ISRAEL[1]

Contents

Legislation — Minefields

☛ Minefield Clearance Law, 5771-2011, 2285 SH, 28 March 2011

On 14 March 2011, the Israeli parliament completed the enactment of the Minefield Clearance Law. The Law outlines the establishment of a National Mine Action Authority, which will operate under the auspices of the Defense Ministry, and will secure a designated annual State budget for this purpose.

Military Legislation — Age of Majority in the West Bank

☛ Order on Security Instructions (Amendment No 10) (Judea and Samaria) 5771-2011 of 27 September 2011 <http://www.acri.org.il/he/wp-content/uploads/2011/10/zav1676.pdf> (in Hebrew)

[1] Information and commentaries by Dr. Yaël Ronen, Senior Lecturer, Sha'arei Mishpat College. The reporter is grateful to Adv. Shlomy Zachary for his assistance in gathering information for the report, and to Adv. Ido Rozensweig for his comments and additional information.

The order contains several changes to military legislation regarding the treatment of minors in the military judicial system in the West Bank. The main amendment is the change in the definition of a minor, so as to include persons up to the age of 18 years rather than 16 years. Other changes concern the obligation to notify parents or legal guardians of a minor who is suspected of violating military law, and to notify minors appropriately of their rights (such as the right to an attorney), taking account of their age.

Investigation of Alleged War Crimes — Targeted Killing of Salah Shehadeh

☛ Report of the Special Investigatory Commission on the Targeted Killing of Salah Shehadeh, 27 February 2011 <http://www.pmo.gov.il/NR/rdonlyres/DA339745-7D9F-40C7-B20F-4481AAF1F4C7/0/reportshchade.pdf> (in Hebrew)

The special investigatory commission published its final conclusions on the targeted killing of Hamas military leader Salah Shehadeh in July 2002. At that time, an Israeli military aircraft dropped a one-ton bomb on Shehadeh's house, killing him and at least 14 other people, including Shehadeh's assistant, his wife and his 15-year old daughter, and injuring 150 additional people.

Applying the parameters for lawful conduct under the Targeted Killing case,[2] the Commission found that as commander of the Hamas military wing in Gaza and second only to the spiritual leader of the Hamas, Shehada was correctly classified as taking a direct part in hostilities. Alternative ways of neutralizing him, including detention, were impractical, since Shehadeh took shelter in a very dense refugee camp in Gaza and any operation to detain him would have (overly) endangered the lives of many Israel Defence Force (IDF) soldiers. Therefore, it was reasonable to decide to launch a targeted killing operation.

Regarding harm to others, the Commission concluded that Shehadeh's assistant was himself a legitimate target, and that the death of Shehadeh's wife was a calculated and legitimate incidental injury. However, the death of Shehadeh's 15 year-old daughter was not anticipated. According to the Commission, Israeli security services cancel operations when there is positive information about the presence of children who might be affected by an attack. Indeed, the operation had previously been cancelled twice due to a high probability that the daughter was present in the house. Ultimately, the Commission found that the decision to approve the implementation of the operation, the risk of harming Shehadeh's daughter notwithstanding, was legitimate. The Commission considered that the outcome of the operation, namely 13 civilian deaths and many others injured, was disproportionate in retrospect. This was also the retrospective assessment of the majority of military authorities involved, who stated that had such an outcome been anticipated, the operation would not have been carried out. The Commission found that the gap between expectations and outcome resulted from inadequate information gathering and analysis processes, which led to the belief that the incidental injury would be less extensive than it was. It noted that various operational constraints led to an imbalance in considering the military

[2] 9 *YIHL* (2006) p. 497.

necessity of targeting Shehadeh against the need to protect uninvolved civilians. The report also noted that all of the relevant State bodies conducted internal inquiries and that the process was subsequently improved in order to avoid outcomes of this nature. In fact, similar outcomes were not found in other cases of targeted killings.

The Commission concluded that the targeted killing of Shehadeh was a legitimate attack against a person who participated directly in the hostilities, and that the unfortunate harm caused by the attack was unintentional and unpredictable, and was not the result of disrespect for human life. Moreover, the Commission rejected any allegations of violations of either Israeli or international criminal law.

