Bank from the point of view of international law. The Commission held that the classical laws of 'occupation' as set out in the relevant international conventions could not be considered applicable to the *sui generis* historic and legal circumstances of Israel's presence in the West Bank during recent decades. In particular, the land has been occupied for dozens of years and the date on which the 'occupation' would terminate could not be calculated. Moreover, if it were found that the area had been taken from another state (the Kingdom of Jordan), it could not be said that the other State's rights and sovereignty on the territory was based on a solid legal grounds, or that the other State had not waived its claims regarding the territory. Finally, the State of Israel makes sovereign claims over the land. Therefore, the Commission declared the common term 'occupation' could not be relevant to the current situation in the West Bank.

Additionally, according to the Commission, the provisions of the *Fourth Geneva Convention* regarding the transfer of a population (Article 49) could not apply and were never intended to apply to the type of settlements like those in the West Bank. The provision was designated to deal with coerced transfer of population which is not the current situation of the Israeli settlements in the West Bank. Therefore, the Commission concluded that 'according to international law, Israelis have the legal right to settle in the West Bank and the establishment of settlements cannot, in and of itself, be considered to be illegal.'

The Commission then turned to examine the legal status of illegal building in outposts and settlements. Its major conclusion was that settlements and outposts in the West Bank that were built on public land or on land purchased by Israelis with the assistance of governmental entities and official ministries were established with the knowledge, encouragement and tacit agreement of the most senior political level and therefore this conduct should be construed as involving an implied agreement. Regarding these settlements and outposts, the Commission recommended that the government and other governmental and official bodies should complete all the necessary steps in order to legalize them. Additionally, the Commission recommended that the relevant official bodies should undertake surveys examining whether the land is public or private. Furthermore, the Commission noted that privately owned land

[13] The Commission's mandate from 13 February 2012 is available in Hebrew at <http://www.acri.org.il/he/wp-content/uploads/2012/04/minuy-Levi.pdf>.

that had been seized for military needs in the past, can and should be used for additional construction within the boundaries of the settlement.

Another recommendation was the full disclosure of data banks of lands ownership that are currently sealed with only limited public access available. It was also recommended that the legislation be amended to enable Israelis to purchase land in the region directly, and to remove existing obstacles now confronting Israelis.

Furthermore, the Commission held that it would be appropriate to rescind the order concerning interference in the use of private land.[14] Alongside this recommendation, the Commission concluded that the 'Procedure for Dealing with Private Land Disputes' must be revoked. These disputes must only be considered and adjudicated by a judicial body. The Appellate Committee in the Military Courts that usually deals with such conflicts should be composed of non-uniformed jurists so that the Committee would be regarded as an independent body.

The Report has been the subject of domestic and international criticism, both on its declaratory part regarding the status of the West Bank under international law and on the operative recommendations. Shortly after its publication, the International Committee of the Red Cross's head of delegation for Israel and the Occupied Territories published an opinion labelling the report as contradicting international law and alleged that its goal was to 'legalize' the occupation.[15] This piece also said that a lack of any real engagement with the existing arguments, and the absence of appropriate reference to international bodies and judicial bodies rulings (like the International Court of Justice's Advisory Opinion), or even the Israeli Supreme Court's numerous judgments regarding the legal status of the West Bank undermined the credibility of the Commission's conclusions. Another source for criticism was that the Commission refrained from defining the status of the territories, and the legal regime applicable to them if they are not under belligerent occupation. Although many attempts were made by political echelons to adopt the Commission's report by the Cabinet or by the Attorney General, such a step has not yet been taken. However, some of the Commission's recommendations are beginning to appear in the State's responses to petitions pending before the Supreme Court.[16]

Government Policy — Israeli Policy towards the Gaza Strip

- The Coordination of Governmental Activities in the Territories (COGAT) presentation regarding 'food consuming in Gaza Strip – the red lines', 1 January, 2008 (published September 2012) <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-heb.pdf> (in Hebrew)

The presentation made by the Coordination of Governmental Activities in the Territories ('COGAT') was published following a successful petition by the Israeli NGO, Gisha, requesting the disclosure of documents and data relied on by the IDF and the Ministry of

[14] This military order was issued by the Military Commander in 2007 to deal with agricultural trespassing by settlers on Palestinian rural lands.

[15] J. P. Schaerer, "The Levy Report vs. International Law", *Ha'aretz*, 4 November 2012 <http://www.haaretz.com/opinion/the-levy-report-vs-international-law-1.474129>.

[16] For example, one of the Commission's recommendation was that private land seized by the Military Commander for military needs (according to article 23 of the *Hague Regulations*), can serve for the expansion of existing settlements within their jurisdiction. This recommendation was adopted by the State in its response from September 2012 in *Qasem v. The Minister of Defenseet al*, HCJ 9669/10. The petition is still pending.

defence in their relationships with the Gaza Strip. Although in the letter attached to the presentation, the IDF implicitly indicates it is only a draft that did not represent the actual policy in operation, it has been proven that major parts of the draft are equivalent to the actual amounts allowed by the IDF to be transferred to the Gaza Strip. Moreover, it was proven that there is a policy regarding the classification of products allowed and disallowed entry to the Gaza Strip and the quantity approved by the Israeli government based on the calculation of a daily consumption formula for the residents of the Gaza Strip. According to the presentation, the daily humanitarian food consumption by residents in Gaza Strip requires the entry of 106 semitrailers from Israel to the Strip per day. However, as Gisha's report indicates, during the first years after Hamas took over control of the Gaza Strip, the number of trucks allowed entry decreased to 65 semitrailers per day. According to the State, the products could not be transferred due to missiles fired from the Gaza Strip.

These presentations were widely criticized by human rights organizations due to the use of civilian population as a tool to put more pressure on the Hamas regime in the Gaza Strip. Israel maintains that it has minimal humanitarian obligations towards the Gaza Strip since it withdrew from the territory in 2005. Moreover, it maintains that the presentations were a tool to assist the State to maintain these humanitarian obligations.

