THE ISRAELI HIGH COURT OF JUSTICE AND THE PALESTINIAN *INTIFADA:*

A STAMP OF APPROVAL FOR ISRAELI VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES

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PREFACE

The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli Violations in the Occupied Palestinian Territories is a legal study prepared by Al-Haq presenting an analytical reading of certain Israeli High Court decisions during the second Palestinian *intifada,* which broke out in September 2000. The study highlights, through analysis of selected decisions, the role which the High Court played and still plays in providing a "legal" basis and a stamp of approval for Israeli violations and war crimes committed by the Israeli occupying forces against Palestinian civilians in the Occupied Palestinian Territories (OPT).

Al-Haq has witnessed an ongoing failure of the Israeli High Court of Justice to uphold respect for the rule of law by Israeli occupying forces in the West Bank, including East Jerusalem, and the Gaza Strip.

This includes in relation to Israel's international legal obligations both as a state party to international human rights and humanitarian treaties, and in respect of international customary law. From the beginning of the occupation in 1967 to date, the High Court has considered hundreds of petitions related to Israeli military practices in the OPT. These petitions have focused on such issues as the use of force, access to humanitarian aid, land confiscation, settlements, deportation and forcible transfer of Palestinians, house demolitions, administrative detention, and the annexation of Jerusalem. An overview of rulings by the High Court on such issues during the current *intifada* brings into grave doubt its independence and neutrality. This overview demonstrates a pattern of interpreting international law to the benefit of the Israeli occupying forces whilst systematically denying the rights of Palestinian civilians in the OPT.

The Israeli High Court of Justice has consistently disregarded the principle of judicial independence in the interests of the Israeli authorities and has systematically failed to hold them accountable to their international legal obligations. The High Court has consistently refused to recognise the *de jure* applicability of the Fourth Geneva Convention to the OPT, and has maintained Israel's selective position regarding the applicability of international humanitarian law, thereby undermining the collective and individual rights of Palestinians. The High Court has become an entity whereby the

Israeli authorities can obtain an apparent stamp of legitimacy for their unlawful practices. Since the Court does not represent an effective remedy for Palestinians, victims of Israeli human rights violations are forced to seek alternative jurisdictions, including under the principle of universal jurisdiction.

Issued originally in Arabic in 2003, the study does not address developments by the High Court in 2004, including in the well-publicised case regarding the May 2004 Rafah invasion or the June 2004 decision on the Annexation Wall. While these decisions addressed some issues that were previously unaddressed, the fundamental problems - the consistent deferral of the High Court to the military commander on the ground, and the reluctance to fully apply Israel's legal obligations to the OPT - have not been overcome.

Al-Haq considers this study - part of its international campaign to expose collective punishment committed by the occupying authorities against Palestinian civilians in the OPT - as an analytical introduction to familiarise human rights specialists, individuals and local and international organisations, as well as international public opinion, with the role that the Israeli High Court justices play in providing a "stamp of approval" to the illegal practices of the occupier against the Palestinian civilians.

Randa Siniora
General Director
June 2004

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LIST OF ABBREVIATIONS

Declaration of Principles	1993 Declaration of Principles on Interim Self-Government Arrangements
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
First Additional Protocol	Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
First Geneva Convention	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Fourth Geneva Convention	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
GA	United Nations General Assembly
Hague Regulations	Regulations Annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
Israeli Basic Law	Israeli Basic Law: Human Dignity and Liberty
MK	Member of the Knesset (Israeli parliament)
OPT	Occupied Palestinian Territories

PCATI	Public Committee Against Torture in Israel
PHRI	Physicians for Human Rights - Israel
PNA	Palestinian National Authority
PRCS	Palestine Red Crescent Society
Rome Statute	Rome Statute of the International Criminal Court
SC	United Nations Security Council
Third Geneva Convention	Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
UDHR	Universal Declaration of Human Rights
UN	United Nations
Vienna Convention	1969 Vienna Convention on the Law of Treaties
WCHR	1993 World Conference on Human Rights

INTRODUCTION

Israel has controlled the Occupied Palestinian Territories (OPT) since 1967. The practices of Israel as the occupying power towards these territories have continued to violate the basic rights and freedoms of Palestinians. Most of these abuses constitute war crimes and grave breaches of international humanitarian law and some rise to the level of crimes against humanity.

After imposing its tight control on the OPT, Israeli authorities started to take actions whose overall aim was to annex these territories. To facilitate this, the Israeli government created a series of legal changes. It created new legislation that took the form of military orders, which touched all aspects of the lives of the Palestinian people. Such legislation prohibited their economic progress, and deprived them of the ability to dispose of their properties, or manage or benefit from their resources. Israel continues to control all the land and water of the OPT, and uses these resources to serve the economy of the occupying power and Israeli settlers who have been illegally transferred and settled in the OPT.

Israel claims that its practices and policies in the OPT are compatible with the rules of international law. It claims that all changes created by it, met and fulfilled the needs of the Palestinian residents on the one hand, and the security requirements of the occupation forces on the other hand. However, facts on the ground refute this claim, and prove that most measures taken by Israel regarding the OPT and its Palestinian population are in contradiction with the basic principles of modern international law.

Military orders issued by Israeli military commanders who successively ruled the OPT form the "legal" basis for the practices of the occupation authorities. These orders introduced substantial and radical changes to the Palestinian judicial system which was well-established in the Palestinian territories before the occupation began. Further, they severely curtailed the jurisdiction of local courts, limiting their jurisdiction to addressing the internal affairs of the Palestinians. Israel created military courts to review various security violations; and set up military judicial com-

missions, such as the compensation, objections, and civil servant salaries committees, to decide on legal matters.[1]

Israeli measures curtailing and undermining the role of the local judiciary, and the minimisation of powers and jurisdictions assigned to it, were accompanied by extending the jurisdiction of the Israeli High Court of Justice to the OPT. Israeli authorities did not object to the local residents resorting to the High Court in Israel to question the legitimacy of the practices of the occupation forces and military commanders.[2]

Since extending its jurisdiction to the territories occupied in 1967, the Israeli High Court has reviewed hundreds of petitions submitted by Palestinians. These petitions challenged the legitimacy of confiscating and controlling lands, and utilising lands to serve settlements and settlers, as well as the policies of deportation, house demolition, administrative detention, collective punishment, killing, assassination, and sabotage and destruction of lands and property that belong to Palestinians. The Court refused most of these petitions, accepting the claims of the occupying power instead. Accordingly, the Court established legal "justifications" for illegitimate practices, thus prohibiting the creation of any change in Israeli policies which might have stopped the violation by the occupying power of Palestinian individual and collective rights.

Although aware of the methods applied by the Israeli High Court in dealing with issues related to the OPT's population, and aware of the policies it adopted in relation to the petitions submitted to it by Palestinians, there are some who hold that the work of the Court has yielded positive results. They believe that subjecting the practices of military commanders to the scrutiny

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[1] Raja Shehadeh, *Occupier's Law: Israel and the West Bank* (Beirut: Palestinian Research Institution, 1990) p. 83 - 95.

[2] In his introduction to the book *Rule of Law in the Territories Administered by Israel,* Haim Cohen, former justice on the Israeli High Court of Justice, talked about extending the jurisdiction of the Israeli High Court to the OPT. He wrote: "The court assumed powers beyond its jurisdiction, on military commanders and their subordinates. The basic reason for this is that all government branches are subject to the Supreme Justice Courts in their works and any shortcomings. Based on this judicial personal and not geographical jurisdiction, the court may order any military commander or any of his subordinates in the area under his administration, to perform a work that he is obliged to do, or to refrain from performing a work that he is not supposed to do by law." *Ibid* at 95 - 96.

of the High Court and the pressure exerted by judges often deters authorities from taking actions that contradict the law.

On the other hand, some believe that extending the jurisdiction of the High Court to the OPT has bestowed an undeserved legitimacy on the procedures of the occupying power and given a "legal" basis to these practices, as well as garnered favourable public opinion on the local and international level.

Several jurisprudence studies addressing how the Israeli High Court of Justice has dealt with the population of the OPT have been conducted. Dozens of research articles and papers have been written on this topic. Yet despite the Court's publicized failure to play a neutral and impartial role in recognising the individual and collective rights of the occupied population, there is an increase in the number of petitions submitted to this Court by Palestinians — both individuals and institutions. This increase has occurred particularly during the current *intifada* (uprising), which has been characterised by excessive and aggressive violations by the Israeli authorities of Palestinian rights and basic liberties, while Palestinians reject and resist the occupation policies. Al-Haq believes that it is important to conduct this study at the current time because Israeli authorities have reached a new extreme in violating human rights and the provisions of international humanitarian law in the OPT.

Al-Haq is limiting the scope of this study to the activities of the High Court during the current *intifada,* which started on 29 September 2000. The Palestinians are now in dire need of attaining their individual and collective rights, which are violated daily by Israeli occupying forces. We have selected specific petitions which reflect the diverse range of petitions decided by the Court during this period in order to judge the credibility of this Court when the issue involves attaining the rights of Palestinians. This will also help us see if the High Court justices are ready to play a neutral and impartial role when ruling on disputes between the Israeli occupier and the Palestinian population of the OPT.

THE LEGAL STATUS OF THE OPT IN VIEW OF INTERNATIONAL LAW

International Humanitarian Law

Modern international law calls for the implementation of customary and conventional provisions of international humanitarian law in armed conflicts and military occupation. Thus, this legal regime should be implemented in the OPT, which have been occupied since 1967. Israel refuses to implement the provisions of international humanitarian law in general, and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention) in particular, relying on various pretexts. This makes it necessary for the international community and countries which are High Contracting Parties to the Fourth Geneva Convention to take actions which will force Israel to implement its obligations, in accordance with the Convention, and to implement international humanitarian law in the OPT.

The Fourth Geneva Convention is clear about the scope of implementing international humanitarian law. Article 2 of the Convention states the following:

> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

In addition, the provisions and rules of the Fourth Geneva Convention shall be implemented in regions under military occupation. The second paragraph of Article 2 stipulates that:

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Article 4, paragraph 1, reflects the personal jurisdiction of the Convention. It defines "protected persons" as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in

the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Convention confirms that it should not be implemented on those individuals who are not nationals of the parties of the armed conflict (foreign citizens who are in the occupied region) nor on citizens of the occupying country,[3] if either of these have been transferred to reside in the occupied region on a permanent or temporary basis.

Article 6 of the Fourth Geneva Convention stipulates that its provisions must be implemented at the actual occurrence of armed conflict, and at military occupation as mentioned in Article 2. Thus, the implementation of these provisions starts once the invading forces sweep into the territories of others, and once it is in contact with the civilian population of these territories. Implementation of the Convention stops with the end of aggressive actions, or termination of military occupation.[4] Some provisions continue to be implemented with regard to protected persons and other individuals until their complete release or return to their homelands, or until there is a decision about their residence.[5] Thus, the Convention prevails as long as the occupation continues.

The Fourth Geneva Convention legally binds all High Contracting Parties.[6] This means that countries that are party to it shall respect its rules and provisions in all cases of armed conflict and military occupation. The International Court of Justice confirmed this through its advisory opinion regarding the *Namibia* case in 1970. The Court concurred that the Convention applies during military occupation, and requested South Africa as an occupying state to implement multilateral international humanitarian agreements.[7]

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[3] See ICRC, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 21.

[4] Article 6, Fourth Geneva Convention.

[5] Article 4(6), Fourth Geneva Convention.

[6] Articles 26 and 34 of the Vienna Convention state that applicable treaties shall be binding to all participant parties, and that the parties shall implement them with good intentions.

[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* ICJ Reports (1971), 16 (Advisory Opinion of 21 June). The continued control by South Africa of Namibia after the termination of the mandate system in this region in 1966 was considered a military occupation. The verdict came from the International Court of Justice in 1971 to support this characterisation. It was followed in 1971 with the UN General Assembly request to South Africa to respect and implement the Third and Fourth Geneva Conventions. For more details, see Adam Roberts, "Prolonged Military Occupation: The Occupied Territories 1967 - 1988," in Emma Playfair (ed.), *International Law and The Administration of Occupied Territories* (Oxford: Oxford University Press, 1992) pp. 29 - 32.

Israeli Position Regarding the Implementation of the Fourth Geneva Convention in the OPT

Despite the international consensus calling for the implementation of the Fourth Geneva Convention in the OPT, the official Israeli position rejects this principle. Although Israel is a High Contracting Party to the Convention, it refuses to implement it in the OPT. To strengthen this position, Israeli ministries and jurists use several justifications which have no legal grounds as a pretext for this non-implementation. They claim that the Israeli occupation of the OPT has a unique legal character and describe it as "the legitimate right of Israel to self-defence" in the face of Arab threats. They strive by this to give legitimacy to their aggression in 1967 which resulted in the occupation of Arab territories.

Immediately after the Israeli forces tightened their military control of the OPT, military commanders started to issue military orders to regulate the circumstances resulting from the Israeli occupation of others' lands.[8] Military commanders issued military orders that created the legal basis for occupation. In accordance with Proclamation No. 2, Haim Hertzog announced as the military commander of the area (West Bank), that he assumed all powers and authorities. Thus he took all legislative, judicial, and executive authorities into his hands.[9]

Military orders issued by the military commander of the West Bank during the first days of the occupation expressed the Israeli official position, which considered the lands which came under Israeli control to be occupied territories to which international humanitarian law applied, including the Fourth Geneva Convention. To ensure this, the first three proclamations issued by the Israeli occupying forces included texts which indicated Israel's intention to implement the provisions of the Geneva Conventions on the lands it occupied. Article 35 of Proclamation No. 3, regarding the formation and structure of military courts, indicated that these courts, "shall implement

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[8] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York: State University of New York Press, 2002), p. 32.

[9] On 7 June 1967, Israeli occupying forces published three military announcements related to the West Bank. The first one announced that the occupying forces had entered the West Bank. The second was an announcement that Haim Herzog assumed all legislative, executive, and judicial authority. The third announcement included text to establish and form military courts. See Shehadeh, *Occupier's Law, op cit,* p. 5.

the provisions and rules of the Fourth Geneva Convention, related to the protection of civilians in time of war, particularly all judicial procedures." It stated that the provisions of the Convention should prevail in case there was a contradiction between it and the military order.

After a short while, Israeli political leaders revealed their determination to retain control of the OPT. Israeli authorities began to refuse to admit that the OPT had the status of military occupation. They called these lands "liberated" or "administered," and in compliance with this new position, they deleted Article 35 of Proclamation No. 3 in October 1967. This came as an announcement of its retraction of the idea that the provisions of the Fourth Geneva Convention had priority over Israeli military legislation in the OPT.

The new position of the occupation authorities regarding the OPT, and their rejection of the applicability of the Fourth Geneva Convention, received support from the jurist Yehuda Blum,[10] who tried to provide legal arguments bolstering the official Israeli position. He utilised several arguments which relieved the Israeli government of the duty to implement the Convention's provisions in the OPT. Blum argued that Jordan's 1950 annexation of the West Bank was not legitimate, and did not receive the recognition of the international community; therefore, Jordanian rule of the West Bank until 1967 was not legitimate. Blum then argued that since Jordan did not have the right to sovereignty over the West Bank, Israel replaced an illegitimate ruler and thus was not necessarily an occupying force. According to Blum, Israel was therefore not obliged to implement the Fourth Geneva Convention. Blum thus concluded that the Convention should be implemented only when the occupier replaces a legitimate ruler.

This argument is not supported by international law. The purpose of the Fourth Geneva Convention is to protect civilians during times of war and occupation, whether the ruler is legitimate (*de jure*) or actual (*de facto*). The implementation of its provisions to the OPT does not depend on the Israeli occupier recognising the legitimacy of previous Jordanian and Egyptian control over the area.

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[10] Yehuda Blum, "The Missing Revision: Reflection on the Status of Judea and Samaria," *Israel Law Review* 3 (1968), p. 279. Yehuda Blum was a lecturer in international law at Hebrew University, and later worked as the Israeli ambassador to the UN. In this article, Blum discussed the legal status of Israel in the West Bank and argued that the Fourth Geneva Convention was not applicable therein.

In addition, Article 2 of the Convention states that it shall be implemented in case of a declared war, or in case of any other armed conflict that arises between two or more High Contracting Parties, even if one of them does not recognise the state of war. Further, it applies to all partial or total occupations of the region by High Contracting Parties. International jurists and the International Committee of the Red Cross (ICRC, which serves as the guardian of the Geneva Conventions) reject this Israeli argument.[11] Article 2 of the Fourth Geneva Convention makes clear that the actual occurrence of an armed conflict is the basic criterion for the commencement of implementation of the Convention. If any party to the conflict refuses to declare the existence of a state of war, or if they deny that such a state exists, then this will not change the legal applicability of the Convention or cause its suspension.

Blum's second argument is that Israel was obliged to go to war in 1967 for "self-defence," and that this gave Israel as much right to the land as Jordan and Egypt had. However, this argument does not have anything to support it in the Convention, which was put in place to protect civilians during armed conflict, regardless of the legitimate or illegitimate nature of these conflicts. In addition, this argument is in contradiction with the principles of modern international law, which do not allow countries to take actions of pre-emptive self-defence, and do not allow them to acquire territories of others by force or threats to use such force.

Regarding the implementation of the Fourth Geneva Convention in the West Bank and Gaza Strip, the Israeli legal position is based on a misinterpretation of Article 2, in particular, the text of the second paragraph thereof:

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The Israelis claim that since the termination of the British Mandate in 1948, sovereignty over the West Bank and Gaza Strip was suspended, and did not belong to any of the High Contracting Parties to the Fourth Geneva Convention. They add that when Israel occupied the OPT in 1967, Jordan and Egypt did not have the right to sovereignty over them. Israeli authorities

[11] For further discussion on this matter, see Kretzmer, *op cit,* pp. 33 - 34.

state that this constitutes a sufficient reason for relieving Israel from the implementation of the Convention. This position has been countered by the objections of the ICRC and the majority of international jurists who argue that the Convention's application has nothing to do with the sovereignty of the disputing parties, and that it shall apply in all cases of military occupation, regardless of the legal status of the disputed region.

In contrast with its rejection of the Fourth Geneva Convention, Israel has stated that it honours and implements the Regulations annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations), as part of customary international law, which is considered part of Israeli law. However, this declaration does not include any explicit reference to civilians and the need to protect them.

Israel's official position regarding the inapplicability of the Fourth Geneva Convention to the OPT has been widely criticised by other High Contracting Parties to the Convention. These countries repeatedly affirmed the obligation to implement international law, including the provisions of the Fourth Geneva Convention, in the OPT. They also criticised measures and procedures taken by the occupying authorities towards these lands and population, including Israeli changes in the OPT. They consider the changes void and illegitimate, and have called for their cancellation. The High Contracting Parties reaffirmed on 5 December 2001 the necessity to apply the Fourth Geneva Convention to the OPT, including East Jerusalem. At the same time, the UN and the ICRC upheld the same position.[12]

Further, it should be kept in mind that the nature of conventional and customary international humanitarian law is that many of its provisions embody and defend values which are widely shared by the community of nations. As such, these provisions are considered to be *jus cogens* in nature, that is, peremptory norms of international law from which no derogation is possible.[13]

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[12] ICRC Statement to the High Contracting Parties to the Fourth Geneva Convention 1949, 5 December 2001.

[13] Jean S. Pictet, *Humanitarian Law and Protection of War Victims* (Geneva: ICRC, 1986) pp. 15 - 16.