The Commission recommended, *inter alia*, that the rules of IHL be better embedded within the work of the security services, that the principle of proportionality be observed, and that written guidelines on the use of targeted killing in accordance with IHL be formulated by the IDF. Moreover, it expressed the opinion that the Israeli Security Service should strengthen its intelligence efforts with regard to collateral damage to the uninvolved civilian population. The Commission also recommended that all relevant interactions, communications, and decisions preceding a targeted killing operation be documented and that the relevant documentation be preserved, in case it is determined that there is a need for an investigation by an external committee, in accordance with the guidelines offered by the HCJ in the *Targeted Killing* case.

Investigation of Alleged War Crimes — Statistics

On 17 April 2011, the IDF Military Police Unit submitted to the Turkel Commission (Public Commission to Examine the Maritime Incident of 31 May 2010) data regarding complaints of alleged violations of IHL submitted to, and investigations conducted subsequently by, the military police from 2000 until the end of March 2011. The information was submitted at the request of the Turkel Commission in connection with its mandate to address the question whether the mechanisms for examining and investigating complaints and claims of violations of the laws of war, as carried out by Israel in general and as implemented with regard to the events of 31 May 2010 in particular, meet Israel's obligations under international law.

According to the report,[3] the IDF had received 3215 complaints. In response to 1983, of those complaints, a military criminal investigation had been launched by the military police. The report does not contain the number of investigations leading to indictments. According to a report by the Ministry of Foreign Affairs issued in January 2010, between 2002 and 2009, 1703 criminal investigations of misconduct by IDF soldiers led to 156 indictments against soldiers in regard to crimes committed against the Palestinian population.[4]

[3] Letter from the Assistant to the Chief of Military Police to the Secretary of the Turkel Commission, 17 April 2011 (on file with author)

[4] Israel Ministry of Foreign Affairs, *Gaza Operation Investigations: An Update* (29 January 2010) para. 68 <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>.

Military Courts — Statistics[5]

In May 2011, the IDF military courts in the West Bank published the annual activity report for 2010. According to the report, during 2010 there were 8516 indictments before military courts in the West Bank, relating to security offenses, ordinary criminal offenses (theft, murder, attacks, etc.), and minor disturbances (rock-throwing, tire-burning, etc.). According to the report, there was a 39 per cent drop in the number of security offenses from 2009, alongside a 6.5 per cent increase in the number of indictments for disturbances. The report reveals that during 2010, the courts completed 9542 cases, consisting of all types of offenses (security, criminal, traffic, etc.). There were 193 appeals pending before the courts in 2010.

According to the report, there was a significant decrease in the number of administrative detention orders issued in 2010 (714 as opposed to 1307 in 2009). Of the 714 cases, 523 detention orders were new and 191 were extensions of previous detention orders. During 2010, 695 appeals were filed for judicial review of administrative detentions. The rate of success of the appeals was 18 per cent for appellants and 41 per cent for the State.

Analysts suggest the decrease in terrorist activity, reflected in the 2010 annual report, was a main factor in the Military Advocate General's change of policy regarding investigations of civilian deaths in the West Bank.[6]

Investigations of Civilian Deaths — Change of IDF Policy

Until 2000, the IDF's investigation policy in cases of civilian deaths was based on the notion that its activity in the Gaza Strip and the West Bank was a form of law enforcement, and was not expected to give rise to the use of lethal force. Therefore, any incident involving civilian casualties was viewed as questionable in nature and was submitted for criminal investigation. Following the outbreak of the second intifada, the Military Advocate General (MAG) defined the situation in the occupied territories as one of armed conflict and concluded that under such conditions, the IDF is not obligated under international law to initiate a criminal investigation into every case involving a civilian death. Rather, a command inquiry would suffice as an initial fact-finding procedure, with a criminal investigation following only where the initial inquiry raised suspicions of criminal conduct by the military forces.

In April 2011, the MAG notified the HCJ that following changes in the nature and scope of the terrorist threat emanating from the West Bank, as well as changes in the nature of IDF activity in the area, IDF combat activity in the West Bank had significantly decreased, and on this basis, the MAG had modified the investigation

[5] Based on Ido Rosenzweig and Yuval Shany, 'The IDF Military Court Annual Activity Report — 2010', 35 *Terrorism and Democracy Newsletter* (November 2011) <http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/35th_Newsletter/1/1.aspx>.