State Practice — Investigations of War Crimes Allegations — Operation Cast Lead

- MAG opinion regarding the death of A-Simoni family during Cast Lead operation in 2009 (1 May 2012)
  <http://www.law.idf.il/163-5081-he/Patzar.aspx> (in Hebrew)

During and after Operation Cast Lead which was conducted in the Gaza Strip in December 2008 and January 2009, reports emerged of Israeli attacks on civilians, in particular of IDF attacks on the *Zaitun* neighbourhood in Gaza City which caused the deaths of 21 Palestinian civilians and injuries to dozens more civilians not involved in hostilities. In response to these reports, the MAG ordered the opening of criminal investigations by the military police. On the basis of findings of the internal inquiry and the military police investigation, the IDF Chief of Staff decided to delay the promotion of the commander of the brigade who had been in command of these operations. In parallel, the MAG examined the criminal responsibility of the brigade commander for the death of the Palestinian civilians.

The MAG examination found that all allegations that the IDF intentionally attacked uninvolved civilians were completely misplaced. There were no findings supporting the allegations that the IDF had concentrated the civilians in the attacked building. The MAG also found that there was no basis for allegations of negligence regarding any of the persons involved in the attack. Although some of the brigade commander's decisions were wrong, they could not be viewed as 'unreasonable' within the margin of appreciation expected from a commander in the circumstances existing at the time. The MAG also noted that in an armed conflict in urban areas the more intense the conflict, the wider the discretion of the 'reasonable commander'. Based on all these reasons, and also considering the disciplinary proceedings taken against the brigade commander, the MAG decided not to pursue any charges, although the MAG suggested that the event in its whole must lead to significant changes and lessons in a systematic level in order to avoid recurrence of future incidents.

Cases — Separation Barrier in Southern Hebron Hills (Daharya and Dura Municipalities)

- *Municipality of Dahariya et al v. Military Commander in the West Bank et al*, HCJ 10202/06 Israel Supreme Court sitting as High Court of Justice, Judgment of 20 September 2012
  <http://elyon1.court.gov.il/files/06/020/102/m25/06102020.m25.htm> (in Hebrew)

The petitioners, two Palestinian villagers from the southern region of the West Bank, petitioned against the legality of the Separation Barrier that was built on their privately owned lands. The petitioners argued that the route of the wall was issued in order to encompass and include the settlement of *Eshkolot* and it is designed to include the settlement future blue-print boundaries. Thus, the petitioners argued, the route's aim is to create an enclave that will allow and will enable future expanding of the settlement. On these bases, they argued that the route was illegal and disproportionate, since it damages the petitioners' lands and bans their access to their lands which will stay in the 'seam-zone'.

The State admitted that indeed the route was informed by the existing blue-prints of the settlement, but argued that on some points the route has been changed in order to minimize the damage to Palestinian private property and that the IDF would allow land owners to cultivate their lands which are located on the other side of the fence. The State argued that the main reason for the chosen route was to ensure the security of the settlement and the road that leads to the settlement.

Citing previous rulings, the Supreme Court acknowledged that the State has the right and duty to use military orders to seize private lands, when there is a need to protect the State of Israel and its citizens, including the citizens in the settlements in the West Bank. The Court ruled that since the authority to seize private land for security reasons is temporary according to the law of occupation, it is illegal to rely on blue-prints for future settlement expansion while planning the route. However, since it had been proven to the Court that the route was chosen due to topographic and security reasons; since the damage to privately owned lands was minimal; and relying on the military commander's declarations regarding the owners' rights to cultivate their lands, the Court confirmed the route and the seizure orders accompanying it. The petitions were therefore dismissed.

Cases — Quarrying in the West Bank

- *Yesh Din – Volunteers for Human Rights v. The military Commander in the West Bank et al*, FHCJ 316/12, Israel Supreme Court sitting as High Court of Justice, judgment of 25 July 2012
  <http://elyon1.court.gov.il/files/12/160/003/p06/12003160.p06.htm> (in Hebrew)

The petitioner, Israeli human rights NGO, submitted a petition for en banc review (review of a Supreme Court judgment by expanded chamber) of the legality of the activity of Israeli quarries operating in the West Bank. The request followed a judgment given in December 2011 which rejected the petition, both *in limine* and on substantial grounds, while revolving the interpretation of Articles 43 and 55 of the *Hague Regulations*.[17]

The petitioner argued that the Supreme Court ruling was unprecedented and contradicts previous rulings of the Supreme Court regarding the duties and limitations on the occupying power in occupied territories. The petitioner asked the Court to re-examine what are the boundaries of occupier's authority in relation to its administration of the natural resources belonging to the occupied territories and what is the relationship between Article 55 and

[17] For an Elaboration of the Quarries judgment, see Yaël Ronen, 'Israel', 14 *YIHL* (2011) pp. 5–7, available from <www.asser.nl/YIHL/correspondentsreports>.

Article 43 of the *Hague Regulations*. Specifically, the petition asked the Court to clarify whether the occupying power in a prolonged occupation has the authority to grant its citizens or corporations owned by its citizens' rights to quarry natural resources in occupied territory in general and in quarries which did not exist prior to the occupation in particular. Additionally, the petition raised the question, as far as an occupying power is permitted to grant rights for quarrying in the occupied territory, is this authority subordinate to the principle of distinction? The petition also asserted that limiting the prohibition on harm to the capital of properties of the occupied territory lays the legal foundation for irreversible economic exploitation of occupied territory by an occupying power, despite the fact that the prohibition on such exploitation is amongst the primary objectives of the international law of occupation. The petition argued that such new deviation deriving from the Court's ruling would give *de facto* permission to the occupier in a prolonged occupation to use the natural resources for its own purposes.

The petition was accompanied by an expert opinion, written by seven Israeli top international law scholars, who argued that the Court had interpreted the international laws of occupation incorrectly.[18] According to this expert opinion, the ruling contradicts the basic principles of the laws of belligerent occupation, especially Articles 43 and 55 of *Hague Convention IV*, and the relationship between the two Articles, as well as the relationship between these Articles and other provisions of international law of occupation and international human rights law. The expert opinion claimed that it is precisely the prolongation of the occupation of the West Bank which requires strict adherence to the principle that decisions by the military commander in the occupied territory be made either on the basis of security considerations or in order to benefit the local population of protected persons. Therefore, inasmuch as the prolongation of the occupation requires the adaptation of the 'traditional laws of occupation' to a prolonged occupation, as the ruling asserts, that adjustment should be made in such a way that benefits the protected population rather than harms it. The prolongation of the occupation in the West Bank does not allow the citizens of the occupying State to profit at the expense of the occupied population.