International Human Rights Law

Contrary to those who call for limiting the implementation of international human rights law to times of peace, the majority of international jurists call for implementing it equitably in times of peace and war.[14] Despite the consensus of the majority of jurists and states on the necessity to implement international human rights law in the OPT to protect its Palestinian population, Israel insists on refusing this principle, and promotes a different argument to support its negative position.[15]

Texts of modern international law and most international decisions are compatible with the opinion of the majority. Most countries have called for the recognition of the universality and comprehensiveness of human rights. They have tried to implement them and honour and respect them in times of peace and war, and in cases of military occupation.[16] The UN World Conference for Human Rights (WCHR), convened on 25 June 1993, in which 171 states participated, was keen to establish this principle through affirming the universal nature of human rights. It reiterated that the practices and measures adopted by countries which are involved in armed conflicts shall conform to the provisions of international human rights law and to the criteria stipulated in international human rights standards.

The position of the WCHR was compatible with the spirit of the UN General Assembly's Resolution 2224 (XXIII) of 1968, which specified the basic criteria that must be adopted to protect civilians in times of armed conflicts. It acknowledged the need to implement the basic criteria of human rights as stipulated in modern international law, and as guaranteed by international human rights instruments, in armed conflicts.

The International Court of Justice (ICJ) issued an opinion in this regard when discussing the occupation of Namibia by South Africa. It held that the occupying force has the duty to fulfil the obligations it undertakes, in accordance with international human rights standards, and to implement them in occupied territories. It considered the term "humanitarian charac-

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[14] Roberts in Playfair, *International Law, op cit,* pp. 53 - 54.

[15] *Ibid,* pp. 54 - 55.

[16] See, *inter alia,* UN General Assembly (GA) Resolutions 2444 (XXIII) of 19 December 1968, 2546 (XXIV) of 11 December 1969, and 2727 of 15 December 1970. Roberts, *ibid,* pp. 56 - 57.

ter and nature of international agreements," very close to and related to human rights. The ICJ noted that the failure of the occupying state to implement human rights agreements in this case would lead to grave violations of the rights of the Namibian population.[17]

The European Commission for Human Rights supported the principle of implementing international human rights law in occupied territories, when it considered the case of *Cyprus v. Turkey.* It accepted Cyprus' claim regarding Turkey's violation of several provisions stipulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[18] Based on Article 1 of the ECHR, the Commission concluded that the protection of human rights extended to all individuals without exception, and that this mission should be shouldered by all states which are parties to this convention. The Commission stated that state parties should protect the rights and fundamental freedoms of all individuals who are subject to their actual authority, and of those who exist in territories which are subject to their sovereignty. It held that Turkey, which occupied Cyprus in 1974, should respect the provisions of the ECHR since it was an occupying power. Further, it considered Turkey's practices against the citizens of the northern part of Cyprus to be violations of its obligations under the ECHR.[19]

International human rights standards include provisions which call for their application to areas within the sovereignty and within the effective control of the state parties. The UN confirmed this principle when the Secretary General said that states should implement international human rights agreements in all territories under their control, including occupied territories.[20]

Clearly, there is an accepted international principle of law that armed conflicts and military occupations shall not suspend or negate the role of international human rights law, even as they call into effect international humanitarian law. Further, these cases shall not relieve the parties to the con-

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[17] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (summary of Advisory Opinion of 21 June), ICJ Yearbook 1970 - 1971, 25 (1971) pp. 105 - 106.

[18] *Cyprus v. Turkey,* European Commission of Human Rights, Vol. 13 (1979) p.85 (decision on admissibility) reprinted in *International Law Report,* Vol. 62, (1982) p. 75.

[19] *Ibid,* p. 85.

[20] UN GA Resolution 2675 (XXV), "Basic Principles for the Protection of Civilian Populations in Armed Conflicts," para. 72.

flict, or the occupying power, from shouldering their responsibilities to protect human rights and basic liberties, in accordance with the criteria stipulated in human rights treaties. This is a rule that is applicable to all armed conflicts and military occupations without exception. Thus, Israel is obliged as an occupying power to stop its violations of internationally-recognised human rights norms in the OPT.

Israel as an occupying power has the responsibility to respect the international civil, political, economic, social and cultural human rights of Palestinians in the OPT. However, Israel's refusal to implement international human rights agreements in the OPT, and its continued violation of the fundamental human rights and basic liberties of the population, constitute a violation of its obligations under the human rights treaties which it has signed and ratified. In addition, this constitutes a violation of the UN Charter, to which all UN member states must agree, regarding the implementation of their provisions on all nations and in all cases, to include cases of military occupation. Such a violation constitutes a breach of the obligations Israel owes the international community. Moreover, Israel has a special obligation to honour human rights, as Israel is the only country which was obliged to honour and implement international resolutions, to maintain peace, and respect human rights as a condition for acceptance as a member of the United Nations.[21]

Israel has provided many reasons to justify its disavowal and renunciation of the implementation of the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the OPT. The Legal Advisor to the Israeli Ministry of Foreign Affairs stated in 1984 that the UDHR and the two Covenants do not apply to the OPT due to the unique relationship between and occupying force and the occupied population, which lies beyond the scope of human rights.[22]

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[21] Regarding the acceptance of Israel as a Member in the UN and conditions for Israel to be admitted see UN Security Council (SC) Resolution 69 of 1949, which admitted Israel as a UN member, and the GA Resolution 273 of 11 May 1949, which confirmed Israel's admission to the UN.

[22] Office of the Legal Advisor, Memorandum, 12 September 1984, written for and contained in Adam Roberts *et al., Academic Freedom Under Israeli Military Occupation* (London: World University Service, 1984), pp. 80 - 81.

This interpretation contradicts the spirit and substance of the international human rights treaties to which Israel is a party, and contradicts the principles of modern international law. The principles governing treaty obligations are enshrined in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention), which granted the parties and international organisations the right to list their reservations on certain aspects of an agreement, provided that they are not incompatible with the object and purpose of the treaty.[23] The ICJ expressed its opinion in this regard two decades before the date of the agreement, in the advisory opinion issued on 28 May 1951, regarding the legitimacy of reservations made by parties that signed the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It supported the right of countries to express reservations on international treaties, given that they are without prejudice to the objectives and principles of the treaty.[24] Rather than making specific reservations to certain articles, Israel refuses to implement any part of the international human rights treaties it has signed in the OPT. Israel appears to be flouting international law with regard to its obligation to implement its human rights treaties in this area.

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[23] Article 19 - 23, Vienna Convention.

[24] See Charles Ruso, *General International Law,* Arabic Translation (Beirut: 1982) pp. 58 - 62. Normally, state parties put their reservations on some aspects of the treaty as an explicit or implicit condition for endorsement. Reservations have restrictive impact. The state which has a reservation announces that it will not implement part or parts of the treaties in its relationship with the other state(s) which are parties to the convention.

SOME DECISIONS OF THE ISRAELI HIGH COURT OF JUSTICE REGARDING THE OPT DURING THE CURRENT *INTIFADA*

Military courts were established in the West Bank in June 1967, in accordance with Proclamation No. 3 (Order on Security Instructions). However, this order was amended and replaced by Military Order No. 378 (Order on Security Instructions - West Bank) of 1970.[25] The establishment of military courts was accompanied by removing much of the jurisdiction of civil courts operating in accordance with Jordanian law in the West Bank, and in accordance with Egyptian law in the Gaza Strip. While the number of cases subject to the jurisdiction of military courts increased continuously, the number of cases subject to local courts decreased.

Changes made by Israel to the judicial system that had been operating in the OPT and the curtailment of the role of this branch in several fields provided the opportunity for the OPT's population to resort to the Israeli High Court of Justice, and appeal the practices of military commanders against them. The High Court convened to consider cases raised by Palestinians appealing the legitimacy of procedures and practices implemented by those commanders in the OPT.

Military Courts

Customary and conventional rules of international law call for respect and maintenance of penal codes and legislation of occupied territories, except in some cases where they cannot be applied. International law allows the occupying power to make some changes to penal codes applicable in occupied territories, and allows it to establish its own military courts. This is seen, *inter alia,* in Article 43 of the Hague Regulations, which states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the meas-

[25] Military courts were established in Gaza in accordance with the Proclamation No. 3 for the Gaza Strip and Sinai Peninsula of 1967 (Implementation of Military Order on Security Regulations in the Gaza Strip and Sinai) and its annexed military order for Gaza.

> ures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Similarly, the Fourth Geneva Convention allows in its turn and in some cases, the occupying power to cancel and suspend applicable penal legislation in the occupied region. Article 64 of the Convention states the following:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

In addition, the Fourth Geneva Convention allows the occupying power to establish military courts, including courts of appeal, provided that such courts are held in the occupied country. This was stipulated in Article 66:

> In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Military courts established by the Israeli occupation authorities were assigned the task of considering security violations committed by Palestinians. As discussed in the previous chapter, the general trend in Israel during the early period of the occupation was to comply with and implement humanitarian law, notably the Fourth Geneva Convention, in the OPT. Article 35 of the

Proclamation No. 3 of 1967 obliged military courts and all their commissions to implement the provisions of the Fourth Geneva Convention with regard to judicial procedures. In cases of conflict between the Proclamation and the Convention, priority was to be given to the provisions of the Convention. However, Israeli authorities ignored the principles on which international humanitarian law is based and quickly amended Proclamation No. 3 and then replaced it with Military Order No. 378, from which it deleted the Proclamation's Article 35, which deals with the military courts' implementation of the Fourth Convention.

After 22 years of occupation, a Court of Appeal was established in the West Bank, in accordance with Military Order No. 1265 - Order Concerning Security (Amendment No. 58 to Military Order No. 378 of 1970). The location of the Court was in the city of Ramallah. Palestinian lawyers in the West Bank often refused to go to this Court because they believed that its basic role was limited to enabling the Israeli military prosecutor to appeal the "mitigated" sentences issued by the military courts of first instance. Frequently, the court accepted the appeal of the military prosecutor, and issued longer sentences.[26]

The Israeli High Court and the OPT

In the forward to *The Rule of Law in the Areas Administered by Israel,* Haim Cohen, a former justice of the Israeli High Court, explained the basis of the jurisdiction of the Israeli High Court of Justice as follows:

> The Court assumed jurisdiction, which in effect is extra-territorial, over the persons of the military commanders and their subordinates, the underlying reason being that all organs of the Israeli government are subject to the jurisdiction of the High Court of Justice in respect of all their acts and missions, wherever they may have taken place. It is by virtue of this personal - as distinguished from territorial - jurisdiction that the Court will order any military commander, or any subordinate official in the administered area, to do an act which by law he is obliged to do, or to abstain from doing any act which by law he ought not to do.[27]

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[26] Al-Haq, *Citizen Search, Arrest, and Military Courts* (Ramallah: Al-Haq, 1993) pp. 39 - 40, and B'Tselem, *The Military Judicial System in the West Bank* (Jerusalem: B'Tselem, 1989) pp. 8 - 9.

[27] Israel National Section of the International Commission of Jurists, *The Rule of Law in the Area Administered by Israel* (Geneva: Israel National Section of the International Commission of Jurists, 1981) pp. 5 - 9. See also Shehadeh, *Occupier's Law, op cit,* pp. 8 - 9.

Israeli extension of the High Court's jurisdiction to the OPT and authorising it to rule on and review Palestinian cases is illegitimate, and contradicts international law, which allows an Occupying Power only to change penal codes for emergency security reasons.[28] International law does not permit an Occupying Power to extend the judicial jurisdiction of its civil courts to the occupied region, but only allows it to establish its own special military courts to prosecute the accused, provided that such courts are formed in a legal manner, and convene inside the occupied territories.[29]

Since the beginning of the occupation and until the present, the High Court has considered hundreds of petitions related to the practices of the Israeli authorities in the OPT, such as making changes to local laws, seizure of lands that belong to Palestinians, erection of settlements, deportation policies against Palestinians, the house demolition policy, annexation of Jerusalem, and administrative detention.[30]

The High Court at first refused to consider Palestinian claims from the perspective of international humanitarian law, either as conventional or customary law. It refused to implement the Fourth Geneva Convention or the Hague Regulations in the OPT on the pretext that their implementation is limited only to High Contracting Parties against each other. Several years after the occupation of the Palestinian territories, the Israeli High Court of Justice decided to adopt a position which required implementation of the Hague Regulations, though not the Fourth Geneva Convention, in the occupied territories.[31]

The *de facto* implementation of the Hague Regulations in the OPT began in 1972, when the Israeli Attorney General expressed his non-objection that the High Court exercise its role in monitoring the extent of compatibility between orders issued by military commanders and the provisions of the Hague Regulations. After this approval by the Attorney General, the Court

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[28] Article 43 of the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land (Hague Regulations).

[29] Articles 64 and 66, Fourth Geneva Convention.

[30] For more information, see Kretzmer, *op cit.*

[31] Mazen Qupty, "The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel, in the Israeli Occupied Territories 1967 - 1988," in Playfair, *International Law, op cit,* pp. 88 - 91.

approved a principle, still currently being implemented, which calls for the implementation of the Hague Regulations in the OPT, because it is part of customary international law which can be routinely incorporated into Israeli law, without having to ratify a special law for such incorporation.[32]

In regards to the Fourth Geneva Convention, the role of the High Court was limited to supporting the official position of the occupation authorities in refusing to implement the Fourth Geneva Convention's provisions in the OPT. Justices of the Israeli High Court have strived to find a "legal" basis for this position. They insist that international agreements concluded by Israel can be implemented only when they become Israeli law through adoption by the Knesset (Israeli parliament). The High Court's position is that although Israel signed the Fourth Geneva Convention, the Israeli government is not obliged to implement it, as long as the Knesset has not issued legislation that incorporates it into Israeli law, so that it becomes part of the local applicable laws in Israel.[33]

It appears that the High Court justices have ignored the customary nature of the Fourth Geneva Convention and given it a pure conventional dimension to find a way out for the policies of the Israeli authorities.

The High Court has adopted an opinion that contradicts the position of the High Contracting Parties to the Fourth Geneva Convention, and the majority of international law jurists. The Court's position relieves the State of Israel from its duty to implement the Convention, on the pretext that the Convention is not part of customary international law. Justices of the High Court always point in their decisions to the intention and the position of official agencies in Israel, which is to implement those texts of the Convention that have a humanitarian focus. Thus, the High Court justices have tried to separate the Fourth Geneva Convention into humanitarian and non-humanitarian provisions. This ignores the pure humanitarian intention of the Fourth Geneva Convention, which is one of the basic foundations of all international humanitarian law. In illogically parsing the Convention, the justices reveal their intent to provide a "legal" basis for Israel's refusal to actually implement the provisions of international humanitarian law in the OPT.

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[32] *Ibid.*

[33] *Ibid,* pp. 101-108. See also Kretzmer, *op cit,* pp. 46 - 47.

It is worth mentioning that the Israeli government and judiciary face wide criticism from the international community, international organisations, and High Contracting Parties to the Fourth Geneva Convention, regarding its failure to implement international humanitarian law. Most of these entities confirm the principle of implementing the Fourth Geneva Convention in the OPT, including East Jerusalem. Israel has been requested, in its capacity as a High Contracting Party, to meet its obligations as stipulated in the Convention.[34]

The High Court looks into disputes that arise among Palestinian civilians in the OPT from one side, and the Israeli occupying forces, including military commanders, from the other side. The Court has taken the responsibility of considering these cases since the beginning of occupation. Results have been disappointing in most cases.[35] The Court refrains from performing

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[34] For a detailed analysis of this matter, see Public Committee Against Torture in Israel (PCATI) and LAW: The Palestinian Society for the Protection of Human Rights and the Environment, *The Assassination Policy of the State of Israel: November 2000* - January 2002 (June 2002), pp. 83 - 84.

[35] With regard to the Court's repeated claim that Israel is "Jewish and democratic," implying that it is therefore likely to be trustworthy and fair in its occupation tactics, it is important to note that the Jewish character of Israel has so far been maintained by practicing an undemocratic racial discrimination policy against the Palestinian society in Israel. For example, the decision issued by the Israeli High Court of Justice on 8 March 2000 in *Qa'dan v. Israeli Land Administration,* was depicted by many as a "revolutionary" and "progressive" case. However, it included provisions which were based on previous decisions of a discriminatory nature, such as the *Watad* and *Burqan* cases. They were depicted as enlightened decisions, reinforcing positive discrimination and substantial equality. In *Qa'dan,* the High Court ruled that it is illegal for the state, through the third-party Jewish Agency, to prohibit an Arab family from purchasing land in the Katzir Jewish settlement, and residing on it. Justice Barak, the Chief Justice of the High Court, attempted to remove the contradiction between the democratic and Jewish nature of Israel, by erasing and defacing the rooted history of Palestinians in the country. He also failed to note the extent of positive discrimination available only to the Jewish citizens of Israel, such as better housing, subsidies, infrastructure, and jobs. He wrote in *Qa'dan:*

> Israel is a state where minorities live. These minorities include the Arab minority. Each of these minorities enjoys equal rights. It is true that there is a special key to enter the house, which was given to the Jewish people (see the Law of Return (1950)), but once the person becomes legally inside the house, then he will enjoy full rights like the rest of the inhabitants of the house. The Declaration of Independence expresses this when it "calls the Arab people living in the state of Israel to maintain peace, participate in the building of the state on the basis of full and equal citizenship." Therefore, there is no contradiction between the values of Israel as a Jewish and democratic state, and complete equality to all of its citizens.

See Marwan Dalal, "The Guest, the House, and the Judge: A Reading in the Unread in the Qa'dan Decision," *Adalah's Review,* Volume II - Land, Winter 2000, pp. 42 - 45.

a neutral role, which would have the occupying forces and the successive military commands respect international humanitarian and human rights law, and implement them in the OPT. Such a neutral role would enhance and strengthen the collective and individual rights of civilian Palestinians.

Currently, Israel continues its human rights violations in the OPT, as well as grave breaches of international humanitarian law. An increasing number of cases are being brought before the Israeli High Court of Justice by Palestinians. As a result of Israel's excessive violation of Palestinian rights during the current *intifada,* we have witnessed a sharp increase in the number of Palestinians resorting to this Court as individuals, groups, and institutions. They have appealed the legitimacy of the occupying forces' practices, which have touched and affected all sectors and organisations of the Palestinian society. Violations have reached unprecedented levels; many of these violations are war crimes and some are even considered to be crimes against humanity.

This study comes at a very critical point of the Israeli High Court of Justice's refusal to enforce, respect, or implement international human rights and humanitarian law in the OPT. The issue of implementing such laws, as well as securing protection for Palestinians, is more pressing now than at any other time. The international community and United Nations should shoulder their responsibilities to effectively interfere to stop illegal Israeli practices against Palestinians.

This study will be limited to discussing a number of cases that have been considered by the Israeli High Court of Justice during the current *intifada,* such as arbitrary "forcible" transfer of Palestinians from the West Bank to Gaza, use of flechette shells, and firing at Palestinian ambulances, as well as the detention circumstances of Palestinians at Ofer camp, the siege of the Nativity Church in Bethlehem, use of Palestinians as human shields and hostages, and the continuation of the house demolition policy against Palestinians.

Case 1: Arbitrary "Forcible" Transfer of Palestinians from the West Bank to the Gaza Strip

From its establishment through to the present time, Israel has employed an uprooting and deportation policy of the indigenous Arab Palestinian population from the land which Israel now occupies and controls.