[6] See Comment on *Investigations of Civilian Deaths — Change of IDF Policy* in this volume of *YIHL*.

policy so that a criminal investigation would be initiated automatically whenever a Palestinian civilian death results from IDF activity. This new policy applies to all cases involving 'regular' policing activity that is carried out by the IDF in the area. By contrast, when the death of an uninvolved civilian occurs in the context of an act of combat, such as exchange of fire with armed combatants, a preliminary military inquiry will be conducted in order to determine whether a criminal investigation is warranted.

Cases — Quarrying[7]

- ☛ *Yesh Din — Volunteers for Human Rights v Military Commander in the West Bank*, HCJ 2164/09, Israel Supreme Court sitting as High Court of Justice, Judgment of 26 December 2011 <http://elyon1.court.gov.il/files/09/640/021/n14/09021640.n14.htm> (in Hebrew) <http://www.yesh-din.org/userfiles/file/%D7%94%D7%9B%D7%A8%D7%A2%D7%95%D7%AA%20%D7%93%D7%99%D7%9F/psak.pdf> (Unofficial English Translation)

The petitioner challenged the legality of quarrying activity in Israeli-owned quarries operating in Area C within the West Bank, and the licensing and land allocation by the State aimed at establishing new quarries and expanding quarries in current operation. According to data provided by the Civil Administration, some 94 per cent of the production of Israeli quarries and some 80 per cent of the production of Palestinian quarries operating in the West Bank are currently being transported to within the borders of Israel. Some 200 Palestinian workers are being employed by Israeli quarries in Area C. The total amount of royalties paid to the Civil Administration in 2009 for the usage of the quarries by Israeli entities stands at approximately NIS 25 million. While the petition was pending, the State revised its position, and, inter alia, announced in May 2010 that it would keep a separate registry of the revenues deriving from royalties and leasing fees paid by the quarries in the territory, and that these funds would be designated as funding for the Civil Administration for the benefit of the residents of the West Bank. According to the National Outline Plan for Mining and Quarrying for the Construction and Paving Industry, all the quarries in the West Bank provide approximately one quarter of the relevant quarrying material consumption in the Israeli economy. According to the State's estimate, even if the Israeli economy continues to consume mining and quarrying materials originating in the territory, and does so for the next thirty years at the estimated extent, the total overall consumption for the whole abovementioned period will exhaust about only half a percent of the overall mining potential in the Area.

The petitioner argued that the activity of the quarries violates the supreme principle of the laws of occupation, under Article 43 of the *Hague Regulations*,[8]

[7] For an elaboration of the State's position, see 13 *YIHL* (2010) p. 520.

[8] *Regulations concerning the Laws and Customs of War on Land* annexed to *Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, UKTS 9 (1910) (entered into force 26 January 1910).

according to which the military commander is obliged to act exclusively for the benefit of the occupied territory while being absolutely forbidden to use public assets for the benefit of the occupying power and its needs other than those concerning its security. According to the petitioner, the products of quarrying operations in the quarries do not serve the requirements of the local population or the security needs of the occupying power, but rather the financial requirements of Israel and private corporations that have been provided with quarrying licenses, and therefore the operation of the quarries must be terminated.

The ruling of the Court revolved on the interpretation of Article 55 of the *Hague Regulations* and on its relationship with Article 43.

Relying on the practice of States and their military manuals, the Court concluded that merely mining minerals in occupied territory by the occupying force or under a concession by the occupant is acceptable and does not contravene international law. It remains controversial however whether the occupying power may open new quarries. Furthermore, the Court noted the need to clarify the link between Article 55 and Article 43 in light of its own jurisprudence that the military commander is not allowed to consider the national, economic and social interests of his own State — inasmuch as these interests have no effect on his security interest in the area or the interest of the local population — and that a territory held in belligerent occupation is not an open field for economic or other exploitation. In addition, the Court recalled that the prolonged occupation, even if deemed temporary from a legal perspective, requires the adjustment of the law to the reality on the ground and imposes a duty on Israel to ensure normal life terms, including the sustainability of economic relations between the occupant and the occupied. According to the Court, this conception calls for adopting a wide and dynamic view of the duties of the military commander, including the responsibility to ensure the development and growth of the territory's economic infrastructure. The Court thus concluded that the State's interpretation of the manner in which it exercises its powers in accordance with Article 55 is reasonable.