The Supreme Court rejected the petition for en banc review since the petitioner's original petition was rejected primarily for threshold reasons which the Court addressed in the concrete circumstances of the petition. For example, it was relevant: that the petition was filed with a significant delay in light of many years that the Israeli quarries had operated; that the dominant aspect of the petition lays political dimensions between Israel and the Palestinian and not of a pure legal nature; and that the petitioner is a public petitioner and not an individual being affected by the quarries). Therefore, the substantial aspects of the ruling were given as *obiter dictum* (and therefore cannot serve as a binding precedent). The Court also noted that since the operation of the quarries was explicitly regulated in the interim agreement between Israel and the Palestinian Authority (via the Palestinian Liberation Organization as an entity who represents the will of the Palestinian people in the region), and since the issue is subject to future final negotiation between the parties, the Court would refrain from intervening in such political case.

Cases — Administrative Detention in the Occupied Territories

[18] See Prof. Yuval Shany, Prof. Eyal Benvenisty, Prof. Barak Medina, Prof Orna Ben-Naftaly, Dr. Guy Harpaz, Dr. Amichai Cohen and Dr. Yaël Ronen, *Expert Opinion* (2012) <http://yesh-din.org/userfiles/file/%D7%97%D7%95%D7%95%D7%AA%20%D7%93%D7%A2%D7%AA/QuarriesExpertOpinionEnglish.pdf>.

☛ *Taher Aziz Machmud Hclahcla et al. v. The Military Commander in Judea and Samaria et al*, HCJ 3267/12 judgment of the Supreme Court sitting as High Court of Justice from 7 May 2012 <http://elyon1.court.gov.il/files/12/670/032/t05/12032670.t05.htm> (in Hebrew)

The petitioners, Palestinian detainees, were detained by an order issued by the military commander in the West Bank. Their detention has continued for several years, and prior to the current detention they were sentenced to prison for their involvement in a terrorist organization and militaristic activities. The petitioners started a hunger strike in order to protest against their administrative detention and against the authorities' policy not to investigate or indict them and grant them full criminal procedures.

The Court re-affirmed its previous rulings regarding administrative detentions, namely: that such detention orders are an extremely exceptional tool that have the effect of harming the detainee's personal freedom; that the authorities should refrain from issuing such orders if and when they have other alternatives; and that there is an obligation to operate with full criminal procedures where possible. The main difficulties in the administrative detention process, even when it is being reviewed by the Supreme Court, is that the Court must rely on confidential evidence presented *ex parte*. However, the prosecutor should undertake proper investigations, and the investigators should be familiar with all the relevant evidence, including the confidential evidence, because that is the only way such an investigation can be effective, and can lead to alternative criminal options. On the other hand, the Court ruled that fighting terrorism in Israel, as well as in other States around the world, forces the State to use exceptional tools and 'a State should not apologize for keeping its security'.

The Court criticized the security authorities for the investigations of the detainees. According to the Court, these investigations were of a general nature and were inadequate to satisfy the necessary evidential threshold for administrative detention. The Court mentioned that due to the long duration of the detention, if the authorities wanted to extend the detention, they would have to reconsider other options, and to undertake more thorough investigations.

Again, the Court raised the option of the 'special advocate' procedure that was offered by the Court in the past to avoid the *ex parte* nature of the evidence before the Court. According to the Court, such an advocate could be lawyer who has been both accepted by the detainee and approved by the security authorities. Alternatively, the advocate could be a retired judge.

The Court mentioned the petitioners' hunger strike, and noted that the strike could not serve any role in a decision regarding the administrative detention. However, in cases where a hunger strike leads to irreversible damage to the detainees' health, security authorities may use other laws to release the detainee as a result of illness or other danger the prisoner's life.

Cases — The Duties Imposed on an Occupier towards Protected Persons' Property and Security

☛ *Ahmed Abdel-Kader et al. v. The Military Appellate Committee et al*. HCJ 5439/09 the Supreme Court sitting as a Supreme Court of Justice, judgment given on 20 March 2012 <http://elyon1.court.gov.il/files/09/390/054/n25/09054390.n25.htm> (in Hebrew)

The petitioners, three Palestinian farmers, were victims of trespassing by Israeli settlers from the neighboring settlement. In order to remove the trespassers from the Palestinian land, the IDF issued an evacuation order against the settlers based on a new military order which had been enacted by the military commander in the West Bank. The military order of evacuation

from private lands was legislated as a direct outcome of the *Sasson* Report issued in 2005, which found that there was a lack of legal tools to deal with agricultural trespassing on private Palestinian lands.

After the Appellate Committee of the Military Court accepted the settlers' claims and declared that the evacuation order was void, the petitioners filed their petition to the Supreme Court, requesting the cancellation of the Appellate Committee's decision and the enforcement of the evacuation order. Since the head of the civil administration supported the petitioners and disagreed with the Appellate Committee, the trespasser filed a counter-petition, which demanded the reaffirmation of the Appellate Committee's decision. The judgment in the joint petitions was the first to deal with the new military order, as the Court dedicated major parts of the judgment to the duties of the occupiers towards the occupied population.

Analyzing the relevant land laws applying in the occupied territories, the Court declared that any military legislation should comply with these laws, as well as general rules of international humanitarian law as found in the 1907 *Hague Convention* and its annexed regulations, unless there is an overriding military need. However, the Court underlined that the Military Commander must respect the local laws, as well as other duties imposed by the international law of occupation. The new military order, therefore, should be examined against these limitations and the legal normative framework.

The Court ruled that the order gives the civil administration a mechanism for administrative evacuation when it has been proved that trespassing on private land without any legitimate right has occurred. According to the Court, the military order fulfilled the military commander's duties to maintain law and order in the occupied territories, and the duty to respect and ensure the protected persons' property rights under Regulations 43 and 46 of the annexed regulations of *Hague Convention IV*, which reflects customary international law.