Israel applied this deportation policy in 1947-1949, using a plan prepared in advance. It uprooted approximately 750,000 Palestinians from the lands on which the Jewish state was established in 1948.[36] In addition, Israel expelled hundreds of thousands of Palestinians, Syrians, and Egyptians from the territories it occupied in 1967.

Since 1967, during its prolonged military occupation of the OPT, Israel has uprooted and deported Palestinian civilians from their homeland in order to diminish their numbers. This is a collective punishment of the entire population.

To implement this deportation/expulsion policy, the occupying forces have resorted to punishing Palestinian leaders, activists, and their families by forcing them out to neighbouring countries. It has also refused to allow thousands of Palestinians who left the OPT for the purpose of work, education, or visiting their relatives to return to their homeland. Moreover, Israeli authorities have confiscated the identification cards of Palestinians living on the outskirts of Jerusalem and forbidden them to return to reside in the city, in order to minimise the presence of Palestinians and increase the number of settlers in Jerusalem.

To justify the continuation of this collective punishment policy against Palestinian activists and their families, the occupying forces deny that such measures constitute collective punishment, and state instead that such measures are necessary for security. The Israeli High Court of Justice supports these policies, and accepts the justifications presented by occupying officials, on the basis that the justifications are compatible with laws applicable in Israel. Further, the High Court denies that this contradicts international law, in particular the provisions of customary international law.

Israeli actions taken during the current *intifada* (begun in 2000) represent the increasing magnitude of Israeli violations of international humanitarian and human rights law. The occupying forces have resorted to a new form of collective punishment: arbitrary "forcible" transfer of families and relatives of Palestinians who performed military attacks or bombings inside Israel or in the OPT. This is what happened to members of the Ajouri family who were deported from the West Bank to the Gaza Strip. The High Court approved the decision to deport them in its decision of 3 September 2002.

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[36] Najeh Jarar, *Palestinian Refugees - Introduction for Review and to Read the Future,* Palestinian Academic Association for Foreign Affairs (Jerusalem: PASSIA, 1994), p. 45.

Imposing Assigned Residence in Accordance with the Military Order No. 378

Military Order No. 378 gives the military commander of the West Bank the authority to issue restrictive orders, watching orders, and administrative detention orders against any person in order to guarantee that the person shall not stay in any place in the West Bank area beyond the period allowed in the order. Based on this order, the concerned person has to notify the authorities as to his or her whereabouts. He might be subject to restrictions which minimise his relations with others and his ability to conduct business.

Article 86 of this Order talks about subjecting persons to special monitoring. The authority to do so has been assigned to the military commander, who can issue an order to put a person under special monitoring, or assign him or her residence in a certain area within the West Bank, as determined by the military commander. The individual may not leave the city, village, or the district where he resides without written permission from the military commander. He shall always notify the military commander or his designate about the house or the place he resides in, and report whenever the military commander asks him, at the right time and place specified. Further, he shall stay in his house during the hours specified in the order by the military commander.

To implement the requirements of the order, the military commander of the area uses the authority vested in him, and issues orders to put certain persons under special monitoring and to impose assigned residence on them. Thus, the Order allows the commander to minimise and restrict travel and movement to specific places and times within the West Bank.[37]

Amendment of Military Order No. 378 (Amendment No. 84)

During 2002, confrontations increased between Palestinians and Israeli occupying forces due to the continued use of excessive force against Palestinians. Several military attacks, such as "Operation Defensive Shield," were conducted on all towns and villages under the Palestinian National Authority. Due to the failure of these operations to achieve "security" for Israelis,

[37] Article 85 of Military Order No. 378 of 1970. Regarding the Gaza Strip, the Military Order on Security Instructions (Annex regarding the commencement of validity of the Order on Security Instructions - Gaza Strip and North Sinai (3) of 1967) gave the military commander the authority to issue restrictive commands, monitor and administratively detain Palestinians in the Gaza Strip.

the Ministerial Committee for National Security decided to adopt a series of steps to minimise the activities of Palestinian resistance, and to deter Palestinian activists.

To implement the consultative opinion issued by the Israeli Attorney General, the Ministerial Committee for National Security decided to use arbitrary "forcible" transfer for families of Palestinians who executed explosions, or participated in their planning and preparation. The families were to be moved from their places of residence in the West Bank to the Gaza Strip, provided that the members of the family were personally involved in "aggressive activities."

The Ministerial Committee adopted this decision based on the recommendations of specialised entities, such as the army, the General Security Services (Shabak), Mossad, and the police. The groups all estimated that deportation to Gaza and the threat of deportation would discourage aggressive actions by Palestinians, minimise the number of such actions, and consequently achieve peace for Israelis. These and other concerned agencies believed that the deportation policy would deter those considering conducting aggressive actions and would cause doubts in those already involved in such activities, because of the hardships of deportation that might later affect their families. Thus, these Israeli agencies hoped, the number of such aggressive operations actually executed would diminish over time.

In response to the policy of the Ministerial Committee for National Security, the military commander of the West Bank amended Article 86 of the Military Order No. 378 and Amendment No. 84 (later a military order) on 1 August 2002. These new provisions expanded the powers and authorities assigned to the military commander to include putting a person under special monitoring, including transfer to the Gaza Strip. The military commander justified the ratification of the new amendment due to the prevailing critical security situation in the OPT, and the requirement to maintain security and deal with "terrorist" actions and their perpetrators. The military commander pointed out that he had issued the order only after obtaining the approval of the military commander in the Gaza Strip, who simultaneously issued an order which stated that anyone who has been issued an order by the military commander of the West Bank, as per Article 86(b)(1) of Military Order No. 378, shall reside in a specific place in the West Bank or Gaza Strip. Such individuals shall not be allowed to leave as long as the order is valid, unless permitted by the military commander of the West Bank or of the Gaza Strip.

Preparation For Arbitrary "Forcible" Transfer

To implement this new type of collective punishment, on the night of 18 July 2002, the occupying forces arrested about 20 Palestinians, among whom were Intissar and Kifah 'Ajuri, the siblings of 'Ali 'Ajuri, who had been assassinated by the occupying forces for allegedly conducting "aggressive acts" against Israel.

'Ali was charged with providing Palestinians with explosive belts and sending them to conduct bombing operations. Further, Israeli authorities claimed that he was responsible for the 2002 explosion which took place in the Central Bus Station in Tel-Aviv that resulted in the killing of five Israelis and injuring several more.

The morning after Intissar and Kifah's arrest, Israeli newspapers reported the government's intention to deport all those who had been arrested to the Gaza Strip. The Israeli Attorney General then clarified the issue, stating that no one shall be deported because of their relation to a person who committed an aggressive act against Israel.

Simultaneously, the military commander of the West Bank announced Amendment No. 84 of Military Order No. 378.[38] The new amendment gave him complete and full authority to deport Palestinian civilians who live in the West Bank and to transfer them to the Gaza Strip.

On the same day, the military commander signed military orders called "Restricting the Place of Residence," which ordered the deportation of Intissar 'Ajuri, Kifah 'Ajuri, and 'Abd-al-Naser 'Assida to the Gaza Strip for two years. They then submitted petitions to the Israeli High Court of Justice to appeal the legitimacy of the deportation decision, following the endorsement of the deportation orders by the Appeal Committee formed by the military commander.

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[38] Until this amendment, the military commander had the absolute authority to impose a particular individual from the West Bank or the Gaza Strip to a specific residence in the area that the person resided. However, Amendment No. 84 expanded the authority of the military commander, so that he could deport any person from the West Bank to the Gaza Strip and assign his residence there. In addition, Amendment No. 84 allows the detention and imprisonment of the person who will be deported for an unspecified period of time until deported. Dozens of amendments were made to Military Order No. 378 since it was issued on 20 April 1970.

Purpose of Petitions

In accordance with the submitted petitions,[39] the applicants Kifah and Intissar 'Ajuri' and 'Abd-al-Naser 'Asida asked the military commanders of the West Bank and the Gaza Strip to explain the following matters:

- Why the military commander of the West Bank did not cancel Amendment No. 84 of Military Order No. 378. This amendment gave him the authority to issue and execute orders transferring a resident from the West Bank to the Gaza Strip.
- Why the military commander of the West Bank refused to reverse his decision regarding signing military orders called "Restricting the Place of Residence," and why he refused to refrain from transferring the petitioners to the Gaza Strip by force, and why he didn't release them.
- Why the military commander of the Gaza Strip did not refuse to participate in the transfer operation, and why he agreed to receive the petitioners in the areas which were under his actual control, when the West Bank military commander deported them there.

Based on the petition submitted to it, the Israeli High Court of Justice limited the scope to the issue of assigned residence. The High Court interpreted the two questions before it as:

- Does the military commander have the authority to issue an order that imposes assigned residence?
- Did the military commander work prudently and wisely, and in accordance with law, when he issued orders that put the petitioners under assigned residence?

The High Court prepared the ground for its decision by discussing the gravity of the security situation inside Israel and the OPT. It considered the situation an armed conflict and not one for police activities, although it did not specify the nature or causes of this conflict. The Court indicated that the Ministerial Committee for National Security approved a decision which called for the transfer of family members of Palestinian resisters from the

[39] See HCJ 7015/02, *Kifah Muhammad Ahmad 'Ajuri, et al. v Military Commander of the West Bank* and HCJ 7019/02, *Intissar Muhammad Ahmed 'Ajuri, et al. v Military Commander of the West Bank,* petitions submitted by Intissar and Kifah 'Ajuri, and 'Abd-al-Naser 'Asida to the Israeli High Court of Justice.

West Bank to the Gaza Strip, if it is proved that the transferees were personally involved in these resistance activities.[40] The decision came after the Court noted that the military operations which it had approved and which was executed by the army in mid-2002, such as "Operation Defensive Shield" and other operations, had not accomplished the desired results.

Background of the Petition

Claims of Petitioners

The petitioners appealed the legitimacy of the military orders calling for their transfer from the West Bank to the Gaza Strip due to the prohibition imposed by customary international law on deporting protected persons or transferring them in an arbitrary manner. They predicted that the arbitrary "forcible" transfer of family members of Palestinians who conducted bombing activities would lead to questioning Israeli officers and soldiers who conducted the transfer, or who gave instructions in this regard, before international criminal courts, because such transfers represented a war crime and a crime against humanity.

The petitioners mentioned the new authorities and powers vested in the military commander by the new amendment. The powers and practices of the military commander until the ratification of this amendment had been limited to restricting the residence of the concerned person to a specific area within the West Bank or within the Gaza Strip. The new amendment expanded the powers of the military commander, allowing him to deport people from the West Bank to the Gaza Strip.

The petitioners noted that the main objective of deportation is to deter Palestinians from undertaking resistance operations against Israel, fearing what might happen to their families as a result. The petitioners described this kind of deportation as arbitrary and said that it was another in the many forms of collective punishment used by Israel against Palestinians, such as house demolition, actions of revenge, threat, intimidation and sabotage of properties. They argued that the practice of deportation contradicts Article 33 of the Fourth Geneva Convention, which prohibits the punishment of

[40] The Ministerial Committee for National Security approved the forcible transfer decision based on the consultative opinion issued by the legal advisor to the Israeli government, giving legitimacy to the policy of deporting the families of Palestinian activists.

protected persons for violations they did not personally commit, and which prohibits collective punishment, including measures of intimidation.

To prove that such transfer is arbitrary, the petitioners based their argument on the opinion that the Gaza Strip and the West Bank are two separate geographical regions. The first one was subject to Egypt, while the second one was subject to Jordan prior to their occupation in 1967. Currently, each region has its own military ruler who exercises "legislation tasks" by issuing military orders independently from the other. They concluded that orders moving them from one entity to the other go beyond imposing assigned residence (restricting their place of residence), and amount to arbitrary "forcible" transfer, in violation of Article 49 of the Fourth Geneva Convention, which states:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

They also stated that this action violates Article 7 of the Rome Statute of the International Criminal Court (Rome Statute), which prohibits deportation or arbitrary transfer of populations and considers these actions to be war crimes. The petitioners asked the court to implement the Fourth Geneva Convention in the OPT, because it is part of customary international law.

In addition, the petitioners questioned the legal basis of the actions of the military commander and his issuance of military orders which led to their arbitrary transfer, in order to deter Palestinians from conducting probable bombing actions in the future. The petitioners claimed that their transfer was illegal, because it contradicted the provisions of Article 95 of the Israeli Penal Code (1977), which relieves the relatives of the person who commits, plans, or initiates a crime from culpability if they help or conceal him, provided that they are first degree relatives, such as parents, brother, husband, or wife. It is also in contradiction with the provisions of Article 17 of Military Order No. 225 of 1968, regarding the responsibility of crimes, and which states,

> Each person who provides shelter to another person, while knowing that the latter committed a crime, or helped him to escape punishment, shall be considered as a partner in the crime, except the father, mother, son, daughter, or wife of the criminal.

Respondents' Reply

The respondents replied that the issuance of military orders against the petitioners was within the powers and authorities of the military commander, who was assigned the role of "legislator" in the West Bank and Gaza Strip. He imposed assigned residence on persons who constituted threats to security to deter individuals and groups who might otherwise perform bombings. They based this defence on Articles 41 and 42 of the Fourth Geneva Convention, which allow the occupying country to impose assigned residence, or to arrest protected persons, if its security necessitates resort to such actions.

To justify their decision to deport petitioners from the West Bank to the Gaza Strip, the respondents claimed that these persons were involved in "terrorist" acts by providing assistance to their family members who conducted bombings. In particular, the respondents claimed that the family members provided food, drinks, and laundry, in addition to knowing about their activities, and transporting them with their own private vehicles inside Nablus. Respondents referred to the provisions of Article 43 of the Hague Regulations which put the burden of accomplishing public security, and guaranteeing it, on the shoulders of the occupying power, provided that it respects applicable rules in the occupied territory, with the exception of emergency cases which prohibit this.

The respondents' reply indicated they had possession of evidence which confirmed that the petitioners were involved in "terrorist" acts that had been performed by their relatives. This, respondents argued, necessitated ordering their transfer from the West Bank to the Gaza Strip. The transfer was necessary in the respondents view to deter probable "terrorists" from implementing their plans due to fear of the suffering that their families would undergo if they did so. The respondents also referred to the position of the Israeli Attorney General in this regard, who allowed this procedure against all those where evidence proved their involvement in helping or encouraging terrorists.

The respondents elaborated on how critically vital deterrence measures were during war, as long as law allows them. For example, the Israeli army demolishes houses where "terrorists" who executed serious operations, had lived. They claimed that demolition in this case should constitute an effective deterrence. They added that several previous High Court

decisions[41] had considered some deterrent procedures, such as house demolition, legitimate and found them compatible with international law, local law, and with the Israeli Basic Law: Human Dignity and Liberty (Israeli Basic Law). According to the respondents' claims, assigned residence orders would play an effective role in reducing aggressive works against Israel by deterring the would-be perpetrators.

The respondents touched on the claims of the petitioners that Article 49 of the Fourth Geneva Convention prohibited deportation, transfer, and evacuation. They considered the transfer procedures legitimate and in line with this article, which they interpreted as allowing the deportation of a certain person for security reasons if done in accordance with laws applicable in the state which made the deportation decision, and provided that the person to be deported has the right to appeal the decision. Regarding this specific case, respondents claimed that this procedure did not contradict the provisions of international human rights or humanitarian law. In particular, they argued, Article 78 of the Fourth Geneva Convention permits the Occupying Power to make security arrangements regarding protected persons, such as imposing assigned residence or arrest, if there are security reasons which require such arrangements.

Decision of the High Court

The Court decided to judge this case in accordance with Article 78 of the Fourth Geneva Convention. The provisions of this Article permit High Contracting Parties to make security arrangements such as arrest and assigned residence of protected persons. Further, the Court emphasised the authorities and powers assigned to the military commander in this regard, in order to undermine any attempt to categorise his actions as deportation or compulsory transfer, which are prohibited by Article 49 of the Convention.

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[41] HCJ 126/83, *Bilal Saleh Abu-'Allan v. Minister of Defence* and HCJ 698/85, *Mazen 'Abdallah Sa'id v. Israeli Army*. The Court expressed its position that each person who performs "terrorist" actions shall know that this will cause damage to him and his family who will suffer much as a result of his action. HCJ 6026/94, *'Abd-al-Rahim Hassan Naza v. Commander of the Israeli Army;* HCJ 2161/96, *Ribhi Said Sharif v. Commander of the Internal Front;* and HCJ 2006/97, *Maysoun Abu-Farah, et al. v. Commander of the Central Front,* included the views of the High Court that the demolition of Palestinian houses by Israeli forces is not a collective punishment. Rather, it aims at deterring Palestinians from performing probable "terrorist" operations against Israel.

As previously mentioned, the Court refused from the outset to consider the action of the military commander as an arbitrary transfer, considering it instead a type of assigned residence. The Court limited its inquiry to investigating whether the military commander was wise in deciding to impose assigned residence on the petitioners. Accordingly, the Court restricted the purpose of the petition to two issues:

- Does the military commander have the authority to issue a military order imposing assigned residence on petitioners?
- Did the military commander work in a prudent and balanced manner, and in accordance with law, when issuing specific orders imposing assigned residence on petitioners?

Authority of Military Commander in Imposing Assigned Residence (Restricting the Place of Residence)

Israeli High Court justices refused the claims of the petitioners that the order of the military commander which led to their arbitrary transfer from the West Bank to the Gaza Strip violated the law and exceeded the authority assigned to him. They added that this does not contradict international humanitarian law, specifically Article 49 of the Fourth Geneva Convention. In support of this decision, the Court cited HCJ 393/82, *Teacher Housing Cooperative Association Ltd. v. Military Commander of the West Bank,* which states that the military commander's authority was based in international humanitarian law, in particular the laws of occupation.

Thus, the judges confirmed the requirement of applying to the OPT those provisions of customary international law related to military occupation, because customary law is part of Israeli law. The judges indicated that the source of the authority granted to the military commander lies in the Hague Regulations,[42] which are considered part of customary international law.

The decision mentioned that the provisions of the Hague Regulations oblige the Occupying Power to accomplish public security and order, and guarantee that it respects the applicable law in the country, except in emergency situations which prevent this. It obliges the Occupying Power to respect the honour and rights of the family, and to preserve life and private property, which shall not be confiscated, and to avoid collective punishment.

[42] Article 42, Hague Regulations.

In harmony with this opinion, the Court decided that the issuance of military orders against the petitioners regarding the transfer of their place of residence from the West Bank to the Gaza Strip did not contradict the authority assigned to the military commander, as stipulated in Article 43 of the Hague Regulations, which states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The judges noted that after examining several provisions of the Hague Regulations, in particular Article 43, and verifying the texts of Articles 49 and 78 of the Fourth Geneva Convention, it was clear that the case they were considering needed to be viewed in accordance with Article 78 of the Fourth Geneva Convention, which states:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
>
> Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

The justices refused to accept the claims of petitioners that the military commander's actions violated the provisions of Article 49 of the Fourth Geneva Convention, which prohibits the deportation of protected persons, believing that this action was compatible with the provisions of Article 78 of the Convention.

Although the decision referenced arbitrary transfer and its impact on protected persons, noting that it violates the human right to live in a free and dignified manner, which are rights that have been guaranteed by national and international laws, the High Court indicated that these rights are relative rights and not absolute ones. Accordingly, they can sometimes be restricted in order to protect the rights of others, or in the public interest. The justices expressed their confidence that the military commanders were aware of the requirements of Article 78 of the Convention when they issued orders related to imposing assigned residence on the petitioner. Article 78 does not regulate arbitrary transfer, but regulates assigned residence on protected persons and their internment. When the military commander acts in accordance with the provisions of Article 78 and imposes assigned residence on a protected person, then his action is legitimate, and does not constitute a violation of the provisions of international humanitarian law.