The Court noted the State's recommendations to the political echelon that no new quarries — which are primarily aimed at producing quarrying materials for sale to Israel — be established in the West Bank. Given this advice, discussion therefore focused on active quarries, opened under the occupation. The Court emphasized the need to take account of the unique aspects of the occupation. In this context the Court opined that the petitioner's strict view might result in the failure of the military commander to perform his duties pursuant to international law. For instance, closure of quarries might cause harm to existing infrastructures and a closure of the industry, which might consequently harm the local population. Furthermore, the quarries in operation provide livelihood for a considerable number of Palestinian residents, and as stated in the State's notification, the royalties paid to the Civil Administration by the operators of the quarries are used to finance the operations of the military administration aimed to benefit the interests of the territory. The Court also took account of the quarries' assertion that their activities had been contributing to the economic development and to the modernization of the territory, such as through the training of employees, payment of royalties and supplying quarrying products necessary for construction purposes. In view of this state of affairs, the Court rejected the petitioner's assertion that the quarrying operations in no way promoted the best interests of the territory, especially in light of the common economic interests of both the Israeli and Palestinian parties and the prolonged occupation. The Court noted that

in view of the significant delay underlying the petition, in light of the many years during which the quarries have been operating in their current format and the harm that could be inflicted should the requested remedy be granted, the petitioner had an especially heavy burden when attempting to establish its arguments. The petition was therefore dismissed.

Cases — Status of Settlements

- *Abbas Hassan Yusef Yusef, Head of Al Janiya Village Council v Supreme Planning Council of the Civil Administration and Others* HCJ 8171/09 and 10462/09, judgment of the Supreme Court sitting as High Court of Justice, 20 November 2011
  <http://elyon1.court.gov.il/files/09/710/081/m30/09081710.m30.pdf> (in Hebrew)

Two petitions, which sought to challenge the plan to change the zoning of the Givat Habrecha outpost from an agricultural area to a residential neighbourhood with 300 housing units (part of which had already been built without a valid outline plan and without building permits), and the smaller plan to build a school on that land, were rejected. The two plans cover a segment of a road that was the only access road for the residents of al Janiya to their agricultural lands.

The petitioners argued that the decisions of the planning authorities were, *inter alia*, in violation of customary international law pertaining to the construction in settlements. The Court reiterated previous rulings that the legality of the settlements under customary international law was institutionally non-justiciable.

Cases — Law Applicable to Israelis and taxation

- *Malcha v Civil Administration in Judea and Samaria* HCJ 5324/10, Israel Supreme Court sitting as High Court of Justice, judgment of 28 December 2011
  <http://elyon1.court.gov.il/files/10/240/053/m13/10053240.m13.htm (in Hebrew)

Israeli nationals resident in the Alfei Menashe settlement petitioned for the annulment of a land registration fee as a condition for registration in the property register of the West Bank.

In setting the normative background, the Court noted that Israeli law does not apply in the West Bank territorially, but rather the area is governed by the law of belligerent occupation. Accordingly, the territorial law in the West Bank consists of the law applicable prior to the entry of Israeli forces, i.e. Jordanian law, which continues to apply unless modified by the military commander. In addition, Israelis resident in the area are bound by Israeli legislation which has been extended extraterritorially on a personal basis. The power of the military commander to modify local law is limited by Article 43 of the *Hague Regulations*, which permits modification of local law only in the pursuit of goals within the military commander's authority. This entails a dynamic approach, in order to ensure that local law responds to evolving needs. This is particularly true with respect to extended belligerent occupation. The Court also noted Article 48 of the *Hague Regulations* as requiring the

military commander to maintain the situation relating to taxes. The Court noted that even if the military commander were permitted to modify local law, there does not seem to be any justification to do so; the differences between local and Israeli law is not in itself a ground for intervention. Furthermore, the military commander's authority is limited to ensuring its military interests and the interests of the civilian population in the territory. Annulment of fees for Israeli nationals does not fall within these parameters and would violate international law. The Court added that law regarding registration of land in Area C in the West Bank applies to all residents of the area, and there is no ground for distinguishing between Israeli and Palestinian residents in this regard.