The Court went further and identified the ways in which it was possible to acquire land rights in the west bank, by interpreting relevant laws existing in the area (Ottoman laws from the 19th century). The judgment determined that in order to acquire lands in the West Bank, it was necessary to prove that the possession of the land did not violate the rules of equity, such as illegal trespassing. The Ottoman laws, according to the Court, should be interpreted in accordance with the general rules of maintaining law and order in the occupied territories. The Court, therefore, accepted the Palestinian petition and ordered the military commander to implement the evacuation order.

Cases — Movement to and from the Gaza Strip and the West Bank

- *Hamoked – The Centre for the Defence of the Individual et al. v. The Military Commander in the West Bank et al*. HCJ 2088/10, the Supreme Court sitting as a Supreme Court of Justice, judgment given on 24 May 2012 <http://elyon1.court.gov.il/files/10/880/020/n21/10020880.n21.htm> (in Hebrew)

The petition challenged the military commander in the West bank's policy regarding Palestinians who are registered in the Gaza strip and who ask to move and relocate to the West Bank.

Since the beginning of the occupation of the West Bank and the Gaza Strip in 1967, these areas have been declared 'closed zones'. Although general permits to the West Bank were given to residents of Gaza in the past, during the last two decades the military commander in the West Bank has changed the policy and from 1988, any person from the Gaza strip who wished to enter the West Bank or to stay there, had to file an individual request. Such

permits, which were of limited duration, were given even though many residents decided not to return to the Gaza strip after the permit expired. Following the violent clashes in 2000, the military commander limited the number of permits allowing travel from the Gaza Strip to the West Bank, granting them only in exceptional and humanitarian cases. This policy was not published and the relevant procedures of the military commander remained vague. Only in 2009, after many individual petitions on the matter had been filed in the Supreme Court, was the official procedure made public. According to the procedure, the movement of residents from the Gaza strip to the West Bank was to be reduced due to the political and security reasons. Movement would be allowed only in the most exceptional and humanitarian cases, while family ties per se would not constitute grounds for a permit. In addition, the procedure requires, as a preliminary condition for entering the West Bank that the applicant has not been subject to 'security banning'. Furthermore, the procedure established other details such as other conditions which must be satisfied for the granting of a permit, the duration of such permits and the options for permanent relocation to the West Bank.

The petition demanded the annulment of the procedure on the basis that it was 'unconstitutional' and violated the basic human rights of the residents of Gaza. According to the petitioners, it is unreasonable that family ties or marriage connections do not fall within the category of humanitarian cases because separation of the family affects and harms the right to family life in contravention of international humanitarian law's provisions in the *Hague Convention of 1907* and the *Fourth Geneva Convention*. Additionally, the petitioners argued that the procedure narrows and limits the freedom of movement and the right of passage between the West Bank and Gaza Strip, which are an integral territorial unit, according to the interim agreements between Israel and Palestinian Authority as well as the Supreme Court previous rulings (notably, the *Ajuri Case* from 2002[19]). According to the petitioners, Israel's disengagement from the Gaza Strip in 2005 did not change this reality. In addition, the petitioners argued that the State had not explained why such a strict procedure was necessary for security reasons, since it derives merely from the political relationship between Israel, the Palestinians Authority and the relevant organizations that rule Gaza Strip *de facto*. The petitioners also argued that the military commander discriminates between Palestinians and Israeli settlers, since the latter do not require an entry permit to access the West Bank, whereas the military orders require that Palestinians have such a permit.

In response, the State argued that the petition should be rejected on procedural grounds. Additionally, the State argued that free passage to and from the West Bank — a territory still under belligerent occupation and subject to the military commander's security considerations — could be misused by hostile organizations in the Gaza Strip. The State argued that it is impossible to consider the West Bank and the Gaza Strip today as one integral territorial unit because of Israel's disengagement in 2005, which led to significant legal, political and security changes in the Gaza Strip. Today Israel and its forces do not control the Gaza Strip, a fact which informs the military commander's decision to grant permits for residents of the Gaza Strip.

The judgment's point of departure was that the military commander has the right to allow or prevent any movement of Palestinians to the West Bank. The military commander has the right to declare the West Bank, in its whole, a military closed zone and restrict the movement to and from the region. This declaration was based on security considerations as well as the duty to maintain law and order in the closed areas. The Court, therefore, accepted the State's argument that the West Bank and the Gaza Strip currently face an imminent security threat,

[19] *Ajuri v. The Military Commander in the West Bank*, HCJ 7015/02, PD 56(6) 352 [2002] <http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.htm>.

which justifies the restriction of free movement between the two zones. Since the disengagement from the Gaza Strip in 2005 and Hamas taking over in 2007, the risk of misuse of the passage between the two areas for terrorist activities has increased, and the current policy is based on the existing reality in the region. Since the military commander's decision and policy are within its competence, the Court generally refrains from intervening in such decisions. The procedure, therefore, could not be declared void, illegal or unconstitutional. The Court also declined to consider the merits of certain of the petitioners' arguments on the ground that these arguments related to political aspects of the relationships between Israel and the Palestinian Authority, which were outside the scope of the Court's power of judicial review.

Despite its finding, the Court commented that it was aware of the significant implications of the procedure on the non-involved residents of Gaza Strip, especially in respect of their ability to create or maintain ordinary family life. As the Court noted, the State was clearly aware of this issue by virtue of the existence of the list of exceptions as detailed in the procedure. However, the Court found that these exceptions were too narrow and in some circumstances, too strict. The Court, therefore, recommended that the State apply these exceptions in a way that facilitates the contact of next-of-kin within families. Additionally, the Court recommended: that cases involving family members who are not next-of-kin also be examined; that married couples from both regions not be categorically banned from settling in the West Bank, as the procedure determines; and that the procedure be re-examined periodically, depending on up-to-date risk assessments. These recommendations, however, are not binding orders.