Thus, the High Court found that in this instance, the military commander acted in accordance with Article 78 of the Fourth Geneva Convention, both in imposing assigned residence on petitioners, as well as in guaranteeing their rights to appeal before a special committee. Further, the commander also upheld Israeli obligations by providing some financial support to those who were transferred, as required under Article 39, which states that a party to a conflict must ensure the support of those Protected Persons who are unable to support themselves due to methods of control imposed by said party.

Regarding the petitioners' claim that imposing assigned residence outside the West Bank violates Article 78 on the grounds that the West Bank and the Gaza Strip are two distinct regions and that each has a separate military commander, the High Court refused this claim on the basis that the West Bank and Gaza Strip are part of the "Land of Israel" (i.e., Mandate Palestine) and that they have been controlled by Israel as an integrated geographical unit. Further, Article 11 of the 1993 Interim Agreement between Israel and the Palestinians confirmed that the Gaza Strip and the West Bank represent an integrated geographical unit, which shall be maintained as such during the interim phase.

Considerations of the Military Commander

The High Court of Justice agreed that the considerations which made the military commander decide to transfer the petitioners were valid. It agreed that it was a legitimate decision because it was compatible with Article 78

of the Fourth Geneva Convention, authorising the military commander to impose assigned residence on a protected person when he represents a threat to security. The justices interpreted Article 78 to permit the assigned residence of those who represent a threat to security. However, the article prohibits the assigned residence of a person who does not represent a threat to security, as a pretext to deter others.

The High Court decided that the military commander himself can impose assigned residence on the person who constitutes a threat and that this is compatible with the "Jewish" and "democratic" heritage of the State of Israel. The individual must pose a substantial threat - it is not sufficient that the threat from the person is secondary or of little importance. However, in practice, as long as there was suspicion and proof, even if the proof was not credible before a court, the military commander could impose assigned residence.

Further, the justices addressed the considerations which force the military commander to impose assigned residence on, or restrict the residence of, protected persons. They gave these considerations a wide but not an absolute space. The Court stated that the military commander should exercise his authorities without prejudice to Article 78 of the Convention. The military commander should not impose assigned residence on those who do not have any relation to actions constituting a threat to security. In sum, the Court's point of view was that there is no way to interfere with the considerations and the decision of the military commander regarding imposing assigned residence on a person who constitutes a threat to security, because this action is considered vital for the security of the region.

The High Court justices considered the decision of the military commander to deport Intissar 'Ajuri. They announced that the confidential information which was provided to them by the Shabak regarding Ms. 'Ajuri indicated that she helped her brother in a direct way through her knowledge of his prohibited activities, and that he was wanted by Israel at the time of the commander's decision. In addition, she knew that he was injured while preparing explosives, and that he was armed and kept a rifle in the family house. Further, she helped her brother directly by sewing a belt to hold explosives. The High Court concluded that the information provided to it regarding Intissar's activities forced the military commander to exercise his authority in accordance with Article 78. He imposed assigned residence on her because of the threat she represented to the security of the

state. The High Court justices believed that these activities were actual and tangible. This made the imposition of assigned residence a logical matter, in order to minimise Ms. 'Ajuri's threat.

Regarding the respondent's refusal to try Intissar in court, the justices accepted the Attorney General's reasoning that there was no evidence or proof that would be accepted by a criminal court. The evidence which proved criminal involvement and responsibility had a confidential nature and could not be presented before such a court. The High Court noted that Intissar was currently under administrative detention (necessitating neither charge nor trial), which was a stronger action than imposing assigned residence, and stated that the military commander had the freedom to continue putting her under administrative detention, or imposing assigned residence on her.

Kifah 'Ajuri, the brother of Intissar and 'Ali 'Ajuri, confessed to the police that he knew that his brother 'Ali was wanted by Israel for causing explosions. He also confessed that his brother was injured while preparing explosives; that 'Ali refrained from visiting the family house because he knew he was wanted by Israel; that 'Ali had in his property two rifles and a pistol; and that he was a member of a cell that set off explosions. Kifah saw his brother hiding a rifle under tiles in the family apartment. Kifah also kept the key to the apartment where members of the cell lived and prepared explosives. On one occasion, he saw two bags containing explosives inside the apartment. He confessed to the police that he once watched members of the cell transferring explosives from the apartment to their cars. He also witnessed his brother and another person videotaping an individual who intended to carry out an armed attack on Israeli targets. Based on this, the High Court believed that the military commander's decision to impose assigned residence on him was correct because the petitioner helped his brother and was seriously involved in the activities. The most dangerous action, according to the Court, was that he watched explosives being transported, which indicated a threat to the security of the area. But when High Court justices asked why the authorities did not try Kifah before a criminal court, the respondent's answer was that this option was not practical, and that imposing assigned residence was therefore a vital procedure to blunt his threat. Accordingly, the High Court believed that the military commander had the right to take into consideration deterrence and impose assigned residence on Kifah.

In contrast, the Court expressed its doubts about imposing assigned residence on 'Abd-al-Naser 'Asida, the brother of Naser-al-Din 'Asida, due to reduced awareness of his brother's actions. Naser-al-Din was wanted by Israel at the time of the case for conducting aggressive works that involved killing Israelis in Yetzhar settlement in 1998, as well as committing two operations at the entrance of Emanuel settlement, which resulted in killing 19 people and injuring dozens of Israelis. The High Court found his brother 'Abd-al-Naser's actions less serious than the first two petitioners. 'Abd-al-Naser confessed to the police that he knew that his brother was wanted by the Israeli security apparatus because of the Yetzhar operation; that he provided his brother with food and clean clothes; lent him his private car several times; and took him to Nablus without knowing the reason. 'Abd-al-Naser also said that he once saw a rifle in his brother's possession. Further, 'Abd-al-Naser helped his brother-in-law, who was also wanted, by providing him with clean clothes, food, drinks, and transporting him several times to Nablus, without knowing the reason or the purpose of travelling or using the car. He transported him once in his car to the hospital, after being injured while preparing explosives, but without knowing the reason of his injury. The High Court found that his actions were less serious than those of the first petitioners. Therefore, it was not possible to impose assigned residence on him, because he was not as aware of his brother's activities. There was no need to implement Article 78 of the Fourth Geneva Convention against him, because his actions did not constitute an actual and tangible threat to the security of the state.

Case 2: Use of Flechette Shells Against Palestinian Civilians by Israeli Occupying Forces

Israeli authorities have been using excessive force in confrontations with Palestinians in order to suppress the Palestinian *intifada*. The forces use various types of weapons in shelling residential quarters and populated areas in the OPT. Israel uses warplanes, combat helicopters, tanks, and shells, despite the fact that international law prohibits use of such indiscriminate weapons in areas inhabited by civilians. This has caused superfluous injury and unnecessary suffering to Palestinians and their property.

Israel started to use flechette shells during the current *intifada*, particularly in the Gaza Strip, which is one of the most densely populated areas in the

world. The international community and international and local human rights organisations have deplored the Israeli authorities' uses of these shells and have called on Israel to refrain from using flechettes,[43] which have killed scores of Palestinian civilians, most of whom are women and children. Israel has remained unresponsive to these requests.

The Palestinian Centre for Human Rights, located in Gaza, and Physicians for Human Rights - Israel (PHRI), located in Tel Aviv, filed a case before the Israeli High Court of Justice against Israeli Defence Minister Shaul Mofaz and the Commander of the Southern Region Doron Al-Mog. They requested that the respondents stop using flechettes in the Gaza Strip.

Background of the Petition

Claims of Petitioners

Petitioners stated that the use of flechette shells by Israeli occupying forces was illegitimate, and represented a barbaric violation of laws governing armed conflicts and occupied territories, most of which are conventional and customary in nature. They argued that flechettes caused superfluous injury or unnecessary suffering, as well as indiscriminate injury. The petitioners stated that the use of flechettes in populated areas was illogical, and in violation of the Israeli Basic Law, because flechettes constituted means which exceeded the parameters of military necessity.

Petitioners based their claim on international humanitarian law, which calls on parties to a conflict to protect civilians who do not participate in aggressive acts and not to expose civilians or civilian targets to danger. These protections are stipulated in the Hague Regulations and the Fourth Geneva Convention which are deemed part of the customary law that binds all nations and should be implemented by the High Court of Justice. The petitioners referred to Article 22 of the Hague Regulations, which addresses means of conflict with the enemy, stating that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." Article 23(e) prohib-

[43] A flechette shell (French for "small arrows") contains thousands of small metal arrows, each only four centimetres long. The effectiveness of the shell is that it explodes 30 metres above the surface of the earth and spreads these arrows over an area 300 metres long and 94 metres wide. The United States developed and produced this type of shell during Vietnam War in its attempt to find weapons effective in killing the VietCong, who spread out through large areas of jungle. See *Jane's Defense Weekly* (http://www.janes.com).

its use of weapons, shells, and material that might cause "unnecessary suffering," while Article 46 calls for respect of family honour and rights.

Petitioners supported their claims with Article 3 of the Fourth Geneva Convention, which sets forth the principle of humanitarian treatment of persons who do not take an active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. Article 3 also prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Petitioners asked the High Court to implement the Fourth Geneva Convention and to use it as the basic term of reference to provide effective protection for civilians during the time of war.

Petitioners also asked for the implementation of the two Additional Protocols to the Geneva Conventions of 1977, because it is agreed that the majority of their provisions are deemed to be customary international law. Under these protocols, military agencies assessing military necessity shall consider how not to infringe on civilian populations. Article 35(2) of the First Additional Protocol of the Geneva Conventions prohibits the use of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Article 51 of the First Additional Protocol calls for the protection of civilians who do not participate in direct part in hostilities. The same article also calls on military officials to avoid harming civilians through indiscriminate attacks; the use of methods and means of combat which cannot be directed at a specific military target; and the use of method or means of combat the effects of which cannot be limited as required by the Protocol. Petitioners argued that use of flechette shells by occupying forces contradicts the provisions of customary international humanitarian law, and that Israel should respect and implement all these laws and treaties.

The petitioners concluded that the extent of the danger of using flechettes in populated civilian areas and the scope of flechette injuries support the position that their use is illegitimate in international law. Each flechette shell scatters thousands of metal arrows that spread over an area 300 metres long and 94 metres wide, indiscriminately harming civilians and resulting in superfluous injury or unnecessary suffering. This happened in several cases where innocent Palestinians died because of the use of flechettes. Accordingly, and in the absence of justifications for the use of such weapons in confronting civilians who live in the Gaza Strip, petitioners asked that the respondents order the military commanders in the southern front to refrain from using flechettes.

Legitimacy of Using Flechettes Under the Israeli Basic Law

The petitioners emphasised that use of flechettes by Israeli occupying forces was a violation of the right to life. Their use also contradicted Israeli law, particularly Articles 2 and 4 of the Israeli Basic Law, which guarantee the right to life and prohibit the violation of this fundamental right. These two articles oblige the state to work towards respecting these basic rights. Petitioners argued that use of flechettes in a place as crowded as the Gaza Strip carried the certainty of hitting not just the intended targets, but also civilians uninvolved in aggressive actions; thus, flechettes were certain to inflict superfluous injury or unnecessary suffering. The petitioners argued that even in cases where flechette use seemed necessary, random shelling did not meet the universally accepted condition of proportionality. Accordingly, flechettes should be prohibited.

Absence of Reasonableness and Logical Considerations

The petitioners considered that the use of flechettes by occupying forces inside civilian populated areas was illogical and unreasonable. This was proved by the number of injuries that were inflicted on civilians, clearly showing that the army was unable to discriminate between civilians and enemy forces in the use of this weapon. This required that the judicial branch look into the soundness and reasonableness of the army decision to use flechettes in the Gaza Strip, and to look into the abuse of authorities vested in the military commanders. The making of illogical decisions by concerned authorities constituted a violation which must be adjudicated by the High Court of Justice.

Respondents' Reply

Legitimacy of Using Flechettes

The respondents argued that the central claim of the petitioners - that flechettes were illegitimate and violated international law - lacked legal basis. They said flechettes were legitimate, and claimed they did not contradict the law of armed conflict. They confirmed that the Israeli Army was committed to not violating customary international law, which included rules governing the conduct and progress of combat operations, i.e., the laws of war. The respondents addressed the two principles of international customary law regarding the use of weapons. The first principle was the prohibi-

tion of superfluous injury or unnecessary suffering and the second principle was the prohibition of the use of indiscriminate weapons.

The respondents justified their use of flechettes by noting that the international community, which convened several conferences about the prohibition of using such weapons,[44] had never prohibited the flechettes. Several agreements related to the subject of weapons had been concluded, as well as agreements that prohibited the use of some conventional weapons.[45] The legitimacy of using flechettes had always been on the agenda of these conferences. However, suggestions and recommendations to prohibit this type of weapon had not found any support, so that flechettes had not been included in any of these agreements. Consecutive discussions of international specialists in 1995 and 1996 resulted in adding a protocol regarding the use of lasers which cause blindness. Suggestions regarding a prohibition of the use of flechettes did not receive any support at that time. No binding restrictions to prohibit flechettes were put into place, making the petitioners' claim regarding the illegality of flechette use baseless and void in accordance with international law.

Use of Flechettes in the Gaza Strip

In the justification of their use of flechettes in the Gaza Strip, the respondents pointed out that the means of combat used by the Israeli army was done in accordance with regulations. Soldiers also followed accurate and correct instructions which targeted "terrorists" who constituted threats to the security of the state and to Israeli citizens, and which forbade inflicting damages on innocent Palestinians.

The respondents pointed out that the decision to use flechettes in the Gaza Strip was based on the judgment of military officials, who believed that the prevailing situation there necessitated the use of such weapons as neces-

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[44] 1899 Hague Declaration 3 Concerning Expanding Bullets; 1899 Hague Declaration 2 Concerning Asphyxiating Gases; 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare.

[45] Resulting in the 1981 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, including Protocol on Non-Detectable Fragments; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices; Protocol on the Prohibitions of Restrictions on the Use of Incendiary Weapons.

sary and vital. However, they approved a series of procedures which ensured that use of such weapons was not done on a routine basis but was restricted only in specific instances. The respondents used security reasons as a pretext for not giving more information on this matter. However, they made some general points which indicated the general content of such information.

The respondents said that Israeli soldiers were prohibited from using flechettes against civilians who did not participate in activities targeting security forces, or against civilian targets not used to support terrorism. Soldiers were allowed to use flechettes only against those suspected of activities against security forces or citizens of the state, and not in any other case (such as dispersion of riots or to maintain order). Soldiers were to refrain from using flechette shells in the centre of Palestinian towns, or in heavily-populated areas, for fear of causing injuries amongst civilians. This type of shell was to be used in relatively open, less-populated areas and adjacent to army locations and Israeli lands. Flechette shells were to be used in the Gaza Strip when soldiers had not been able to control "terrorists" using other means such as firing from light weapons or arresting them.

The occupying authorities justified targeting civilians and killing them with flechettes by claiming that they were operating under very difficult circumstances, where "terrorists" were disguised as civilians and carried concealed weapons. This required shooting in their direction, even if it was later discovered that they were innocent citizens. Further, the respondents claimed that flechettes were one of the most effective weapons available to the army to resist Palestinian "terrorism." Unfortunately, the use of flechette shells resulted in injuries to civilians. However, this was not a sufficient reason to prohibit the use of this weapon, despite both the large number of civilians injured or killed by flechettes, and the high risk of injury to civilians.

The respondents stated that the cases the petitioners cited did not constitute sufficient grounds to prohibit the use of these shells. The first incident of killing three children was thoroughly investigated, and it was proved that their movements were suspect and required shelling them with a flechette. Two knives were found later near their coffins. The length of each knife was 30 centimetres. Shooting at Netzarim settlement from various directions preceded the second incident in which three women were killed. Suspected objects loomed in front of soldiers north of the settlement. They believed that they were "terrorists." The army fired a number of flechette

shells. It was later found that they were three women that soldiers could not recognise because of darkness.

Position of Respondents

The respondents asked the High Court of Justice to reject the petitioners' claims that international law of armed conflict prohibits the use of flechette shells. They asked the High Court to refuse their claims regarding the illegitimacy of using this type of shell in the Gaza Strip, because such a holding would, in the midst of battles in Gaza, order the military commander to refrain from using legitimate combat means. This was interference in the business of the military commander, and was instructing him how to use the weapons he had in resisting "terrorists."

Further, the respondents said that the High Court should refuse the petition which asked it to interfere in the tactical considerations related to the army's determination of combat means. Instead, they asked the High Court to judge the case in accordance with the opinion it adopted in HCJ 5872/01, *MK Muhammad Barakah v. the Prime Minister, et al.,* which stated:

> Selection of combat means by the respondents in their attempt to foil terrorist works shall not be part of the issues that the court shall judge and rule.

The respondents concluded that the Court should reject the petition,

> due to instructions given in the context of using this type of shell, and the instructions which called for not hurting innocent civilians, and whereas the decision to use combat means belongs to the discretion and judgment of the military commander and military specialists in fighting fronts, who shall take into consideration the necessity not to hurt and harm innocent civilians as much as they can.

Particularly given that the government undertook in its reply to exert its efforts not to cause damage to innocent civilians, the respondents hoped the High Court would refuse the petition.

Decision of the High Court

The High Court justices began their decision by reviewing the recitals of the petition and the parties' claims. The petitioners asked the Court to issue

an order which would prohibit the Israeli forces from using flechette shells during military operations in the Gaza Strip. The justices addressed the claims made by the petitioners that use of such shells contradicted the grounds on which the laws of war were based. These laws prohibit use of "indiscriminate weapons" which do not differentiate between civilians and combatants, and which cause unnecessary pain and suffering. The High Court noted the position of the respondents that such shells would not be routinely used, and that their use would be restricted to confronting Palestinian fighters, and then only if it would not cause harm to civilians. The Court pointed out that the respondents explained the circumstances of the cases cited during which civilians were injured.

The High Court turned down the petitioners' claim by adopting the position of the respondents with regard to the international laws of war. It noted that the use of flechettes was on the agenda of several international conferences and symposia but had never been prohibited. Agreements were signed where conference participants refused to list flechettes among prohibited traditional weapons. The justices justified their rejection of the claim by saying:

> In accordance with the security situation there, the use of these shells is vital and there is no other alternative. However the use of this type of shell constitutes a threat to those who do not participate in aggressive acts against the army.

Thus, the High Court rejected the petition to prohibit the occupying forces from using flechettes based on the fact that the laws of war did not prohibit the use of this type of shell. It based its decision on an Israeli rule approved in the past that selection of combat means by respondents in fighting terrorism was not subject to second-guessing by a court. In addition, the High Court noted that field commanders had instructions on how to use flechettes, were aware that use of such weapons comes within the context of "defending" the Israeli army and citizens, and that flechettes should not cause damage to civilians who did not participate in aggressive acts.