Cases — Targeted Killing

- *Thabit v Attorney General* HCJ 474/02 Israel Supreme Court sitting as High Court of Justice, Judgment of 3 January 2011 <http://elyon1.court.gov.il/files/02/740/004/n24/02004740.n24.htm> (in Hebrew)

In December 2000, the IDF killed Dr. Thabit Thabit while he was driving in his car in the West Bank city of Tulkarm. In January 2002, Dr. Thabit's widow submitted a petition to the HCJ requesting that a criminal investigation be initiated against then Prime Minister Ehud Barak and IDF Chief of General Staff Shaul Mofaz for the targeted killing of her late husband. At the petitioner's request, the ruling on the petition was suspended until after the HCJ published its judgment in the *Targeted Killing* case in December 2006.[9] According to that judgment, the use of targeted killing is not illegal *per se* and must be examined on a case-by-case basis.

The Court reiterated that the legality of a targeted killing operation should be examined initially by an independent committee of inquiry rather than by the Court, since the HCJ does not have the professional tools to make an independent and professional evaluation *de novo*.

Cases — Investigation of Civilian Deaths

- *B'Tselem and Association for Civil Rights in Israel v Military Advocate General* HCJ 9594/03, Israel Supreme Court sitting as High Court of Justice, Judgment of 21 August 2011 <http://elyon1.court.gov.il/files/03/940/095/n22/03095940.n22.htm> (in Hebrew)

This petition concerned the investigation policy of the IDF in the West Bank that had been in effect since the start of the second intifada in 2000. According to this policy, the IDF did not regard itself obligated under international law to initiate a criminal investigation into every case involving a civilian death, but only where the initial command inquiry raised suspicions of criminal conduct by the military forces. In 2003, the petitioners challenged this change of policy, claiming that it created conditions under which Palestinian civilians could be harmed with impunity.

[9] See in 9 *YIHL* (2006) p. 497.

Following the April 2011 announcement by the MAG,[10] the petitioners argued that a decisive answer was still necessary regarding the IDF's obligation to investigate civilian deaths if the MAG decides that the situation has escalated into an armed conflict.

The HCJ acknowledged the MAG's announcement of the change in the investigation policy and rejected the petition. It emphasized that the duty to investigate relates only to those incidents of death suspected of having been caused by unlawful conduct. The duty to investigate applies both in times of armed conflict and in times of peace, but unlawfulness depends on the circumstances. The Court accepted as sufficient the MAG's notification that in incidents that do not clearly involve combat action, the death of a Palestinian civilian would itself be sufficient to raise suspicion of unlawful conduct.

The Court acknowledged that command inquiry has its shortcomings, but there is no alternative to command inquiry as a means of inspecting the conduct of the forces on the spot. The Court also noted the potential importance of command inquiry in learning from experience in order to minimize future harm to the civilian population.

The Court held that unlike the situation in the West Bank, there is still an ongoing armed conflict in the Gaza Strip. Therefore, opening a criminal investigation for every occurrence of a civilian casualty that takes place is not appropriate, since not every incident involving the death of a civilian would give rise to *prima facie* suspicions of unlawful conduct.

☛ *Adala v Attorney-General* HCJ 3292/07, Israel Supreme Court sitting as High Court of Justice, Judgment of 8 December 2011 <http://elyon1.court.gov.il/files/07/920/032/n06/07032920.n06.htm> (in Hebrew)

The Supreme Court rejected a petition brought by three human rights NGOs against the decision of the MAG and the Attorney-General not to open criminal investigations in connection with two counter-terrorism operations conducted by the IDF in the Gaza Strip in 2004. The HCJ reiterated its ruling in HCJ 9594/03 and noted that a severe injury to the civilian population does not in itself raise the need for a criminal investigation and as such, this obligation arises only when there has been a *prima facie* grave violation of international law which amounts to a violation of criminal law. Therefore, a demand for a criminal investigation must rest on a sufficient factual basis. The Court highlighted that the decision whether to open criminal investigations and proceedings is subject to the discretion of the MAG and the Attorney-General, and that it generally refrains from interfering in such cases.