☛ *Ms. Azza Azat et al. v. The Minister of Defence et al.*, HCJ 495/12, the Supreme Court sitting as a Supreme Court of Justice, judgment given on 24 September 2012 <http://elyon1.court.gov.il/files/12/950/004/t09/12004950.t09.htm> (in Hebrew)

The petitioners, who started their university studies in the West Bank prior to the year 2000 in the fields of human rights, gender, law and sustainable development, had requested weekly permits for passage from the Gaza Strip to the West Bank in order to complete their studies. They argued that since the State's policy, as was presented to the Court in the past, was to issue permits in cases with 'positive human implications', it was unreasonable to deny their requests. In addition, the petitioners argued that since 2011, the State's policy had changed and thousands of Gaza's residents received entry permits to Israel for various reasons. Since Israel owes humanitarian duties towards the residents of the Gaza Strip, the petitioners argued that it must allow freedom of movement and assist in fulfilling the petitioners' right to education.

The State reiterated its policy that permission for entry from Gaza to Israel was limited to exceptional humanitarian cases, especially emergency medical cases, as well as merchants' entry. The petitioners' desire to study in West Bank's universities was not considered a humanitarian need. In addition, the restrictions imposed on the residents in Gaza derived not only from security considerations, but also from political considerations, like the decision to isolate Gaza from the West Bank. The respondents argued that there was no mandatory right for aliens to enter Israel, and that the limitations imposed on residents of the Gaza Strip (an entity under the control of a terrorist organization) were essential. Alternatively, the State also argued that there were security concerns regarding some of the petitioners.

The majority of the Court (Justices Naor and Zilbertal) dismissed the petition. The departure point was that aliens have no automatic and inherent right to enter the State of

Israel, even for the sole reason of passage to the West Bank. The majority said that the Court would not intervene in the State's consideration of this issue. The Court accepted that the State was unable to check applicants from Gaza due to the lack of effective control in Gaza Strip. The majority rejected the proposal for 'exceptional cases committee' as proposed by the minority, since there was no legal duty to do so and it would lead to a substantial change in the State's policy.

The minority (Justice A. Rubinstein) would have accepted the petition, and would have granted judgment in favour of the petitioners with no security limitation to obtain the permits, even though the Court lacks a legal basis to require the State to issue the permits. The minority relied on the State's policy which stated in the past that a 'committee for exceptional cases' should be established. The minority Judge reaffirmed that Israel has some humanitarian duties towards the Gaza Strip and its residents, and the 'exceptions' committee' would be a reasonable mechanism that would prevent arbitrary decisions. Such a committee would be able to imply the principle of 'positive human implications'.

Cases — Investigation of Allegations of Torture by the General Security Services

- *Public Committee against Torture in Israel et al. v. The Attorney General*, HCJ 1265/11, the Supreme Court sitting as a High Court of Justice, judgment given on 6 June 2012 and 12 November 2012
  <http://elyon1.court.gov.il/files/11/650/012/t05/11012650.t05.htm> (in Hebrew)
  <http://elyon1.court.gov.il/files/11/650/012/t08/11012650.t08.htm> (in Hebrew)

The petition challenged the policy of the Attorney General ('AG') regarding criminal investigations of officers of the General Security Services ('GSS') following complaints by detainees who had been under investigation by the GSS. Prior to the petition, a set of complaints had been filed with the GSS investigations' comptroller,[20] and the comptroller's commissioner in the Ministry of Justice had decided not to initiate criminal investigations regarding the allegations.

The Court reviewed the procedure in Israeli law according to which complaints against the GSS were considered. According to this procedure, before deciding whether or not to open a criminal investigation, the complaint would be examined by the GSS investigations' comptroller, whose decision would be subject to the approval of the commissioner, a senior AG official. After receiving the comptroller's brief of the complaint, the commissioner would examine the file and recommend whether a criminal investigation should be opened, whether domestic proceedings should be conducted within the GSS, or whether the file should be closed. Since 2010, the comptroller has no longer been a GSS officer but a senior official from the Ministry of Justice.

The petitioners argued that the AG should order the opening of a criminal investigation whenever a complaint is filed regarding torture or abuse by GSS investigators. Due to the nature of GSS investigations, only a proper criminal investigation by a professional body would be able to detail the factual situations missing from the GSS's comptroller reports. The petitioners argued that the existing procedure accords the GSS and its investigators *de facto* full immunity. A report by an NGO, the Public Committee against Torture in Israel (which was annexed to the petition), highlighted that of 598 complaints regarding torture and abuse by GSS investigators filed with the AG between 2001 and 2008, not a single case led to a

[20] The complaints focused on the harsh conditions of detention; the long duration of detentions; investigations that were conducted in a painful positions and shackling; sleep deprivation; physical and mental abuse. According to the petitioners, all these constituted "torture" under international norms and domestic law.

criminal investigation. Therefore, the existing procedure violated the duty to investigate allegations of torture. This *de facto* immunity undermines the basic right to receive due process and nullified the absolute prohibition in international law against torture.

The Court began its judgment with a detailed description of the growing discontent in the relationship between the GSS and the judiciary, as the Court said the GSS was in a 'legal twilight zone'. Changes to the GSS over the years have led to a new era of transparency, especially after the legislation of Basic Law: Human Dignity and Freedom, the Supreme Court ruling in the Torture Case in 1999,[21] and legislation of the GSS law in 2002. Emphasizing that the GSS is not above the law and is subject to review, the Court nonetheless acknowledged that due to its fields of operation there was room for some filtering. The GSS comptroller is a professional body that examines complaints, and such a body is also subject to other external review bodies. The Court noted that the fact that the comptroller is an official of the Ministry of Justice and not a GSS employee is important both from substantial and institutional perspectives.

After exploring the legal history of the GSS 2002 Law and other relevant provisions, the Court found that the petitions had some merit, notably that the AG is not bound by the procedure applicable to the comptroller and commissioner. But when exploring the relevant aims and goals of legal arrangement governing the mechanism, the Court accepted the State's arguments that the abovementioned procedure is the best alternative. The Court concluded that the AG and its subordinates are the proper authorities to decide whether to initiate a criminal investigation or not, as such a decision is an integral part of any authority dealing with law enforcement which needs to decide if there is sufficient evidential background for an investigation.