Case 3: The Targeting of Palestinian Medical Services Personnel by Israeli Occupying Forces

Background of the Petition

On 8 March 2002, during Israeli occupying forces' incursion into Palestinian National Authority (PNA) territory, PHRI submitted a petition to the Israeli High Court of Justice. The petitioners alleged that the occupying forces violated international humanitarian law, including the Fourth Geneva Convention, by shooting at ambulances. These ambulances belonged to the Palestine Red Crescent Society (PRCS) or several international organisations. The shooting caused injuries to ambulance crews and hindered their work in transporting injured people to hospitals for treatment, thus violating international law. The petition named as respondents the military commanders of the West Bank and Gaza Strip.

In response to the Court's request, the respondents submitted answers to the claims which were referenced in the petition. They used the progress of combat operations and what such operations require as a pretext for not being able to verify the recitals and circumstances of the shooting incidents. They did commit to investigate, review, and study the reasons and recitals of these incidents. Regarding the substance of the case, the respondents based their answers on the decision in HCJ 2936/02, PHRI, *et al. v Military Commander of the West Bank.* The respondents formatted their reply in the same manner that was followed in this case. They claimed that there were objective reasons which prevented and obstructed the arrival of ambulances which were transferring the injured to hospitals. The respondents agreed that there had been one case of shooting at a Palestinian ambulance. They attributed this case to a complicated field situation and to the alleged actions of Palestinians which contradicted international humanitarian law. They claimed that ambulance vehicles were used in transporting explosive materials. However, they also reiterated their position that the occupying forces did implement the legal and ethical aspects of international humanitarian law in the territories. As evidence that they were doing so, they pointed at the instructions given to Israeli forces regarding the respect and implementation of these rules.

Decision of the High Court

In HCJ 2117/02, *PHRI v. Military Commander of the West Bank, et al.,* issued on 28 April 2002, the judges pointed to their previous declarations

on the obligation to respect the provisions of international humanitarian law which provide protection from belligerent attacks to medical crews and materials. Articles 18 and 19 of the Fourth Geneva Convention were cited. These provisions also state the obligation to protect civilian hospitals, except in cases where they are used to commit acts harmful to the enemy. The presence of wounded or sick military personnel receiving treatment in these hospitals, or the presence of small weapons and ammunition which have been taken from these military individuals and not turned over to the administration, shall not be considered an act that is harmful to the enemy. The Convention states that protection of such hospitals shall not cease until after notice has been given.

The Court confirmed in its decision that medical crews should enjoy complete protection when performing their duties, which should be limited to inspection work and the collection, transport, and treatment of sick and injured individuals, according to Articles 24 and 26 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention). Further this protection should also to cover the Red Cross and other recognised and voluntary relief organisations which are duly licensed by their governments.

The judges mentioned Article 21 of the First Geneva Convention, which stipulates that protection shall also be extended to mobile medical units belonging to medical services, unless they are used outside their humanitarian duties, in activities that hurt the enemy. Such protection shall cease only after giving notice and a reasonable time period in which to end the hurtful activities.

The High Court of Justice expressed its opinion that the Israeli combat forces would be keen to implement the humanitarian rules related to providing medical treatment to sick and wounded individuals, and to respecting the bodies of the dead. However, the illegitimate use of medical crews, hospitals, and ambulances by Palestinians in transporting weapons, forced the Israel military to do what was necessary to prohibit such activities. The High Court stated that prevention of illegal Palestinian activities should be done in a manner that would not lead to grave breaches of international humanitarian law, and done in accordance with the rules of international law, which, according to the Court, were compatible with the traditions of the State of Israel as a "Jewish and democratic" state.

Case 4: Detention Conditions in 'Ofer Camp: Torturing Palestinian Prisoners and Prohibiting Them from Meeting Their Lawyers

Background of the Petition

Israeli occupying forces arrested around 1,600 Palestinians in March 2002 during the military operations they executed inside towns and all residential concentrations under the PNA. Israeli forces collected and detained Palestinians inside 'Ofer Camp, located south of the Bitouniya area beside the city of Ramallah. The detention conditions in the camp were excessively bad. Palestinian prisoners were forced to stay completely outside for three days in very cold weather. They were also subjected to cruel treatment and deprivation of water and food.

Because of the tragic situation inside Ofer Camp, four non-governmental organisations (NGOs) specialising in the field of human rights submitted a petition to the High Court of Justice. The High Court issued HCJ 2901/02, *HaMoked, et al. v. the Military Commander of the West Bank* on 7 April 2002 and amended it on 15 April.

Petitioners protested against both the detention circumstances in the camp and the subjection of Palestinian prisoners to various psychological and physical torture practices, including humiliation tactics and breaking the fingers of some prisoners. The petitioners also appealed the legitimacy of the order issued by the military commander which prohibited Palestinian prisoners from meeting their lawyers. They considered this order unjust and asked the High Court to issue an order allowing prisoners to meet their lawyers.

At that time, Israeli occupying forces had arrested and detained Palestinians in accordance with Military Order No. 1500, issued on 5 April 2002. Article 1 of this order defined a "detained person" as a person who had been detained during the progress of military operations, and whose arrest was due to the threat he presented to the security of the area, army, and the public. Article 2 stated that an authorised officer might decide to keep the detained person for a period not to exceed 18 days, with the possibility of increasing or decreasing the period of arrest. Further, Article 3 noted that the detained person shall not meet

with an attorney during the entire period of detention. Such a meeting could take place upon completion of the arrest period, if permitted by an appropriate military authority.

Decision of the High Court

Upon considering the petition, the High Court justices noted that one of the most basic rights of the "detained" is to meet his lawyer. However, they stated that there might be reasons and cases which prohibit the exercise of this right by the detained, particularly when it might prejudice the security and safety of the public. In accordance with the position of the Israeli government, the justices indicated that the purpose of the current military operation was to control "the Palestinian terrorism network." The High Court made it clear that the legal basis for the arrest of Palestinians was in accordance with a specific group of military orders, including Military Order No. 1500, issued by the military commander of the West Bank on 5 April 2002.

Despite reiterating that one of the most fundamental human rights was a detained person's right to meet his lawyer, the High Court held that this right might be suspended under certain circumstances. The Court legitimised the failure to allow Ofer Camp detainees access to their lawyers, as well as the camp's general detention conditions. It reasoned that such procedures were "legal" because they responded to a need related to the safety and security of the public, and accorded with a specific military order issued by a military commander.

Case 5: The Siege of the Church of the Nativity in Bethlehem by Israeli Occupying Forces

Background of the Petition

During "Operation Defensive Shield," launched in the OPT by the Israeli occupying forces at the end of March 2002, Israeli forces invaded the city of Bethlehem on 14 April 2002. This forced dozens of Palestinians to seek refuge in the Church of the Nativity. According to Israeli allegations, a number of those who fled to the Church were "wanted" because of their responsibility for killing Israelis. Further, dozens of armed members of Palestinian security forces took refuge inside the Nativity Church. Israeli authorities asked those who took refuge inside the Church to leave, and pledged that they would not touch those who were not "wanted," and would give the "wanted" people the option of arrest or deportation outside the OPT.

They also claimed that several sick and wounded individuals who took refuge inside the Church left during the siege, were referred to various hospitals, and received medical care, and that several children left the Church. In addition, they stated that 48 priests and religious men stayed in a separate part of the Church where water and food were transported to meet their private needs.

The Governor of Bethlehem, who was present inside the Church, and Member of Knesset (MK) Muhammad Barakah submitted a petition (HCJ 3451/02, *Muhammad al-Mandi, MK Muhammad Barakah, et al. v. the Minister of Defence, et al.*) to allow medical crews and the International Committee of the Red Cross (ICRC) to enter the Church, deliver medicine and food, evacuate the bodies of the dead, provide necessary care to the injured, allow those who wanted to do so to leave, and provide those inside the Church with food and water.

Legal Claims of the Parties

The petitioners claimed that the behaviour of the Israeli forces in their siege of the Nativity Church constituted a flagrant violation of international humanitarian law. The forces cut off food, water, and medicine to those inside who included civilians, wounded, sick, and religious figures. The military commander did not agree with the petitioners, and considered the Israeli authorities' behaviour compatible with the provisions of international law. Although the case continued, the Israeli army objected to the Court's interference in this matter because there were negotiations around it, and they were close to solving the issue.

Case 6: Use of Palestinians as Human Shields and Hostages by Israeli Occupying Forces

Israeli occupying forces intentionally used Palestinian civilians as human shields and hostages during the current *intifada.* During military operations launched by these forces against Palestinians in towns and refugee camps in the OPT, Israeli military forced Palestinian civilians to enter buildings to verify the existence of timed explosives or objects that might explode, and to remove suspected objects from roads used by the Israeli army. They also took civilians as hostages, forcing them to stay inside buildings used by soldiers as military concentration points, in order to force Palestinian fighters not to shoot at these locations.

In addition, Israeli soldiers forced Palestinian civilians to walk in front of them in order to protect them from possible gunfire. Soldiers fired their weapons from points located close behind civilians. These were not isolated cases: several local and international human rights organisations documented many such cases.[46] Clearly, the occupying forces adopted hostage-taking and the use of human shields as a practice.

Israeli authorities have continued the policy of using Palestinians as human shields. As a result, Adalah: The Legal Center for Arab Minority Rights in Israel submitted a petition asking the Israeli High Court of Justice to issue a preliminary injunction obliging the Israeli army to immediately stop these illegal practices.[47]

Claims of the Petitioners

The petitioners called the use of human shields and hostage-taking barbaric and inhumane. They argued that these practices violated the pride and dignity of Palestinian human beings, as well as their basic right to life. These practices were also grave violations of the provisions of international humanitarian law, particularly Articles 27, 28, 31, 32, 33, 34, and 51 of the Fourth Geneva Convention.

The petitioners indicated that these practices violated Article 27 that states protected persons are entitled in all circumstances to respect for their persons, their honour and their family rights. They should be treated at all times in a human manner, and protected from all acts of violence and threats thereof. They rejected the Israeli interpretation that Article 27 allows disputed parties to make monitoring or security arrangements against protected persons, thus allowing the use of them as human shields in order to achieve these objectives.

The petitioners stated that the Israeli occupying forces used civilians to protect the army from probable operations against it, during its incursions

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[46] See e.g., Amnesty International, *The Heavy Price of Israeli Incursions,* 12 April 2002 and *Preliminary Findings of Amnesty International Delegates' Visit to Jenin,* 22 April 2002. See also Human Rights Watch, *Jenin: IDF Military Operations,* 3 May 2002 and *In a Dark Hour: The Use of Civilians During IDF Arrest Operations,* 18 April 2002.

[47] Adalah took this petition in the name of seven Israeli and Palestinian human rights organisations. HCJ 3799/02 *Adalah, et al. v. Yitzhak Eitan, Commander of the Israeli Army in the West Bank, et al.*

into Palestinian towns and refugee camps in the OPT. This practice violated the provisions of Article 28 of the Fourth Geneva Convention which prohibits exploiting protected persons or placing them in dangerous places.

The petitioners also claimed that such human shield and hostage-taking practices violated the provisions of Articles 31, 32, 33, 34, and 51 of the Fourth Geneva Convention. These articles prohibit contracting parties from exercising any form of physical or psychological duress against protected persons. They also prohibit making arrangements that might cause physical suffering or the death of protected persons who exist under its authority. The provisions also prohibit punishing a protected person for a violation that he or she did not personally commit, taking protected persons as hostages, or forcing them to work in its armed forces or provide assistance to it. The petitioners concluded that such practices constituted war crimes and grave breaches of the Fourth Geneva Convention.

The petitioners explained that these practices also contradicted the provisions of the Hague Regulations. Article 45 prohibits forcing the population of the occupied territories to swear allegiance to the hostile Power. Article 46 calls for respect of family honour and rights, while Article 50 prohibits collective punishment against populations, or making them collectively accountable for actions committed by individuals.

In addition, the petitioners claimed that hostage-taking and the use of human shields constituted violations of Articles 51, 57, and 58 of the First Additional Protocol to the Geneva Conventions. These articles prohibit terrifying civilians with violent or threatening acts against them. The articles call on the military to minimise the impact of military operations on civilians, and avoid placing civilians in dangerous areas.

The petitioners also noted that such practices violate domestic Israeli law, particularly the Israeli Basic Law which prohibits endangering human life and dignity and guarantees complete protection of life, body, and dignity.[48] To support their position, the petitioners used a group of decisions issued by the judges of the High Court of Justice which prohibit infringement of and encroachment on the life, body and dignity of human beings.[49]

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[48] Articles 2 and 5 of Israel's Basic Law: Human Dignity and Liberty.

[49] HCJ 5100/94, *PCATI v. Government of Israel* and HCJ 6055/95, *Tsemeh v. Minister of Defence.* These decisions and others stated that personal freedom is a first class basic right, and is a condition for the exercise of the rest of the basic human rights.

Respondents' Reply

Regarding the request to issue a judicial injunction prohibiting Israeli forces from using Palestinian civilians as human shields or hostages, respondents replied that the army had already taken care of these matters, thus an injunction was unnecessary.

Based on the information and factual material included in the petition, and without accepting their accuracy, the army command decided to issue an immediate order which absolutely prohibited the use of Palestinian civilians as human shields or hostages to protect army personnel from "terrorist" acts by Palestinians. As for the complaints included in the petition about the Israeli army using Palestinian civilians to break into houses, instructions were issued to prohibit such practices once the military commander in the field found that there was a danger to the life of the person used in the operation.

In response to the request of the respondent, the High Court justices did not issue an injunction, but were satisfied by the respondents' commitment to issue orders and take steps guaranteeing to put an end to such practices. Later, at the hearing held on 21 May 2002, the justices asked the respondents to submit a reply within 30 days of that date explaining the "legal" basis for their practices in this regard.

Continuation of Use of Human Shields and Hostages

On 14 August 2002, Nidal Abu-Muhsen, a 19-year-old Palestinian, was killed when an Israeli soldier used him as a human shield during a military operation in the town of Tulkarem. Israeli soldiers forced Mr. Abu-Muhsen to walk in front of them and to knock on a neighbour's door. There the soldiers fired at the neighbour, killing him and Abu-Muhsen as well.

On 18 August 2002, Adalah submitted a petition requesting the High Court of Justice to issue an injunction prohibiting the use of Palestinian civilians as human shields or hostages, in knocking on the doors of their neighbours, for verification of suspicious areas, or walking in front of soldiers when encircling targeted places. Adalah further asked the Court not to rely on the discretion of military commanders in the field, as their first concern is for the success of the military operation and for the life and safety of their soldiers, without giving any consideration to the life and safety of Palestin-

ians. In response to the petitioners' request, the High Court justices issued on the same day a provisional "temporary" judicial injunction, prohibiting Israeli forces from using civilians as human shields or hostages.

Due to the continued use of Palestinian civilians as human shields and hostages by the Israeli military,[50] Adalah submitted a motion for contempt of court to the High Court on 20 November 2002 in response to the respondents' failure to respect the provisional judicial injunction.

On 24 December 2002, Adalah submitted to the Court evidence that the Israeli occupying forces were continuing to use the human shield policy.[51] It cited a case in which soldiers forced Mr. Nabhan al-Najjar to accompany them in searching the Badra family house in Nablus. While soldiers were firing their rifles in all directions during this military operation, Mr. Badra was fatally injured by a bullet.

Respondents' Reply

The respondents' reply came seven months after submitting the claim, at which time they noted that they had issued a precautionary order. They announced that in view of several complaints they had received, including the detailed information in the petition, and without verifying the information and the complaint, it was decided to issue an order to operating forces in the field, prohibiting them absolutely from using civilians as human shields or taking them as hostages to protect troops from shooting or other operations executed by Palestinians.

The respondents referred to some complaints included in the petition which, in respondents' view, were not examples of using civilians as human shields, but were rather "seeking assistance" from Palestinians when entering houses of other Palestinians. It was decided to prohibit such practices in the cases where the military commander saw that the life of the Palestinian helping them was at risk. Based on the commitment made by the army to investigate the cases included in the petition, the High Court did not respond to the request of the petitioner, and refused to issue an injunction.

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[50] See B'Tselem, *Human Shields: Use of Palestinian Civilians as Human Shields in Violation of High Court Order,* 14 November 2002.

[51] Adalah, *The Use of Palestinian Civilians as Human Shields by the Israeli Army,* 22 July 2003.

Before the deadline to consider the case on 21 May 2002, the respondents submitted a reply in which they indicated that the military authorities had investigated the various means of obtaining "assistance" from Palestinians during military operations. It had been decided to prohibit any act of this nature, whenever there was any doubt that it might cause harm to the Palestinians. The respondents confirmed that getting "assistance" from Palestinians was an alternative to conducting military operations, which might result in many injuries to soldiers.

Progress of the Case in Court

On 21 May 2002, the respondents' attorney agreed that the army would draft internal instructions regarding "getting assistance" from Palestinian civilians, and would provide them to petitioners after deleting matters which were a security risk. He also undertook to conduct an investigation into the specific complaints included in the petition.

In view of this, the High Court of Justice issued a decision in which it requested that respondent submit a supplementary statement within 30 days. The petitioners would then have seven days to answer the statement. However, the High Court intentionally extended the deadline for the respondent to submit the statement, on the pretext that the army needed the time to complete the drafting of the internal instructions related to getting assistance from Palestinians.

On 18 August 2002, before the submission of the supplementary statement, the petitioners submitted a new request to issue an injunction. They asked the High Court to prohibit the respondents from using Palestinians as human shields and hostages during military operations or in knocking on doors of neighbours, in accordance with the discretion of military agencies, until the case was completed. Based on this request, the Court issued a provisional temporary injunction, and the state was ordered to reply within seven days.

At the request of the respondents, the Court agreed to postpone the deadline for their reply due to insufficient time to prepare an answer and draft orders for use in the field.

After repeated delays, the respondents answered on 5 December 2002. They mentioned the detailed discussions which had taken place during the past period with personnel on all levels, including the Israeli Army Chief of Staff, Ministry of Justice, Attorney General, State Prosecutor, and others.

The discussions focused on allowing army units to "get assistance" from Palestinians while executing military operations, to avoid causing humanitarian losses.

The respondents mentioned in this context that the internal instructions aimed at regulating this matter from then on had been discussed. It was decided to impose an absolute prohibition on the army's use of Palestinian civilians as human shields in confronting operations or firing by Palestinians, in addition to an absolute prohibition on taking civilians as hostages.

However, respondents also justified "getting assistance" from Palestinians under the pretext of avoiding loss of lives. The respondents mentioned that a detailed order should be issued to reflect the possibility during military operations aimed at arresting "wanted" Palestinians or inspecting buildings, to ask a local Palestinian to give early warning to the inhabitants of the building where there is information that there are "wanted" people inside it. This would be done in order to minimise the risk of hurting innocent civilians and the "wanted" themselves. The initial purpose of this assistance was to enable innocents to leave the building and to give the "wanted" people the opportunity to surrender in order to avoid use of power which might threaten people's lives.

The respondents added that in order to accomplish these objectives, it was legitimate to go to a local resident and ask him to enter the building where the "wanted" people were, and to announce to the inhabitants the presence of army forces in the place, warning them that remaining inside the building would lead to use of force by the army in order to arrest the "wanted" people. They mentioned that the person who was asked to assist the soldiers should be informed that the purpose of assistance was to avoid hurting innocents, and that he was not obliged to execute the request. The respondents added that if the military commander became convinced that there was a threat to the life of the local resident, then he would not get the resident's assistance, even if he expressed his readiness to provide the assistance.

The respondents indicated that the issuance of the order allowing the army to "get assistance" from Palestinians received the approval of the government judicial advisor, on the basis that getting assistance from local residents with their consent minimised the threat to human lives, particularly Palestinian lives. They noted that the order was compatible with international law and Israeli laws.