The Court also opined that while the manner in which criminal investigations should be carried out under international law and Israeli law is the subject of an ongoing academic debate, Israeli law fulfils the requirements of international law, especially under the *Geneva Conventions* of 1949, to criminalize IHL violations.

Cases — Methods of Warfare

[10] See Comment on *Investigations of Civilian Deaths — Change of IDF Policy* in this volume of *YIHL*.

☛ *Physicians for Human Rights v Minister of Defense* HCJ 3261/06, Israel Supreme Court sitting as High Court of Justice, Judgment of 31 January 2011 <http://elyon1.court.gov.il/files/06/610/032/n06/06032610.n06.htm> (in Hebrew)

Several human rights NGOs petitioned against the IDF's operational decision to decrease the 'safety buffer' distance of artillery shelling into the Gaza Strip from 300 m to 100 m from civilians and civilian objects. They argued that this violated three core principles of IHL, namely the distinction between combatants and civilians, proportionality, and the obligation to take precautions during attack.

The Court held that the petition relates predominantly to professional–military aspects of IDF counter-terrorism methods rather than to legal ones. Since the HCJ does not hold the relevant expertise to review such aspects, it should refrain from interfering in such methods. In the absence of any legal benchmarks rendering a range of 100 m prohibited under international law as opposed to a range of 300 m, the Court accepted the State's assurances that the IDF operates in accordance with the relevant IHL provisions.

Furthermore, since the State had in the meantime announced the suspension of its use of the challenged method, the Court noted that the petition had become moot. If the IDF decides to resume the use of firing artillery shells into the Gaza Strip, the petitioners could ask the Court to revisit the issue.

Cases — Protection of Private Property

☛ *Elajuly Money Changing Company v Minister of Defence* HCJ 10244/06, Israel Supreme Court sitting as High Court of Justice, Judgment of, 9 February 2011, ILDC 1699 (IL 2011)

During a search of a moneychanger's home and office in 2006, over NIS 4 million was found. The moneychanger was arrested and charged with assisting an illegal association (Hamas). The military commander issued an order to confiscate the money. The moneychanger and his company challenged the confiscation on the ground that under Articles 23(g), 46 and 52 of the *Hague Regulations*, and Article 53 of the *Convention (IV) relative to the Protection of Civilian Persons in Time of War*,[11] the military commander was prohibited form confiscating private property.

The Court reiterated its ruling from 1985 in *Al Nawar*, which established the rule that where the ownership of property is uncertain, the property would be deemed public (and could be confiscated) until proven otherwise. This was in line with the approach adopted by the British Ministry of Defence's *Manual of the Law of Armed Conflict*. When there is a mixture of private money with money held for the benefit of an illegal association in a manner that does not permit distinction between the two, there is no justification for allowing the individual to benefit from the protection of private property to which civilians not involved in hostile activities are entitled. Relying on this principle where there is unambiguous evidence of intentional camouflaging of the money's origins provides an appropriate balance between the two

[11] Opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*').

principles governing the conduct of the military commander under the law of belligerent occupation, as it prevents the financing of terrorist organizations while minimizing injury to private property.

The Court acknowledged that the private–public property distinction in the *Hague Regulations* and the *Fourth Geneva Convention* is grounded in the civilian–combatant distinction, which is difficult to transpose to situations where the actors are not combatants in the ordinary sense but members of terrorist organizations.

☛ *Valiro v State of Israel* HCJ 3103/06, Israel Supreme Court sitting as High Court of Justice, Judgment of 6 February 2011 <http://elyon1.court.gov.il/files/06/030/031/r13/06031030.r13.htm> (in Hebrew)

The Valiro estate petitioned for a declaration concerning property in Hebron bought by the deceased in 1935. The property had been taken by the Jordanian government in early 1967. Following the 1967 war the military commander has declared that all property belonging to or registered under the Jordanian Hashemite Kingdom came under his sole authority and administration. The petitioners claimed that since then they had been unable to enjoy their constitutional right to property. The petitioners asked that since the property would not be returned to its owner in the near future, it should be declared to have been taken by the State of Israel, or should be taken by it. They would thus be entitled to compensation.