The Court than concluded that a preliminary examination of the complaints should be done by the GSS comptroller and not by an entirely external body, since it is in the public interest that the GSS methods of investigations remain secret. As long as the GSS comptroller remains distinct from the GSS, the existing procedure balances all relevant considerations and therefore cannot be defined as unreasonable.

In addition, the Court mentioned that the commissioner's decisions regarding the GSS comptroller are subject to appeal before the relevant authority in the Ministry of Justice, and later are subject to judicial review by the Supreme Court.

The Court's main conclusions were: that the procedures of the GSS comptroller — as long as it is part of the Ministry of Justice — are reasonable and strike the correct balance between the two competing interests (i.e. state's security and upholding human rights and investigating allegations of torture); that the commissioner will review every complaint, and that the law should be amended so the commissioner will be able not only to close a file, but also to order the opening of a criminal investigation whenever necessary; and that the complainant receives a proper notice of any decision given in respect of its complaint as well as notice of its right to file an appeal in respect of any decision, and that the appeal is subject to judicial review of the Court.

In a concurring opinion, Justice Vogelman noted that an investigation within the GSS should be carried out into the allegation that not a single criminal investigation has been opened, despite the fact that there have been hundreds of complaints (a fact was not contradicted by the State).

Cases — Targeting Killing/Investigating of Civilians Death

[21] *The Public Committee Against Torture in Israel et al. v. The State of Israel*, HCJ 5100/94, PD 53(4) 817 [1999] <http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.htm>.

- *Hana Dababsa et al. v. The Military Advocate General*, HCJ 1901/08, the Supreme Court sitting as a Supreme Court of Justice, judgment given on 15 July 2012 <http://elyon1.court.gov.il/files/08/010/019/c23/08019010.c23.htm> (in Hebrew)

The petitioners asked for a criminal investigation regarding the targeted killing of their family member. The judgment was based on the MAG decision to retract its previous policy not to automatically open criminal investigations in cases of civilian deaths.[22]

In 1998, the deceased, Dababsa, had been declared a wanted terrorist by security forces due to an armed incident. In 2001, he died during an operation in the West Bank. While the petitioners argued that the sole aim of the operation was the assassination of the deceased, the MAG argued that the aim was to conduct arrests and that the deceased was killed because he resisted arrest and because of the risks posed to security forces. Following the incident an internal investigation was conducted by the IDF and MAG, which decided not to open a criminal investigation. In the following years, the family of the deceased and their lawyers filed motions with the AG demanding a criminal investigation on the basis that the death had been part of well-planned assassination. The petitioners argued that an independent investigation was required in accordance with the Supreme Court ruling in the *Targeted Killing Case* in 2006.[23] The petitioners also argued that the international law of belligerent occupation requires a criminal investigation where a civilian is found dead after an arrest operation. The MAG argued in response that since the deceased died during an attempt to arrest him and not as part of a targeted killing operation, the targeted killing ruling was distinguishable. The MAG also pointed out that the petition had been filed following a significant delay, being six and a half years since the incident occurred.

Relying on the judgment of the general petition regarding criminal investigations of civilians,[24] the Court dismissed the petition. Although the MAG's change of policy did not apply retrospectively, it could be applied to some cases that had occurred before the new policy was brought into effect. However, the Court found that this particular case was not one of them. The deceased's death occurred during an arrest operation and not during a targeted killing operation. The the IDF and the MAG's internal investigation found that the force was not acting illegally, and in any case, the decision not to open a criminal investigation did not rely solely on the internal investigation. The Court said that it would not intervene in the MAG's conclusion unless there were extreme circumstances, which were not present in this case.

Cases — State Immunity for Damages during Armed Conflict/Belligerent Acts

- *Req.C.A. 3866/07 The State of Israel v. Atef Na'iif Almakussi*, the Supreme Court sitting as Court of Civil Appeals, judgment given on 21 March 2012 <http://elyon1.court.gov.il/files/07/660/038/k05/07038660.k05.htm> (in Hebrew)

In this case, the Supreme Court upheld an appeal by the State, ruling that an injury to the respondent, a Palestinian resident, during an attempt to arrest in the occupied territory in Gaza strip, was subject to immunity as a combat action.

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[22] See Yaël Ronen, 'Israel', 14 *YIHL* (2011) pp. 5, 8–9, available from <www.asser.nl/YIHL/correspondentsreports>.

[23] *Public Committee against Torture in Israel et al. v. The Governrnent of Israel et al.*, HCJ 769/02 P, Judgment, 15 December 2006. See 9 *YIHL* (2007) pp. 497–499.

[24] See *B'Tselem and the Association for Civil Rights in Israel v. the Military Advocate General,* HCJ 9594/03. Yaël Ronen, 'Israel', 14 *YIHL* (2011) pp. 8–9, available from <www.asser.nl/YIHL/correspondentsreports>.

The District Court Judges accepted the claim that the injuries resulted from the special police squads' shooting during an attempt to conduct an arrest and characterised the policemen's activities as 'law enforcement' acts and not as combat actions. Only combat actions are subject to the immunity according to Article 5 of the *Civil Tort Law (Liability of the State)* ('Tort Immunities Law').

In reaching its decision, the Supreme Court has expanded the scope of Article 5 of the Tort Immunities Law. Although the Law specifically states that Article 5 relates to the IDF activities, the Court ruled that it also applied to police forces who conduct their activities as part of the forces operating in the occupied territories. Additionally, the Court ruled that in occupied territories ordinary 'law enforcement activities' can turn into 'acts of war', and therefore be immune to tort claims.

The Court made a distinction between two types of acts of war. The first category focuses on law enforcement acts that change into a combat acts because of their dominant belligerent nature. In respect of these combat acts, the Court said that it was important to identify the risks faced by the forces since the Court should examine if the change from law enforcement into a combat act is reasonable having regard to the relevant risks.

The second category of combat acts includes all activities that were originally designated to be combat activities. In this category, it is less important to identify whether there was a risk to the belligerent forces during the act that caused the damage, because it is clear that the acts are immune to any civil claim.