The respondents tried to prove that international law does not absolutely prohibit getting assistance from local residents to warn others of probable attack, particularly if this person agrees to do so, and if there is no threat to his life. On the contrary, respondents claimed that international law required that an early warning must be given before the start of an attack, to avoid hurting civilians or in places which have a civilian nature but are used for other purposes.

The respondents based this claim on Article 26 of the Hague Regulations, which states that the commander of the attacking units shall do all in his power before the start of shelling, to warn authorities, except in cases of assault. Article 21 of the First Geneva Convention notes that protection of fixed and mobile medical units shall not stop, unless they are used outside their humanitarian duties, and in works that hurt the enemy. However, protection shall stop only after giving notice. Further, Article 19 of the Fourth Geneva Convention prohibits the withdrawal of protection of civil hospitals unless they are used outside their humanitarian objectives, and in acts that hurt the enemy, provided that notice shall be given before the cessation of protection. This is also stipulated in Article 57(2)(3) of the First Additional Protocol.

Thus, the respondents argued that international law allows forcing local inhabitants to give notice or warning to others, in cases where there is a military need for it. This is similar to forcing local citizens to evacuate a certain place for military needs. Article 49 (paragraph 2) of the Fourth Geneva Convention states that an Occupying Power may totally or partially evacuate a certain occupied area, in case it is necessary for the security of the population, or for compelling military reasons.

The respondents concluded that the High Court of Justice should reject the petition which demanded that Israeli forces be prohibited from using Palestinian civilians as human shields or hostages, because the orders issued by the commander of these forces calling for the prohibition of these practices made the petition useless.

At the time of writing, more than two years have passed without a final decision since submitting the claim in May 2002. Israeli occupying forces continue to use Palestinian civilians as human shields and hostages.[52] Be-

[52] See, *inter alia,* B'Tselem, "The Use of Ahmad Asaf by IDF [sic] Soldiers as a Human Shield in Tulkarem Refugee Camp on 12 January 2004" (Hebrew).

cause of the procrastination of the respondents, the High Court of Justice has delayed issuing a final ruling in this case. Its actual role during this period has been limited to issuing a provisional temporary injunction on 18 August 2002 to prohibit these practices.[53] However, it cancelled this injunction on 21 January 2003, after receiving the 5 December 2002 reply of the respondents to wait for the parties to complete their claims.

Case 7: Demolition of Palestinian Houses without Prior Notice

Israeli forces have exercised the policy of demolishing Palestinian houses since their occupation of the Palestinian territories in 1967. There is a broad international consensus that the policies of house demolition, and forcible and compulsory transfers, are one of the most prevalent collective punishments and arbitrary practices in the OPT.[54]

Most often, these forces resort to demolishing and sealing Palestinian houses on the pretext that someone has committed security violations, despite the fact that the owners of most demolished or sealed homes are found not responsible for the violations. Sometimes there is absolutely no relationship between the house that is demolished and the violation that was committed.[55]

The case discussed below is not another appeal of the legitimacy of the demolition or sealing policies - these have been repeatedly justified by the Israeli High Court of Justice, who considers such actions "legitimate," using various "legal" justifications. The present case is limited to the petitioners' request to the High Court that the demolition of houses not be a routine procedure done without notice. Instead, petitioners requested that the inhabitants and homeowners have the opportunity for a hearing before the commencement of the demolition process, or to be informed in advance so that they might evacuate the houses or buildings and take their property.

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[53] Despite the Court's injunction, Israeli forces continued implementing the policy of using Palestinian civilians as human shields and hostages, without giving any consideration to this injunction.

[54] Al-Haq, *Israel's Punitive House Demolition Policy - Collective Punishment in Violation of International Law* (Ramallah: Al-Haq, 2003) p. 4; Al-Haq, *Demolition and Sealing of Houses as a Punitive Measures in the Israeli-Occupied West Bank* (Ramallah: Al-Haq, 1987) citing records kept by Al-Haq ; and Kretzmer, *op cit,* p. 145.

[55] Kretzmer, *op cit,* pp. 148 - 149; Al-Haq, *Israeli Demolition of Houses in the West Bank and Gaza Strip, Legal Consequences* (Ramallah: Al-Haq, 1994) p. 4.

Background of the Petition

The background to this claim was the demolition of hundreds of houses by Israeli occupying forces in Jenin Refugee Camp in 2002, without giving prior notice or notification to the inhabitants.[56] The petitioners asked the High Court to preliminarily order the respondents to explain why they demolished homes in this manner in Jenin, and to issue a preliminary injunction to immediately stop demolition proceedings which might threaten the life and security of the camp's civilian residents.

The petitioners cited factual information taken from the inhabitants of the camp, and from the local and international media. The information indicated that on 5 April 2002, Israeli forces started arbitrary demolitions of dozens of homes located in the camp without giving prior notice to the civilian inhabitants inside them. The army used heavy bulldozers, shells, and helicopters.

The petitioners mentioned that despite sending an urgent message on April 8 to Colonel Shlomo Politis, the Legal Advisor of the Respondent, they had not received any answer by the time they filed the case.

Claims of the Petitioners

The petitioners questioned the legitimacy of demolishing houses without giving prior notice to their inhabitants. They stated that this policy contradicts international law and reiterated that the respondents should meet their international obligations which include respecting Palestinian safety and their right to life. Petitioners cited international human rights standards, as well as provisions of international humanitarian law, particularly those in the Fourth Geneva Convention and the First Additional Protocol. Petitioners particularly noted the occupier's obligation to protect the occupied population from threats resulting from military operations, and to treat them in a humanitarian manner, as well as to prohibit physical punishment, torture, and collective punishment against them. Failure to meet these obligations constituted grave breaches of the agreements.

The petitioners claimed that demolition of homes without prior notice deprived the inhabitants of their rights to a hearing, to evacuate their property

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[56] HCJ 2977/02, *Adalah, et al. v. Military Commander of the West Bank.*

from these houses, and to leave before the start of demolition. This constituted a serious violation of the obligations of the Israeli occupying forces.

Supporting their point of view, the petitioners quoted HCJ 4112/90, *Association of Civil Rights in Israel v. The Commander of the Southern Region,* which endorsed the demolition of houses in al-Breij Palestinian Refugee Camp in order to improve the road for "security" needs. The decision stated:

> Even where an action of the military government is taken for reasons of military necessity, the carrying out of which involves damaging civilian property other than for punitive and deterrent purposes, the right of a hearing for those who are about to be harmed stands... even when circumstances exist obliging the military commander to take immediately those steps which he considers necessary for protecting security and human lives, and to prefer the immediate execution of house demolitions over upholding the right to a hearing prior to such execution, he must ensure that the damage is limited as far as possible, to carry out the actions in a manner that would reduce as far as possible the suffering and harm which may be caused to those harmed by the order's provisions, and to allow them to state their claim in front of competent authorities which are present in the area.

Further, the petitioner considered demolition of houses in this manner a contradiction of the statement made by Israeli representatives at the beginning of 2002, stating that:

> The Israeli army will inform home owners in advance, and will allow them a reasonable period of time to make their arguments in the matter. Having made their arguments, home owners will be given a statement regarding the decision in their case, and a period of 24 hours prior to the execution of the demolition. All this, of course, unless there are security reasons which would prevent this (such as shooting from the area of the buildings).

Respondents' Reply

The respondents began their reply to the petition by presenting the situation prevailing in the OPT and Israel. There are many attacks which have caused the deaths of hundreds of Israelis, forcing the occupying forces to conduct a major military attack on the areas under the PNA, including towns, villages, and refugee camps. Israeli forces faced fierce and wide resistance from Palestinian militants in Jenin Refugee Camp, which the respondents depicted as a military garrison.

The respondents indicated that the forces which attacked Jenin Refugee Camp found that the majority of houses it stormed had no inhabitants, and that no civilian residents existed in the heart of the camp. The army launched a street war from house to house, during which it was exposed to firing from Palestinian snipers, and to houses booby-trapped with gas cylinders.

The respondents noted the narrowness of the camp street which forced Israeli forces to open roads using heavy bulldozers in order to move forward inside the camp. The advancement of bulldozers was accompanied by announcements through loudspeakers asking civilian residents to evacuate houses. The bulldozers usually started the demolition work an hour and a half after the announcement to enable the inhabitants to leave their homes.

The respondents confirmed that during military operations in the heart of the camp, some inhabitants left their houses after hearing the warning, and that some of them remained in a number of houses despite hearing the warning. They evacuated these houses when the bulldozers demolished one of the walls, and before the complete collapse of the house.

The respondents referenced the number of human losses in the ranks of the Israeli army since the beginning of military operations in the camp. Nine soldiers were killed and 50 injured as a result of shooting by Palestinian militants who were inside the camp, armed with Kalashnikovs, M-16 rifles, and night vision devices. The Israeli army also found quantities of weapons and explosive belts prepared in order to kill soldiers. Respondents confirmed receipt of this information from Colonel Moshe Cohen, the Deputy Commander of the battalion, which conducted military operations inside the camp.

The position of the respondents was that the prevailing situation inside Jenin Refugee Camp and the military operation in it called for the rejection of the

claim. They argued that it would be impossible for the High Court to look into this case and rule on it, because of the dynamic situation in the field which did not allow giving a real picture of what was happening on the battlefield. The respondents supported their position using HCJ 355/88, *Association for Civil Rights in Israel v. The Commander of the Central Region,* which stated the following:

> Sometimes, military operations stand as an obstacle towards implementing judicial oversight, like a military unit conducting a military operation to remove a specific obstacle, or to overcome resistance, or to counter an immediate attack which targets army forces or citizens, or acts similar to this, which require that the army execute an immediate and urgent military operation, because it is not possible to postpone a military operation which must be executed in an urgent manner.

The respondents concluded that the complicated combat situation prevailing in the field, resulting from the Israeli army encountering Palestinian militants, required that the petitioners put the blame on the Palestinians. Moreover, respondents argued that the execution of military operations by military units inside the camp amounted to prior notice to the inhabitants to evacuate and leave their houses. They said this was compatible with the provisions of Article 23(g) of the Hague Regulations which allow soldiers to destroy or seize enemy property, if there is a military requirement for it.

Opinion of the High Court Regarding House Demolition Without Prior Notice

The Israeli High Court of Justice rejected the claim based on the reply of the respondent that they were doing the best they could to not inflict damage on innocent people, except where required by military need, and then it was done in accordance with international humanitarian law.[57] The justices believed that the circumstances around the then-current military operations did not provide an opportunity to the petitioners to give details regarding the demolitions. However, the High Court believed that the military authorities were doing their best to prevent damage to civilians from these operations, taking into consideration the circumstances prevailing in the

[57] *Ibid.*

area where military operations were taking place. It should be noted that this case served as a precedent, as the High Court adopted this same policy of permitting the demolition of houses without prior notice in subsequent cases.[58]

Within the framework of justifying the policy of house demolition without prior notice, the High Court accepted the claims of the military authorities that giving prior notice about a military operation which would take place in an enemy area might threaten the safety of the forces about to execute the mission. This would enable the enemy to prepare ambushes inside the houses to be demolished, and in the roads leading to them, which would thwart and abort the operation. The Court noted that this had happened the previous month. Moreover, the High Court reasoned that military forces in general do not give prior notice before commencement of military operations in an enemy area, because this will undermine the safety and security of the soldiers.

The justices considered the right of a person to have a hearing before being exposed to injury or violation of any basic right; a right which should be exercised in peace and war. This right also applied to the demolition of houses inhabited by "terrorists." At the same time, the High Court indicated that this was a relative right and not an absolute one. The right of the individual to appeal against damages to his body and property must be weighed against the public interest which the military operation strives to achieve, without ignoring the safety and life of soldiers.

Accordingly, the Israeli High Court of Justice held that no prior notice must be given when there is a threat to the life of soldiers, or if the notice would make failure of the operation probable. If the threat is removed, a warning can be issued in order to give the opportunity to appeal. The petition was rejected because of its general nature, as it did not reference specific cases.

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[58] See HCJ 6696/02, *Yousef Hamid Mustafa Zu'rob v Military Commander of the Gaza Strip,* issued on 6 August 2002, regarding petitions submitted by Palestinian families whose children committed armed attacks on Israeli civilian targets. They limited their demand to asking for a hearing before the Israeli occupying forces demolished their houses. Accordingly, the justices presumed that the military commander had the right to demolish the houses of these families. They limited the case to the following question: Is the respondent obliged to give the petitioners the opportunity to submit their statements before they commence exercising the powers vested in them, which allow them to demolish houses?

LEGAL REVIEW OF THE ISRAELI HIGH COURT OF JUSTICE'S DECISIONS

This part of the study includes a legal analysis of the High Court's decisions reviewed in the previous chapter. We will conduct this analysis using modern international law, which applies to the OPT and which obliges the Occupying Power to implement international human rights and humanitarian law. The purpose of this discussion is to see how far and in what ways these rulings are compatible with the provisions of international law, particularly those stipulated in international humanitarian and human rights law. These laws are supposed to organise and regulate the relationship between the Israeli occupying forces and the Palestinian people in the OPT.

Interestingly, what characterises all decisions issued by the Israeli High Court of Justice during the current *intifada,* including those which are the subject of this study, is the consensus of the justices to reject the petitioners' claims without any variations in the opinion. There are no divisions in the justices' points of view. Accordingly, we do not have minority and majority opinions, or conflicting or contradicting opinions, regarding any of the cases considered above.

Overall, international law calls for protecting the population, and respecting their basic rights and freedoms. This study attempts to track the effects of these decisions on the practices and policies of the occupier on the one hand, and their impact on implementing or improving the rights of Palestinians on the other hand.

Arbitrary "Forcible" Transfer of Palestinians from the West Bank to the Gaza Strip

The Hague Regulations did not address the subject of arbitrary transfer, and did not include any provisions prohibiting these practices. During this period, states implemented arbitrary transfers and deportation policies against people of occupied regions.[59] This issue was addressed in the Geneva Conventions, which outlawed arbitrary transfers and deportation.

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[59] ICRC, *Commentary, op cit,* pp. 278 - 279.

The basic question in this case was the urgency of the cases which compelled the military commander to amend the military order in order to expand his authorities and enable him to transfer protected persons from the West Bank to the Gaza Strip.

At the outset, we should mention the duplication and lack of clarity which engulfs the position of the Israeli High Court regarding the implementation of international humanitarian and human rights law in the OPT. While the Court always confirms that the provisions of customary international law, such as the Hague Regulations, shall be applied in the OPT because as customary law, they are part of Israeli law, it deals with the Fourth Geneva Convention in a very selective manner. The High Court follows the Israeli official position, which calls for the implementation only of the humanitarian aspects of the Fourth Geneva Convention. The Court reflects this official position in all of its decisions. Thus, the justices refrain from treating as a homogenous unit the entire Convention which has a humanitarian character and should be respected and implemented without exception.

The Israeli High Court of Justice erroneously but repeatedly attempts to divide the Fourth Geneva Convention into humanitarian and non-humanitarian provisions. The position that the Convention includes provisions which lie outside a humanitarian framework is not credible. The Fourth Geneva Convention has a pure humanitarian nature. It is not concerned about the "legitimacy" of armed disputes. Its role is limited to the protection of civilian persons in time of armed conflicts, regardless of whether the civilians belong to the aggressor, to the victim, or to any other party. Until the end of the Second World War, and the ratification by the international community of this agreement in 1949, there was no convention or treaty which provided effective protection for civilians during times of war. The international community agreed to adopt this advanced document, thus filling a legal vacuum. The whole reason for the existence of the Fourth Geneva Convention is humanitarian protection. It makes no sense to treat it as if many of its provisions have some other purpose. Thus, it is imperative to implement the Convention in its entirety in any situation of occupation or war; applying it in a piecemeal fashion as the Israeli High Court of Justice chooses to do is not defensible.

The High Court's refusal to admit that all of the Fourth Geneva Convention applies to and protects Palestinians in the OPT helps Israel dodge its obligations to apply the Fourth Geneva Convention, and humanitarian rights in the territory it occupies.

Powers of the Military Commander

To legitimise the procedure used by the military commander of the Israeli occupying forces to deport family members of Palestinian activists from the West Bank to the Gaza Strip, the High Court chose to rule on the case based on reasoning that merged customary law and conventional law. The justices deemed "legitimate" the military commander's amendment to Military Order No. 378, expanding the authorities assigned to him, and the commander's issuance of an order which called for the deportation of Palestinians from the West Bank to the Gaza Strip. The Court reasoned that customary international law allows the Occupying Power to make changes to laws applied and implemented in the occupied region.[60]

However, the Hague Regulations very clearly only permit the Occupying Power to change and replace some laws in the occupied region when there is an urgent need or emergency requiring such a step in order to guarantee public order and security. In the sections below, we discuss the decision of the military commander and explore whether there was an urgent need or emergency which called for such action.

Whether or not such an emergency existed, the Hague Regulations include provisions which prohibit the Occupying Power from collectively punishing the occupied population. The population cannot be considered collectively responsible for actions committed by individuals.[61] International humanitarian law includes in its definition of collective punishment forcible and compulsory transfer and deportation.

Selective Application of the Fourth Geneva Convention

Despite the Israeli High Court's reluctance to admit the applicability of the Fourth Geneva Convention to the OPT, in harmony with the official Israeli position, the justices resorted to applying some of it at least in practice, thus dealing with the Convention in a selective manner. They refrained from implementing its provisions when the situation required protection of Palestinians, claiming that this lay within the scope of customary law.

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[60] See Article 43 of the Hague Regulations, which oblige the occupation force to achieve and guarantee security and public order, as well as respect laws applicable in the country, unless there are emergency situations which require that they not do so.

[61] *Ibid,* Article 50.

While the Court's opinion has settled on the non-applicability of the Fourth Geneva Convention to the OPT, Israeli official statements regarding the obligation to implement the humanitarian aspects of the Convention, show that the judges rely on some of the Convention provisions to justify the "legitimacy" of various Israeli practices against Palestinians. These practices include collective punishment such as forcible and compulsory transfer and the deportation policy. The justices concluded that the Israeli authorities acted in ways compatible with the Convention and with Israel's obligations to respect its humanitarian aspects.

In this particular case, the High Court refused to apply a protective provision of the Fourth Geneva Convention and chose a security-oriented provision to rely on instead. The Court refused to accept the petitioners' claim that their transfer from the West Bank to the Gaza Strip violated Article 49 of the Fourth Geneva Convention, prohibiting forcible collective transfer and deportation actions of protected persons from the OPT. The justices decided that this article did not apply to the population of the OPT. Instead, they preferred to apply Article 78, which allows an Occupying Power to impose assigned residence on Protected Persons inside the occupied region for security reasons.

Further, the Court refused the principle of separation between the West Bank and the Gaza Strip. It considered them both to be part of the "Land of Israel" (i.e., Mandate Palestine).[62] It stated in its decision that they both constitute geographical regions, which cannot be divided since Israel has controlled them both since 1967. In addition, Article 11 of the 1993 Declaration of Principles on Interim Self-Government Arrangements (Declaration of Principles) between Israel and the Palestinians confirmed that the West Bank and Gaza Strip was one integrated geographical unit, and that their unity should be maintained and preserved during the interim period.