The State responded that under Jordanian law, enemy property, which included property of Israeli residents, had become Jordanian State property, and the original owners no longer held property rights in it.

In determining the applicable normative framework, the Court cited Article 55 of the *Hague Regulations* as authorizing the occupying power to administer public property in accordance with the rules of usufruct. The occupying power does not become the owner of the property, nor is it entitled to transfer ownership in it.

The Court noted that the peace treaty with Jordan did not regulate the status of 'enemy property' taken by the Jordanian government, despite Israel no longer constituting an 'enemy'. The status of enemy property in the West Bank has therefore not altered. Even if the law of occupation *allows* the occupying power to release 'enemy property' to its original owners, it clearly does not *obligate* it to do so. In exercising its discretion, the government must take into account the possibility that release of property to its original Israeli owners may lead to an increase in claims of Palestinians residents of the West Bank of their own property within Israel, and rejection of these claims may lead to tension in the area and to an increase in property disputes. Thus, a decision not to return property to its original owners is in line with the military commander's obligation to maintain public order. Moreover, the government may not take account of considerations relating to Israeli property for which West Bank Palestinians may have claims, since the military commander may ensure its own military interests and those of the local population but not national, economic or social interests of his own country. Consequently, the problem of Jewish property in the West Bank must be resolved through political negotiations.

☛ *State of Israel v Daud* Civil Appeal Request 3675/09, Judgment of the Supreme Court sitting as High Court of Justice, 11 August 2011 <http://elyon1.court.gov.il/files/09/750/036/p08/09036750.p08.htm> (in Hebrew)

The Court accepted an appeal by the State on a district court's judgment awarding damages to Palestinian owners of West Bank property that had been destroyed by the IDF for security purposes. The Court held that there was no negligence on the part of the IDF.

In *obiter dictum* regarding the property owners' right to compensation under international law, the Court held that even if such a right existed, it was administrative or constitutional, and should therefore be invoked in an administrative procedure or directly before the Israeli Supreme Court sitting as High Court of Justice, rather than in tort. The Court confirmed that the property owners may claim their rights under the *Hague Regulations*, which has been accepted as customary international law into Israeli law.

Cases — Separation Barrier/Fence/Wall

- *HaMoked: Center for the Defence of the Individual v Government of Israel* HCJ 9961/03, Israel Supreme Court sitting as High Court of Justice, Judgment of 5 April 2011 <http://elyon1.court.gov.il/files/03/610/099/n37/03099610.n37.htm> (in Hebrew)

A human rights NGO petitioned the Supreme Court against the creation of the 'seam zone' — which is an area on the Israeli side of the separation barrier in the West Bank but within the West Bank itself — that has been declared a closed military area and is governed by a complex permit regime. The petition also called for cancellation of the decision to build segments of the separation barrier extending to the east beyond the Green Line. It argued that the permit regime implemented in the 'seam area' constituted a clear separation between Israelis and holders of Israeli visas and Palestinians from the West Bank and as such amounted to the crime of apartheid.

The Court rejected the petition. It confirmed the military commander's authority to declare areas as closed military areas, and found that in the overall balance, the arrangements made were not illegal although their implementation should be modified in order to alleviate the hardship with which residents were confronted. With respect to the claim that the permit regime was collective punishment and prohibited discrimination, amounting in certain circumstances to apartheid, the Court stated that the need to act against Palestinian terrorists inevitably involved injury to the Palestinian population as a whole, despite the fact that for the most part this population does not present a security risk. This is an unavoidable product of Israel's actions to protect the security of its residents in the West Bank and in Israel. It is therefore not collective punishment of the Palestinian population as such. Similarly, the allegation that this policy constitutes apartheid is misplaced.