In this particular case, the Court ruled that the arrest operation had been conducted by the special police squad but that since it was as part of a larger operation dealing with Hamas, it should be classified as an 'act of war'. Although the purpose of the action could be viewed as law enforcement, its dominant nature was that of an act of war. The fact that the police unit was disguised indicated the complexity of the operation, and this fact could not be held against the State (notably, the Court refrained from discussing the alleged violations of the principle of distinction by the police force and if there were any consequences arising from that violation in respect of the tort claim). The Court further found there was an imminent risk in such operations, and therefore they could not be defined as law enforcement acts, but rather as combat actions. The Court concluded that the State was immune to the tort claim since the injury derived from a combat act as stated in Article 5 of the Tort Immunities Law.

☛ *C.A. 4112/09 Muhamed Zagiyer v. The Military Commander in Judea and Samaria et al*, the Supreme Court sitting as Court of Civil Appeals, judgment given in 3 January 2012 <http://elyon1.court.gov.il/files/09/120/041/p14/09041120.p14.htm> (in Hebrew)

In 2002, the appellant was injured as part of a targeted killing operation against senior terrorists in the occupied territory of the West Bank. The claim was filed against the State for damage incurred by the plaintiff, being a civilian who took no part in the operation.

The District Court rejected the claim, ruling that the operation was a combat act, and therefore, was subject to the immunity granted by Article 5 of the Tort Immunities Law. In this regard, the District Court found that the act had been committed by the army whose purpose was to prevent the targeted person from committing terrorist attacks; that the means employed by the army (i.e., missiles and military aircraft) were not law enforcement measures; and that the action was part of an armed conflict. In addition, the District Court ruled that the operation in its whole was reasonable and was conducted as a targeted killing operation, after considering all other less harmful alternatives.

The Supreme Court rejected the appeal and reaffirmed the District Court Ruling. Although the legality of the targeted killing policy has been approved by the Court in the past, the circumstances of each operation need to be taken into account in assessing its legality.[25] Therefore, the Court rejected the contention that all targeted killing operations are illegal, and also dismissed the claim that the policy is illegal in cases involving a risk to civilians. In these cases, the Court reaffirmed that it should analyze the operation according to the principle of proportionality. Although collateral damage is a possible side-effect of a targeted killing operation in urban areas, such damage does not necessarily render the operation illegal under international law.

The Court ruled that the issue of the legality of the operation was separate from the preliminary step of considering whether the operation was a combat act. In general, the Courts will not make a preliminary decision on the legality of the combat act before deciding whether it is combat act as it might blur the distinction between the administrative aspects and tort-law aspects, which would nullify the reasoning behind the principle of state immunity for combat acts.

Based on these reasons, the Court ruled that the targeted killing, although it was committed in an occupied territory, could not be viewed as a law enforcement operation but rather as a legitimate belligerent act. Therefore, the operation was subject to immunity from tort suits.

The Court refrained from deciding on whether such a two-stage examination would be needed in exceptional cases. In reliance on US legislation and State practice, the Court noted that tort claims are not fit to deal with damages deriving from combat acts.

Justice Hendel added in his concurring judgment that the targeted killing policy is part of Israel's ongoing battle against terrorism. Due to the different type of combats, the term 'combat act' should be interpreted in accordance with modern reality. Additionally, Justice Hendel stated in *obiter dictum* that a combat act committed against a popular violent uprising in an occupied territory is different from combat activities against terrorists who operate from urban civilian environment that include non-involved civilians.

- *CA (Dist. Nazareth) 35106-08/10 The Estate of the late Faiz Mastbah Hashem Al-Diya v. The State of Israel – Ministry of Defence*, the District Court of Nazareth, judgment of 5 September 2012

During Operation Cast Lead in 2009, Israeli aircraft attacked the house of the *Al-Diya* family, erroneously identifying it as a storage place of armed groups' munitions, killing 22 family members and injuring one. The plaintiffs, the injured person and the estate of the deceased, filed a claim against the State demanding compensation for the attack. The State argued that the claim should be dismissed since the incident was a 'combat act' as defined in Article 5 of the Tort Immunity Law.

The Court rejected the plaintiffs' claims, while ruling that the State is immune to any claim deriving from an IDF combat act. Military operations against terrorist organizations, hostile acts or uprisings which endanger life are also under the category of combat act. In contemporary armed conflict, it is not sufficient for the Court to examine merely whether the act had a combat nature, rather the Court must also consider the entire circumstances of the operation in order to determine whether the operation posed any special military risk.

[25] *Public Committee against Torture in Israel et al. v. The Governrnent of Israel et al.*, HCJ 769/02 P, Judgment, 15 December 2006. See 9 *YIHL* (2007) pp. 497–499.

Operation Cast Lead was a comprehensive military operation in the Gaza Strip, which was a reaction to ongoing attacks on the southern cities of Israel. The operation took place inside urban centres and within zones inhabited by civilian populations who were injured and damaged during the Operation.

International law acknowledges the uncertainty faced by commanders in the field during combat, and therefore, requires only that they make decisions in 'good faith' based on the knowledge and facts available at the time the decision is made. In this incident, the IDF mistakenly targeted the house and as a result, 22 innocent civilians died. The Court found that the attack on the house was not intentional. According to the Court, tragic mistakes might happen during an armed conflict and each party should take responsibility for its own casualties and therefore, each party is not responsible for damage caused to the other party.

Cases — Family Unification

- *MK Zehava Galon – Meretz-Yachad et al. v. The Attorney General*, HCJ 466/07, the Supreme Court sitting as a High Court of Justice, judgment given on 11 January 2012 <http://elyon1.court.gov.il/files/07/660/004/o30/07004660.o30.htm> (in Hebrew)

The petitioners challenged the constitutionality of the *Citizenship and Entry to Israel (Temporary Provisions) Law 2003*, as amended in 2007.[26] The Law restricts the Minister of Interior and the IDF commander in the West Bank from granting Israeli citizenship, residence status or entry permits to Palestinians from the West Bank and Gaza Strip who marry Israelis. As in the previous case,[27] the petitioners argued that the prohibition on family unification of Israeli citizens and their Palestinian spouses and other relatives (including children) — especially when it is for such a long duration (the law first legislated in 2003 as a temporary provision and has been extended every year since) — violates the right to family life. Additionally, since the law primarily affects Israeli Arabs, they argued it is also discriminatory in character. The petitioners further argued that although the law is presented as one that derives from security considerations, it is actually motivated from demographic considerations, and is therefore unconstitutional.