[62] The handling of occupied Arab territories as part of the "Land of Israel" represents a political-expansionist approach that has been implemented by Israeli government officials and institutions, from the time it occupied and tightened its control on the OPT in 1967, until the present. Accepting the acquisition of territory by force is a violation of the principles of international law. Therefore, the Israeli High Court's adoption of this stance, and the justices' focus on it in most cases they considered, makes the High Court seem biased; it tries to justify violations of international law and give priority to political interests and not to justice and ethical principles. This compromises its credibility and integrity when considering claims between the Occupying Power (Israel) and the occupied population (OPT).

The justices did not question why the military commander, at this particular stage, implemented a forcible transfer policy of Palestinians from the West Bank to the Gaza Strip, for the first time since the occupation began. Nor did they ask questions about the objectives behind this trend.

Finally, the High Court failed to notice that currently, the Israeli army has made the West Bank and the Gaza Strip two separate geographical regions between which Palestinians are prohibited from travelling.[63] While Israeli occupying forces started to implement some practical steps to separate the West Bank and Gaza Strip from each other 15 years ago, they continued this policy after the conclusion of the Declaration of Principles. The situation at the time of this court case was one of complete and actual separation between the two Palestinian regions, made totally separate by the presence of two different military commanders. The position of the respondents that the West Bank and the Gaza Strip represented one geographical region, and the Court's acceptance of such a contention, is deceiving and misleading. This position is refuted by the actual procedures of the occupation on the ground. The Court's opinion serves the policy of the occupier, and finds a "legal" justification for it.

Transfer Based on the Claim to Protect Security

Deportation of Palestinians from the OPT in order to maintain security is one of the Israeli authorities' most common arbitrary practices.[64] The Israelis began deporting Palestinians during the first days of the occupation. This policy reached its peak in 1992, when Israel deported approximately 420 Palestinians to Lebanon, because they were suspected of being active in Hamas or Islamic Jihad.

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[63] Despite the fact that the Declaration of Principles confirmed that the West Bank and the Gaza Strip constitute an integral indivisible geographical entity, and that Israel is obliged to link them by a safe passage that goes across Israel, and guarantees the right of Palestinians to travel between them, Israel has restricted the travel of Palestinians and severely limited their movement between the West Bank and the Gaza Strip. The situation has reached a point of absolute separation between the two regions, so that travel between them can be done only through Jordan or Egypt.

[64] Israeli authorities practiced the deportation policy in accordance with Article 112(1) of the 1945 British Defence (Emergency) Regulations which were applicable during the British Mandate in Palestine. These regulations allowed the Mandate government to issue an order to deport any person outside Palestine, provided that the concerned person stayed outside the Palestinian territories as long as the order against him was valid.

The Israeli High Court has always endorsed the deportation policy, despite the fact that it falls within the definition of collective punishment. While this policy has always ultimately gained the approval of the High Court, it has always been keen to have the person to be deported exhaust all formal legal procedures, such as the right to appeal before a specialised commission, as well as exhaust judicial procedures before the Court. Nonetheless, the Court's decisions never addressed the core and substance of the deportation decision, nor did the judges discuss the policy's background or legitimacy. It refrained from interfering in the decisions of the military authorities related to deportation, and failed to force these authorities to reverse their decision.[65]

In implementing its deportation policy, Israeli authorities have often transferred Palestinians in a forcible manner to the Lebanese or Jordanian territories, after the Israeli High Court has endorsed these arbitrary individual and collective punishments. Such deportations violate international law, as they constitute grave breaches of Article 147 of the Fourth Geneva Convention.[66] They also constitute a war crime and a crime against humanity under the provisions of Articles 7 and 8 of the 1998 Rome Statute.[67]

This case represents a totally new phenomenon in the practice of Occupying Powers. It targets persons and forcibly transfers them from the West Bank to the Gaza Strip because of the family relationship that links them with Palestinian activists who detonated explosions aimed at Israelis, or who helped others plan and execute explosions. In the attempt to establish the "legal" basis for the deportation of the family members of the activist, the military

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[65] Kretzmer, *op cit,* pp. 165 - 167.

[66] Article 147 of the Fourth Geneva Convention defines grave breaches as,

> ...those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[67] It should be noted that while Israel is not a State Party to the Rome Statute, the Statute has extensive legal value in the codification of existing international law regarding criminal responsibility.

commander amended Military Order No. 378 so that it was possible to deport Palestinians from the West Bank to the Gaza Strip under the claim of maintaining and preserving security. Until this new amendment, the practices of military commanders were limited to either expelling Palestinians outside the OPT entirely, or restricting them to the areas where they lived using an order of Assigned Residence. Israeli military commanders had never transferred Palestinians from the West Bank to the Gaza Strip, or vice versa, before.

Collective Punishment in International Law

International law prohibits punishment of Protected Persons who are not responsible for a given act. The Fourth Geneva Convention is very clear when it stipulates that no protected person may be punished for a violation that he or she did not commit personally. The Convention prohibits all forms of collective punishment, as well as measures of intimidation or terrorism.[68] Thus, it relies on one of the basic principles of legal theory, which states that criminal responsibility is limited within the personal scope, so that a person shall not be questioned or held responsible for a violation that he did not commit, or in which he did not participate. Punishment of individuals and groups for actions that they did not commit in their personal capacity represents a violation of human principles and values. The Hague Regulations support this opinion when they stipulate that no collective punishment, financial or otherwise, shall be imposed on a population because of actions committed by other individuals. A population cannot be collectively responsible for such actions.

Arbitrary "Forcible" Transfer and Assigned Residence in International Law

The forcible transfer policy practiced by Israel towards the population of the OPT is a prohibited act listed as a grave breach under international humanitarian law, particularly the Fourth Geneva Convention. The Convention prohibits forcible individual and collective transfer of protected persons, or deporting them from the occupied territories to the territories of the Occupying Power, or to the territories of another occupying or non-occupying country, regardless of the reasons. International law distinguishes among the practices of deportation, forcible transfer, and assigned or restricted residence[69] used against protected persons in order to protect the

[68] Article 33 of the Fourth Geneva Convention. See also ICRC, *Commentary, op cit,* p. 225.

[69] Articles 42, 43, and 49, Fourth Geneva Convention.

Occupying Power's security. However, it prohibits all forms of deportation and forcible transfer, regardless of the reason.[70]

An Occupying Power may partially or completely evacuate a certain occupied area, for the security of the population or for imperative military reasons. However, the evacuation process should not result in the displacement of Protected Persons, unless within the boundaries of the occupied territories. If that happens, the Convention mandates that displaced populations be returned to their homes as soon as hostilities in the area in question have ceased.[71]

Despite the language of Article 49 of the Convention, which on its face prohibits all forms of deportation and forcible transfer of the occupied peoples unless their security is at risk or there are military actions occurring,[72] the common opinion among the High Court justices was that Article 49 is not relevant to the deportation and forcible transfer applied by military commanders against Palestinians. This is based in their misinterpretation that this article applies solely to the kinds of transfer practices that were used by Germany during World War II.

Although the High Court stated that local courts shall not implement Article 49 because it is not part of customary international law,[73] there was a

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[70] *Ibid.* The Occupying Power may totally or partially evacuate a certain occupied area, if necessary for the security of people or for forcible military reasons, provided that the evacuation is within the borders of the occupied region. Displaced inhabitants in this manner shall be returned to their homes, once aggressive works stop in this region.

[71] Article 49, Fourth Geneva Convention.

[72] The first two paragraphs of Article 49 of the Fourth Geneva Convention state that,

> [i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

[73] In accordance with the trend prevailing among the justices of the Israeli High Court, Israeli courts should implement the provisions of customary international law. However, the Fourth Geneva Convention can be implemented in its contractual capacity only if the Knesset incorporates it into Israeli law by a special law which makes its provisions part of these laws.

consensus among the majority of the High Court justices that Article 49 does not prohibit deportation of members of the OPT's population.

By justifying this arbitrary procedure, the justices refused the petitioners' claims that their transport from the West Bank to the Gaza Strip constituted a grave breach of Article 49 of the Fourth Geneva Convention. The High Court supported the position of the military commander by confirming that he was not acting outside the scope of the authorities assigned to him, and that he was acting according to his authority to issue legislation in the OPT.

As usual, the Court dealt with this case in a selective manner. It held that the provisions of Article 49 "do not apply" in the OPT. It accepted the respondents' explanation that the procedure used against petitioners was not included within the scope of deportation or forcible transfer, but came under the definition of imposing assigned residence, which is compatible with the provisions of Articles 41, 42, and 78 of the Fourth Geneva Convention,[74] and the provisions of Article 43 of the Hague Regulations.

Article 43 of the Hague Regulations specifies the role of the occupation forces to accomplish and guarantee public order and safety. It obliges the Occupying Power to respect laws in force in the country, except in cases of emergency. This also applies to Articles 41 and 42 of the Fourth Geneva Convention, which do not allow the Occupying Power to impose assigned residence on protected persons, unless there are absolute security necessities.

However, in the case we are considering, such serious security concerns appear to be lacking. The military commander of the West Bank did not list the type of reasons for the move which would prove a security case, or an emergency need that required resort to such actions against them. The only "security concern" was that one of their family members had used explosives against Israel, and planned or participated in their preparation.

The respondents did not present any evidence which proved that the petitioners actually provided assistance to the accused family members. This forced Israel not to prosecute them on the pretext that doing so would disclose the source of their information, and damage Israeli security.

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[74] Article 78 of the Fourth Geneva Convention constitutes the basis by which the justices selectively dealt with the Convention. They admitted the "legitimacy" of measures taken by the respondents against the petitioners as they conformed to the text of the Article 78. They considered this measure as imposing assigned residence, and they held that assigned residence is not deportation.

In addition, the military commander confirmed that security considerations forced him to take this action in order to deter others from executing explosions, making them fear the suffering which might affect their families. The commander believed that it would also deter families from providing any assistance to their relatives. These statements by the military commander support the argument that this procedure lacks legitimacy, and represents a form of collective punishment against Palestinians. They show that the basic objective of taking action against petitioners and deporting them to the Gaza Strip was limited to threatening Palestinian activists with damage to their families for conducting armed attacks on Israeli civilian targets.

Based on the above facts and arguments, the credibility and integrity of the High Court decision in this regard must be questioned, as it contradicts the principles of international humanitarian law.[75] The justices should have rejected the procedures which aimed at transferring petitioners to the Gaza Strip without trial or legal procedures, and refrained from providing "legal" cover for an illegal act. The respondents abandoned the fundamental international legal principle of prosecuting individuals only for charges attributed to them.

This is evident in the justices' acceptance of confidential "proof" submitted to them by the respondents, which stated that prosecuting the petitioners might disclose the source of their information, thus presenting a threat to the security of the State. This resulted in the justices' provision of a legal basis for the denial of the petitioners' right to a fair and public trial in accordance with international human rights and humanitarian law; their right to know the nature and source of the accusations and charges attributed to them; as well as their basic right to confront the witnesses of the respondents and refute the charges.[76]

This case proved in a decisive manner how far and to what extent Israel and its leaders violate the provisions of international humanitarian law, as stipulated in the Hague Regulations and the Fourth Geneva Convention. The military commander's amendment of the military order to expand the authorities assigned to him and his issuance of orders against petitioners to transfer them from the West Bank to the Gaza Strip, is a grave breach of the rules and provisions of international humanitarian law.

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[75] In accordance with international humanitarian law, no ruling shall be issued, and no penalty shall be implemented against a person who has been convicted of a crime related to armed conflict, unless through a ruling issued by an impartial court whose jury has been legally formed, and who adheres to acceptable and recognised judicial procedures. Article 72, Fourth Geneva Convention, and Article 75(4), First Additional Protocol.

[76] Articles 72 - 74, Fourth Geneva Convention, and Article 75, First Additional Protocol.

Use of Flechette Shells against Palestinian Civilians by Israeli Occupying Forces

At the start of the current *intifada,* Israeli forces adopted a policy of using excessive force against Palestinians. This included use of flechette shells in the Gaza Strip, despite the fact that it is the most densely-populated area in the world. The use of flechettes by Israeli occupying forces against Palestinian civilians has had a serious impact because it inflicts unjustified damages and pain. This constitutes a grave breach of international humanitarian law.

International humanitarian law provides limits so that the parties to a conflict shall not use military necessity and the maintenance of public security as a pretext to go too far in using force. International humanitarian law prohibits belligerent parties from inflicting damage on their enemy that is not proportionate to the intended objective, which should be to weaken or destroy the enemy's military. The objective must be the destruction or weakening of the military force of the enemy. Parties in the conflict are also restricted in selecting the means of inflicting damage on the enemy. Clearly, international humanitarian law states the necessity of protecting and respecting those who do not participate in military operations, and dealing with them in a humanitarian way.

Restrictions Imposed on the Selection of Combat Means and Methods by International Humanitarian Law

It is recognised that many of the provisions of international humanitarian law are *jus cogens* in nature due to the important values they defend.[77] Article 53 of the Vienna Convention defines a *jus cogens* provision as,

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

International humanitarian law imposes restrictions on the parties to armed conflicts in selecting combat means and methods. Belligerents do not have absolute freedom to select means of harming the enemy, and they do not

[77] Jean S. Pictet, *International Humanitarian Law: Evolution and Principles* (Geneva: ICRC, 1984) p. 50.

have the right to inflict damages on their enemy that are disproportionate to the intended objective, which aims at weakening or destroying the military power of the enemy. Persons who do not participate in military operations shall be protected, respected and dealt with in a humanitarian manner. This includes civilians and *hors de combat,* persons who put down their arms and become incapable of continuing to fight because of injury, sickness, or becoming prisoners of war.[78]

Aiming to respect the individual, his or her life, human dignity, and physical safety, international humanitarian law prohibits the use of excessive force, and some types of weapons which cause superfluous injury and unnecessary suffering (such as some shells; poisonous biological or chemical weapons; and some types of explosives), and restricts the use of indiscriminate conventional weapons like incendiary weapons, mines and traps.[79]

The First Additional Protocol restricts the right of the parties to armed conflicts to select combat means and methods. The Protocol prohibits the use of weapons, shells, material, and combat means which inflict and cause superfluous injury and unnecessary suffering.[80] It upholds the principle of protecting civilian populations from dangers resulting from military operations, and that they must not be subject to attacks, or acts or threats of violence aimed at terrorising civilians. It also calls for compliance with international humanitarian rules, such as protecting persons who are not directly involved in hostile acts, prohibiting indiscriminate attacks which might injure civilians, and prohibiting attacks for the purpose of deterrence against civilian populations.[81]

The failure of belligerents to implement the provisions of any of the four Geneva Conventions because the enemy does not respect them is considered a retaliatory action against protected persons. This is strictly prohibited by the Geneva Conventions, many of whose provisions are *jus cogens.* This principle is confirmed by Article 60 of the Vienna Convention, which states that any material breach of a multilateral treaty by one of its parties shall give the right to other parties to partially or totally suspend the agree-

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[78] For more information, see Pictet, *ibid,* pp. 24 - 25.

[79] 'Amer al-Zimaly, *Introduction to International Humanitarian Law* (Tunis: Arab Institute for Human Rights and the ICRC, 1997), pp. 28 - 29.

[80] Article 35, First Additional Protocol.

[81] *Ibid,* Article 51.

ment except for "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[82]

Distinction Between Civilians and Military Targets

Civilians and fighters in cases which are not stated in agreements shall remain under the protection and authority of the principles of the Martens Clause,[83] as settled in humanitarian principles and customary law, and as called upon by general conscience.

The absence of an international agreement prohibiting the use of flechette shells does not give the parties in a conflict an absolute right to use this type of random weapon if it inflicts unjustifiable damage and pain. In this case, the parties in the conflict must respect international humanitarian law, which protects civilians by guaranteeing that they will not be attacked. Attacks must be limited to military objectives.[84]

The parties to a conflict shall in this case take two basic principles of international humanitarian law into consideration. The first principle is that of military necessity, which states that the parties of the conflict shall use only necessary power to accomplish the objective of fighting, which is weakening the military power of the enemy and defeating him. Use of power for any other purpose is not necessary and therefore unjustifiable. The second

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[82] For more information, see Pictet, *International Humanitarian Law, op cit,* pp. 16 - 17.

[83] This opinion is attributed to the famous Russian legal jurisprudent and diplomat Vidor Martner who played a basic role in the preparation and drafting of the 1899-1907 Hague Conventions. This principle has been included in the preamble of the Fourth Hague Convention, as follows,

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

[84] In accordance with Article 48 of the First Additional Protocol,

> [i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

principle is that of proportionality, which states that those military actions shall not exceed the military needs and requirements to achieve the definite military advantage anticipated. Disproportionate force is prohibited. Military necessity shall not be used as an excuse to attack civilians, or to terminate those who become incapable of continuing the fight.[85]

Accordingly, the parties to a conflict shall refrain from performing any action outside the scope of military necessity, because that would be a prohibited act. It is not necessary to continue inflicting damage and suffering on the enemy after he becomes incapable of fighting due to injury, sickness, or captivity. Further, proportionality shall be respected in a manner that guarantees protection to persons who did not participate in hostile acts, such as civilians, or persons who became incapable of fighting. They shall be dealt with in a humanitarian manner. Military necessity shall not cancel such protection.[86]

Use of Flechettes Against Palestinian Civilians in the Gaza Strip

The claims of the respondents regarding the use of flechettes in the Gaza Strip were contradictory, lacked clarity, and were full of generalisations. They claimed that there were clear instructions which prohibited military commanders from using such shells against civilians who did not directly participate in hostile acts, or in heavily populated areas, and inside Palestinian villages and towns, to avoid causing injuries to Palestinian civilians.

However, the very different facts on the ground refute these claims. Israeli forces excessively used this type of indiscriminate weapon in the Gaza Strip in a way that contradicted the principles of military necessity and proportionality. This was evident in the high number of recurrent and grave injuries to Palestinian civilians. These injuries reflected the dangers of using random shells which affect civilians and inflict unjustifiable damages and pain, particularly in the densely-crowded Gaza Strip.

Israel attributed its killing of isolated and unarmed civilians, particularly

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[85] al-Zimaly, *Introduction, op cit,* p. 78. Parties to the conflict shall take into consideration the rule of proportion in all cases, so that military operations shall not exceed the necessary scope to accomplish the limited military objective. *Ibid,* p. 28.

[86] Pictet, *International Humanitarian Law, op cit,* pp. 65 - 66; al-Zimaly, *Introduction, op cit,* p. 78.

women and children, with flechettes to the complicated circumstances surrounding combat operations. It claimed that shelling operations using flechettes targeted suspected Palestinian fighters who hid their weapons and disguised themselves with civilian clothes, but these individuals were discovered later to be innocent civilians.

Clearly Israeli occupying forces were disrespecting the principles of international humanitarian law. Credible evidence from damage caused by flechettes to innocent civilians showed that the flechettes themselves and the Israeli use thereof are indiscriminate. They targeted women and children without verifying their identity, or even determining if they were fighters or civilians.

In their use of flechettes, Israeli forces failed to respect the principles of military necessity and proportionality, and failed to verify the targeted places and the identities of targeted persons. These practices seemed designed to take revenge on Palestinians, killing, terrorising, and oppressing them intentionally. International humanitarian law prohibits this, and such practices and policies represent a grave breach of its provisions, which prohibit the parties of the conflict from wilful killing of protected persons, or inflicting great suffering or serious injury to physical safety.[87]

The respondents' stated reasons for not using flechettes in the West Bank reflect the reluctance of the Israeli occupying forces to ensure the necessary protection and respect for the life, safety, and dignity of Palestinians. An assessment of the respondents' statements make clear that they distinguished between the West Bank and the Gaza Strip in terms of geography and the boundaries of areas where military operations might take place. Where the borders were clear, as is the case in Gaza, Israeli authorities seem to believe that the use of flechettes is permissible. In contrast, where the border is less clear and the population concentrations thus overlap, as in the West Bank, Israeli forces did not use these shells.