Cases — POW Status

- *Military Prosecution v Mahmad Mahjmud Ali A'Shafai* Appeal (West Bank) 1453/09 Military Court of Ramallah, Judgment of 26 September 2011

The defendant was put on trial for membership of an unlawful association (Force 17), and for the attempted killing of IDF soldiers by firing toward IDF patrols and tanks. The defendant claimed that Force 17 was part of the Palestinian Authority's police force, recognized by Israel, and that he had operated in Area A of the West Bank which was under the exclusive authority of the Palestinian Authority. Accordingly, he claimed POW status. The Trial Court ruled that since the defendant acted as a member of the Palestinian security forces in an area under the authority of the Palestinian Authority forces, while he was in uniform, and only operated against military forces (the IDF), he might have been entitled to POW status. The Court of Appeal overturned the decision, holding that the defendant was not entitled to POW status under IHL. The Court accepted as a point of departure that the conflict between Israel and the Palestinian terrorist organization was an international armed conflict, but that there was no armed conflict between Israel and the Palestinian Authority. Possibly relevant categories of persons entitled to POW status under such conflict are guerrilla fighters under Article 4(A)(2) of *Convention (III) relative to the Treatment of Prisoners of War*,[12] guerrilla fighters under Article 44 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*,[13] and participants in a *levée en masse* under Article 4(A)(6) of the *Third Geneva Convention*. Since the West Bank was under occupation, the latter category was inapplicable. For all three categories, a condition for POW status is compliance with the laws of war by the organization with which the individual is affiliated. This excludes members of the Palestinian terrorist organizations, because these organizations violate the laws of armed conflict by expressly targeting civilians, and because they usually fail to comply with the requirements of carrying arms openly and wearing a distinctive emblem. Insofar as the members of the Palestinian armed forces are concerned, the situation is more complicated. The individual must belong to a group which is engaged in fighting rather than act individually, and the group must belong to a State. Since the Palestinian Authority and its security forces are not engaged in organized fighting against Israel, its members who engage in hostilities are acting in a private capacity and are not entitled to POW status.

Moreover, since 2000, Force 17 has been acting against Israel in violation of IHL norms, leading to the declaration of the organization as an unlawful association. Even if the defendant had acted in his capacity as a Force 17 member, he was thus not entitled to POW status.

NGO Reports — Yesh Din

- ☛ 'Tailwind: Non-Enforcement of Judicial Orders, Foot Dragging And the Retroactive Legalization of Illegal Construction in the Occupied Palestinian Territories' (October 2011)

[12] Opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Third Geneva Convention*').
[13] Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*').

<http://www.yesh-din.org/userfiles/file/Reports-English/Tailwind%20%5BEng%5D.pdf>

- 'Alleged Investigation: the Failure of Investigations into Offenses Committed by IDF Soldiers against Palestinians' (August 2011) <http://yesh-din.org/userfiles/file/Reports-English/Alleged%20Investigation%20%5BEnglish%5D.pdf>

NGO Reports — B'Tselem

- 'Show of Force: Israeli Military Conduct in Weekly Demonstrations in a-Nabi Saleh' (September 2011) <http://www.btselem.org/sites/default/files2/201109_show_of_force_eng.pdf>
- 'No Minor Matter: Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone Throwing' (July 2011) <http://www.btselem.org/sites/default/files2/201107_no_minor_matter_eng.pdf>
- 'Dispossession and Exploitation: Israel's Policy in the Jordan Valley and Northern Dead Sea' (May 2011) <http://www.btselem.org/sites/default/files2/201105_dispossession_and_exploitation_eng.pdf >
- 'Human Rights in the Occupied Territories Annual Report 2011' (March 2012) <http://www.btselem.org/download/2011_annual_report_eng.pdf>

NGO Reports — Physicians for Human Rights (Israel)

- '"Humanitarian Minimum": Israel's Role in Creating Food and Water Insecurity in the Gaza Strip' (December 2010) <http://www.phr.org.il/uploaded/Humanitarian%20Minimum_eng_webver_H.pdf >

NGO Reports — Gisha

- 'Scale of Control: Israel's Continued Responsibility in the Gaza Strip' (November 2011) <http://www.gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf>

NGO Reports — Association for Civil Rights in Israel

- 'The State of Human Rights in Israel and the OPT 2011, Situation Report' (December 2011) <http://www.acri.org.il/he/wp-content/uploads/2011/12/State2011.pdf>

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