In the previous judgment given in 2006, the law had not been declared as unconstitutional since the majority of six judges accepted the State's argument that for reasons of security there should be limitations on the free entry of Palestinians into Israel. One of the majority judges, Justice E. Levy, ruled that other, less harmful, alternatives should be considered within nine months, otherwise, it was possible that the law and its amendments would be declared unconstitutional the next time the issue was brought before the Court.

In the current judgment, the minority — led by Justice Levy with other four judges — declared the law unconstitutional. However, the majority of six judges rejected the petition and upheld the constitutionality of the law. The six judges accepted the State's argument that the law's purpose derived from security considerations, and that 'human rights for themselves are not a recipe for a national suicide', as one of the judges put it. As some of the judges ruled, the law was legislated as a temporary provision in order to prevent catastrophic risks to the State's security and therefore to satisfy the 'Precautionary Principle'. The dissenting opinion of the other five judges stated that the law infringes upon the right of family life and equality in a disproportionate manner and therefore should be declared invalid.

[26] See 10 *YIHL* (2007) pp. 495, 500–501.
[27] See 8 *YIHL* (2005) p. 432. Since the previous ruling approved the constitutionality of the law only as a temporary provision, the new petition was filed, challenging the permanent nature of the 'temporary provision'.

Cases — Military Courts — Confiscation of Terrorism Money and the Protection of Private Property

- *App. (Judea and Samaria) 2169/12 Ahmed Fadel Ahmed Yasin v. The IDF Military Commander in Judea and Samaria*, Military Court of Appeal, Judgment given on 18 December 2012

During a search in the appellant's home, a sum of over USD 200,000 was found and confiscated by the military commander. The appellant challenged the confiscation, arguing that the military commander's actions were contrary to international humanitarian law and that the money was for private use.

Based on classified evidence, the Court rejected the appeal. The Court reiterated the Supreme Court ruling in the Elajuly given in 2011,[28] acknowledging the constitutional right to property and that such right is part of customary international humanitarian law applied in the region. However, the Court stated that the right is not absolute and is subject to limitations. Additionally, the Court ruled that the protection of private property does not apply to monies of terrorist organizations. Such property is not private, but public and therefore other provisions international law apply, as was ruled in the *Al Nawar Case* in 1985 (which created the presumption that where the ownership of property is uncertain, the property would be deemed to be public unless proven otherwise).

NGO Reports — The Public Committee against Torture in Israel

- Family Matters II: Using Family Members to Pressure Detainees Under GSS Interrogation (June 2012) <http://www.stoptorture.org.il/files/FAMILY%20MATTERS%202_%2026%20June%202012.pdf>
- Accountability Still Denied: Periodic Update — Report on Impunity (January 2012) <http://www.stoptorture.org.il/files/PCATI_eng_web_0.pdf>

NGO Reports — B'Tselem

- Arrested Development: The Long Term Impact of the Separation Barrier (October 2012) <http://www.btselem.org/printpdf/133358>
- Under the Guise of Legality: Declarations on State Land in the West Bank (March 2012) <http://www.btselem.org/printpdf/130839>
- B'Tselm's Paper Submitted to the Levy Commission Regarding the Illegality of the Settlements (March, 2012) <http://www.btselem.org/download/20120329_14615_letter_to_levy_committee_heb.pdf> (in Hebrew)

NGO Reports — The Association for Civil Rights in Israel

- The State of Human Rights in Israel and the OPT 2012: Situation Report (December 2012) <http://www.acri.org.il/en/wp-content/uploads/2012/12/ACRI-Situation-Report-2012-ENG.pdf>
- Failed Grade: The Failing Education System in East Jerusalem (August 2012) <http://www.acri.org.il/he/wp-content/uploads/2012/12/Failed-Grade-en.pdf>

[28] See Yaël Ronen, 'Israel', 14 *YIHL* (2011) pp. 10–11, available from <www.asser.nl/YIHL/correspondentsreports>.

- The Association of Civil Rights Position regarding the Levy Commission Regarding the Status of Building in Judea and Samaria (April 2012) <http://www.acri.org.il/he/wp-content/uploads/2012/04/outpost-Levi190412.pdf> (in Hebrew)

NGO Reports — Yesh Din

- Position Paper Submitted to the International Fact Finding Mission Appointed to Investigate the Impact of the Settlements on Palestinian Rights in the West Bank (8 November 2012) <http://www.yesh-din.org/userfiles/file/Position%20Papers/Yesh%20Din%20Position%20to%20UN%20FF%20Mission.pdf>

The document reviews the ramifications of Israeli settlements in the West Bank on Palestinians' human rights which are relevant to Yesh Din's activities.

NGO Reports — Machsom Watch

- Invisible Prisoners (January 2012) <http://www.machsomwatch.org/sites/default/files/InvisiblePrisoners3.pdf>

NGO Reports — Human Rights Watch

- Israel/Gaza: Unlawful Israeli Attacks on Palestinian Media (December 2012) <http://www.hrw.org/news/2012/12/20/israelgaza-unlawful-israeli-attacks-palestinian-media>
- Gaza: Palestinian Rockets Unlawfully Targeted Israeli Civilians (December 2012) <http://www.hrw.org/news/2012/12/24/gaza-palestinian-rockets-unlawfully-targeted-israeli-civilians>
- Forget about Him, He's not Here — Israel's Control of Palestinian Residency in the West Bank and Gaza (February 2012) <http://www.hrw.org/sites/default/files/reports/iopt0212webwcover.pdf>

Other Reports — Children in Military Custody

- Children in Military Custody: A Report Written by a Delegation of British Lawyers on the Treatment of Palestinian Children under Israeli Military Law (June 2012) <http://www.childreninmilitarycustody.org/wp-content/uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf>

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