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[87] Article 147, Fourth Geneva Convention. However, Articles 51 and 57 of the First Additional Protocol state the obligation to protect civilians from hazards and dangers resulting from military operations, and not make civilians vulnerable to indiscriminate attacks, such as those which do not target a specific military target. The Protocol also prohibits use of combat means and methods which do not distinguish between civilian and military targets, and obliges the parties of the conflict to exert continuous efforts during military operations to avoid injuries among civilians, and not to cause damage to civilian installations.

Al-Haq believes that the fundamental reason for this difference is that Israeli forces did not wish to risk causing harm to Israelis citizens, a risk which is much more likely in the West Bank because of their close proximity in illegal Israeli settlements or near the Green Line (the *de facto* border between Israel and the West Bank). However, areas targeted inside the Gaza Strip by these shells were more isolated from Israeli population areas, thus Israelis would be protected from any danger or injury resulting from flechette use. In short, Al-Haq believes that the fact that Israeli forces refrained from using flechettes in the West Bank indicates that they recognise that their use is dangerous and should be banned because of their indiscriminate nature.

The Israeli High Court of Justice's Position on the Use of Flechette Shells

The High Court ignored all claims submitted by the petitioners which were based on international humanitarian law and called for the protection of victims of armed conflicts. Although Israeli law includes rules that respect the life, safety, freedom, and dignity of individuals, the justices decided to reject the petition, because there was no international agreement prohibiting the use of flechettes.

Despite the facts presented regarding the number and seriousness of the injuries to Palestinian civilians, particularly women and children, and despite the dangers of using flechettes in the heavily-populated Gaza Strip, there was unanimity among the justices that using these shells was not unlawful. They claimed that maintaining the security of the Israeli forces and citizens justified using them in confrontation with Palestinian fighters.

The basic shortcoming of the decision issued by the Court is that it ignores the provisions of international humanitarian law which guarantee protection for all victims of armed disputes. The justices not only ignored the fundamental human rights to life and to live in dignity, they overlooked the claims mentioned by the petitioners, and did not address them or decide upon them. They limited the case to the fact that there was not international agreement prohibiting the use of flechettes.

The High Court did not want to interfere in the considerations of military commanders regarding the selection of the type of weapons to use in confrontation with Palestinians. The justices reasoned that military commanders have the knowledge and experience to estimate the circumstances which

require the use of a particular weapon, and to select the combat means and methods. In making this decision, the High Court ignored the information presented by the petitioners on the loss of Palestinian civilian lives, and the dangers resulting from the continuous use of this random weapon. Although the justices mentioned the dangers of these shells in terms of numbers of flechettes, the area of disbursement, and injuries it might inflict on civilians in an area like the Gaza Strip, they justified their use by Israeli forces.

The justices did not give any consideration to the provisions of international humanitarian law which restrict the right of the conflicting parties to select combat means and methods, and prohibit use of weapons, shells, material, and combat means which cause superfluous injury and unnecessary suffering. This law obliges the parties to a conflict to distinguish between civilians and fighters, and between civilian installations and military targets.

The justices' reluctance to consider this case in accordance with international humanitarian law prejudiced the integrity and credibility of this decision. International law is very clear in stipulating that civilians shall not be the object of attack, or subjected to acts of threats or violence whose primary purpose is to spread terror. Further, international law prohibits indiscriminate attacks, including attacks by bombardment by any methods or means which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects. International law also prohibits attacks which might cause loss of lives among civilians or damage to civilian installations.[88] The justices should have sought guidance first from these humanitarian provisions, which are compulsory, and which require the protection of Palestinian civilians from Israel's use of excessive force, including the launching of indiscriminate attacks with weapons such as flechettes.

By not condemning the use of flechette shells in Gaza and by justifying it, the High Court totally ignored the basic principles of international humanitarian law which should be respected by all parties to a conflict. Principles such as that of military necessity and proportionality should guide military forces involved in combat operations. The parties should always exert their efforts to avoid causing damage to civilians and civilian installations, as

[88] Article 51, First Additional Protocol.

well as do their best to verify that the targets which will be attacked are not civilian in nature but military targets. They shall take all possible precautions when selecting the means and methods of the attack to avoid inflicting loss or causing damage. They shall refrain from launching any attack that might indiscriminately cause loss or damage. Further, they shall cancel any attack if they find out that the target is not a military target.[89]

It appears that the High Court justices ignored the cases mentioned by the petitioners regarding the loss of life caused by the Israeli forces' use of flechettes against Palestinian civilians. This harm to civilians refutes all justifications of the occupying forces as to why they resorted to using flechette shells in the Gaza Strip. The judges accepted the claims and pledges of the respondents that instructions given to the Israeli military regarding the use of flechettes were very clear and strict, and that the army did not use this weapon routinely. Because the instructions ordered that damage to civilians be avoided, the justices allowed the continued use of the shells, despite evidence before them regarding the substantial damage caused by them.

The Targeting of Palestinian Medical Services Personnel by Israeli Occupying Forces

Israeli occupying forces have targeted Palestinian medical services personnel and ambulances since the beginning of the current *intifada.* Using excessive force to attack civilian Palestinian areas, Israeli soldiers also intentionally shot at medical personnel while they were aiding injured and sick people and transferring them to hospitals to receive necessary treatment.

In addition, these forces hindered the work of medical crews and Palestinian ambulances. They prevented them from performing their humanitarian duties by making them wait for long periods of time at check points or denying them the right to cross at all. This caused several deaths of sick people who were being transported by ambulances to hospitals for treatment. Further, Israeli forces targeted Palestinian hospitals, encircling them, inspecting all ambulances, and generally hindering the access of injured and sick persons to them.

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[89] *Ibid,* Article 57.

In addition, cars transporting to hospitals pregnant women about to deliver were delayed. This caused dozens of deliveries at checkpoints, and sometimes led to the death of newborn babies or their mothers. This often took place while Israeli forces stood at the checkpoints without showing any interest in what was happening before them.

The Legal Status of Medical Services Personnel in International Humanitarian Law

International humanitarian law guarantees immunity for medical facilities, medical transportation means, personnel and crews of medical services. It guarantees them immunity, provided that the medical crews and staff shall not engage in any aggressive actions. Medical services personnel, including physicians and nurses, are given this immunity due to their care for victims of armed conflict.[90]

The concept and scope of this protection has been expanded in the First Additional Protocol, which calls for rendering all possible assistance when necessary to all civilian medical services personnel who operate in an area where civilian medical services are suspended because of combat. It obliges the Occupying Power to provide all possible assistance to civilian medical services personnel in the occupied regions, to enable them to perform their humanitarian duties in the best possible manner, and to exercise their rights to go to any area that needs their services, provided that they adhere to monitoring and security procedures that the parties of the conflict deem necessary.[91]

Occupying Forces' Targeting of Medical Services Personnel and Palestinian Ambulances in Light of International Humanitarian Law

The respondents expressed their readiness to respect the provisions of international humanitarian law regarding providing protection to ambulances which transport injured and sick persons. However, they did not answer the petitioners' claims regarding Israeli forces' targeting of medical services personnel and ambulances, including shooting directly at them. The reply of the respondents was misleading, deceptive, and generalised. They continued to justify their practices towards medical services personnel and

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[90] Pictet, *International Humanitarian Law, op cit,* p. 72.

[91] Articles 15 and 16, First Additional Protocol.

ambulances because of the "complicated" situation in the battlefield, which they claimed did not help them investigate and verify facts and incidents when they occurred. They gave the impression that the combat activities were between two armies equal in number and weaponry. They accused Palestinians of violating the provisions of international humanitarian law by using ambulances to transport weapons and combat equipment, which obliged Israeli forces to stop, inspect, seize, and shoot at them, as well as hinder the personnel from performing their medical services.

The decision of the High Court was characterised by the same ambiguity and generalisations. The justices confirmed the obligation to respect the provisions of international humanitarian law, as stipulated in the Third and Fourth Geneva Conventions which guarantee necessary protection for medical supplies and crews, and which is compatible with the "Jewish" and "democratic" traditions of the State of Israel. However, the Court did not deal seriously with the petitioners' claims, which identified specific cases such as the occupying forces' shooting at medical vehicles and crews. The Court adopted the claims of the respondents, reasoning that the Palestinians were using ambulances to transport weapons, which was of course outside the scope of protection. (It should be noted that the Court took this position despite the fact that in several instances, ambulances were fired upon from a distance, although Israeli soldiers could not have known whether the medical vehicle in question was in fact carrying weapons.) The Court did not take into consideration the actual circumstances of military operations inside Palestinian towns and villages, and the weapons used by both parties. It is unquestionable that a huge asymmetry exists between the two parties in this conflict. Israeli forces are a regular army with state-of-the-art weapons, including fighter jets and high technology rifles, while a much smaller number of Palestinian resisters (only a few dozen in each town or refugee camp) are equipped only with, at most, automatic machine guns. With such an imbalance of power, it is surely always possible for the stronger force (Israel) to achieve its military objective without firing on medical personnel and ambulances. Further, international law provides for a means by which to handle situations involving injured fighters, as medical personnel may separate them from their weapons before providing them with treatment.

The justices confirmed the necessity of respecting the provisions of international humanitarian law, and expressed their confidence that the Israeli forces were keen to be committed to this, in accordance with the "Jewish" and "democratic" values of Israel. However, the justices only made general

comments to this regard, and did not delve into international law requirements, such as giving notice before halting protection for civil hospitals. They refrained from addressing the content of humanitarian provisions, which regulate the protection of civil hospitals, medical services personnel, as well as ambulance and first aid crews.

Article 17 of the Fourth Geneva Convention obliges the parties in the conflict to agree on local arrangements for transporting the injured, sick, disabled, and children from encircled and besieged areas, and arrange to facilitate the passage of medical services personnel and medical supplies to these areas. In accordance with Articles 18 and 19 of the Convention, the parties to the conflict shall respect and not attack civilian hospitals which provide treatment to injured, sick, women, children, and the elderly. In addition, protection to civilian hospitals shall not cease, unless they are used for non-humanitarian purposes, such as performing activities that harm the enemy. In such instances, the protection shall cease only after giving prior notice to these hospitals with a reasonable period of time in which to stop practicing such acts to guarantee the continuation of medical services to sick and injured person. Protection shall only be lifted in cases where the hospital does not respond to the warning and continues works against the enemy.[92] Article 20 of the Convention also requires respect and protection for personnel who regularly work in the operation and management of civilian hospitals, including persons assigned to care for the injured, sick, women, and elderly, as well as transporting and treating them.

Similarly, the First Additional Protocol includes several provisions which call for protecting medical units.[93] Article 12 calls for the protection of

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[92] ICRC, *Commentary, op cit,* pp. 54 - 156.

[93] Article 8 of the First Additional Protocol states that medical units include installations and other military and civil units which are organised for medical purposes such as searches for the injured, sick, and persons in natural disasters, transporting, evacuating, diagnosing and treating their cases, including first aid, medical transport means, medical vehicles, medical ships and boats, and medical planes, etc.
In accordance with Article 13 of the First Additional Protocol, the following works are not considered harmful to the enemy:

(a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
(b) that the unit is guarded by a picket or by sentries or by an escort;
(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
(d) that members of the armed forces or other combatants are in the unit for medical reasons.

medical units, and states that they shall not become a target for offensive operations, unless they are used outside their humanitarian mission and in hurting the enemy. However, this protection shall cease only after giving notice with a reasonable period of time to cease the non-humanitarian activities, and if this notice is not acted upon.

Article 19 of the Fourth Geneva Convention does not prohibit providing treatment to military wounded and sick persons. The second paragraph of this article states:

> The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Civilian hospitals may provide medical treatment to military personnel who keep their light weapons and ammunition, provided that the administration of the hospital takes them, and keeps them until they are handed over to appropriate authorities. The army shall not lift protection from these hospitals because of the presence of weapons, and shall not consider this a hostile action. The administration of the hospital must periodically hand over weapons to concerned agencies.[94]

The High Court of Justice ignored all the notice provisions in international law and the weapons exception when treating fighters, and instead accepted the respondents' weak rationale for firing on medical personnel and places.

Detention Conditions in Ofer Camp: Torturing Palestinian Prisoners and Prohibiting Them from Meeting Their Lawyers

Israeli forces committed grave violations of international law when they arrested thousands of Palestinians in a collective manner; concentrated them in detention camps unsuited to detain them; tortured and subjected them to cruel, insulting, and inhumane treatment; and prohibited them from meeting their attorneys for more than 18 days. These practices violated the provisions of Article 147 of the Fourth Geneva Convention, which considers the following to be illegitimate: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or

[94] *Ibid.*

serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. These unlawful acts come under the scope of grave breaches of the Fourth Geneva Convention.[95]

The position of the High Court justices was identical to that of the Israeli authorities when they justified the practices against Palestinian prisoners as necessary in fighting "Palestinian terrorism." The Court should have discussed the essence of the case and the method of collectively arresting Palestinians, gathering them in a military garrison which was not originally equipped to detain prisoners, and depriving them of their basic rights. The Court would then have found that these practices were collective punishment, which is prohibited by international humanitarian law. In particular, Article 33 of the Fourth Geneva Convention forbids punishing any protected person for a violation that he or she did not personally commit, as well as prohibiting collective punishment and all types of intimidation or terrorism.

The Court did not deal in a serious and responsible manner with the circumstances of arresting thousands of Palestinians inside this camp, or with the practices of the Israeli occupying forces against them while they were in detention. Article 37 of the Fourth Geneva Convention states that Protected Persons who are in provisional imprisonment or enduring a penalty that deprives them of their freedom, shall be humanely treated during the period of their imprisonment. In addition, Article 80 guarantees that civilians shall retain their civil capacity and exercise the rights associated with that as much as the imprisonment case allows. Further, these practices constitute a violation of the rules that deal with the treatment of internees, as outlined in Section IV of the Fourth Geneva Convention, regarding the obligation of the conflicting parties to place Protected Persons from the beginning of their detention in places which meet all health conditions and safety guarantees, and provide effective protection from bad weather, as well as provide care, medical tests, sufficient food and clothes for the prisoners.

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[95] To understand the extent of brutality and seriousness of the Israeli occupying forces' practices against thousands of arrested Palestinian during that period, see Al-Haq, *Screaming in the Dark: Life in Israeli Detention* (Ramallah: Al-Haq, 2001).

The High Court justices unanimously rejected the claim because it was very general, and did not contain specific and individual cases related to specific persons. However, the petition did not appeal the detention cases themselves; the fundamental demand of the petitioners was limited to obliging the military commander of the area to allow detained persons to meet their lawyers.

The justices took the view that it was unreasonable in the middle of a military operation to ask the commander to allow suspected and dangerous persons, or persons who constituted a danger to the security of the area, the army, or the public, to meet with their lawyers, as long as the identity of each detained person had not been verified. Therefore, there was nothing that compelled the High Court to issue a temporary injunction in this case.

It seems that the High Court justices intentionally ignored the essential fact that the arrests were done collectively and without discrimination. It was not just wanted or suspected people who were arrested, but virtually every male in each home. The sweep involved thousands of people who were then isolated from the outside world after their arrest. They were deprived of the right to meet their lawyers. Petitioners could not plead individual cases because there was not enough information about any one individual to do so. This forced the petitioners to address the case from the perspective of the authorities depriving the arrested individuals of the opportunity to meet with their lawyers who came to visit and defend them. This issue dealt with thousands of civilian Palestinians who were arrested and gathered in the openness inside a military garrison not designed for detention. Further, the detainees were badly treated and prevented from meeting their lawyers for 18 days. This constituted a violation of the basic human right of detainees to have and consult with a lawyer. This right is guaranteed by numerous international human rights standards, and in international humanitarian law by Article 72 of the Fourth Geneva Convention, which guarantees the right of any suspect to obtain the assistance of a qualified lawyer of his choice, and to be visited by the lawyer freely.

As always, the Israeli High Court of Justice accepted the request of the respondent to reject the case. It affirmed the necessity of considering the cases of Palestinian detainees once the circumstances allowed this. At that future time, the military commander of the area was to give a reasonable cause for forbidding the detained persons from meeting their lawyers. The

justices could find no reason to interfere with the jurisdiction of the military commander by cancelling his order prohibiting legal representation. The High Court justices rejected the case, ignoring the obligation to treat arrested persons in accordance with the guarantees under international humanitarian law.[96]

The Siege of the Church of the Nativity in Bethlehem by Israeli Occupying Forces

The Israeli High Court considered the siege of the Church of the Nativity by the occupying forces a "legitimate" action, in accordance with Israel's right to self-defence. The justices justified this siege by saying that Israel was in a very difficult war, which required it to exercise its "right to self-defence," in accordance with Article 51 of the Charter of the United Nations. However, this "war" did not happen in a legal vacuum. The provisions of international law on the use of force and conduct during armed conflict regulate it.

Logic and Precedents Used By the Israeli High Court of Justice

The High Court justices did not accept the maxim that "when the cannons roar, the muses are silent," or that laws are silent during war. They cited HCJ 91/168, *Marcus v. The Minister of Defence,* PD 45(1)467, which noted,

> But even when the cannons roar, the Military Commander must uphold the law. The strength of society to withstand its enemies is based on its recognition that it is fighting for values worthy of defence. The rule of law is one of those values.

The justices quoted HCJ 3114/02, *Barakah v. the Minister of Defence,* for which a decision was issued during "Operation Defensive Shield," the Israeli military attack on areas under the jurisdiction of the PNA. The decision stated that,

> Even in a time of combat activity, the law applying to combat activity must be upheld. Even in a time of combat activity, all must be done in order to protect the civilian population.

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[96] See Chapter Four, Fourth Geneva Convention, and Article 75, First Additional Protocol.

The justices enthusiastically devoted much space in their decision to the values of Israel as a "Jewish and democratic" state, and to the objectives for which this state was established. They reiterated that Israeli actions were not taken because of pragmatic considerations, but reflected political and legal values. The justification for war was deeper, because it lay in the difference between a democratic state, which fights to survive, and "terrorists" who confront and fight it in a manner that is contrary to law. Accordingly, the fight against terrorism is the war of law against outlaws. In addition, the High Court noted that Israel was a state with Jewish and democratic values and was always keen to implement law in order to accomplish its national objectives as well as the aspirations of generations. Israel implemented laws that recognised and respected human rights in general and the dignity of individuals in particular.

United Nations Charter and the Legitimate Right of States to Self-Defence

The High Court interpreted the Israeli forces' practices against Palestinians during the current *intifada,* including the siege of the Church of the Nativity, as in accordance with Article 51 of the UN Charter, which gives states the right to self-defence in confronting an armed attack. This reasoning involved a great deal of deceptive and misleading information.[97] It ignored the fact that Israel is an Occupying Power, and that it has controlled the OPT since 1967 through aggression and the use of force. Thus, Israel is violating the very UN Charter which the Court used to justify its actions. Indeed, Israel is violating the basis on which modern international law is established.[98]

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[97] Article 51 of the UN Charter states,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[98] In accordance with Article 2(4) of the UN Charter,

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

As an Occupying Power, Israel must respect the provisions of international humanitarian and human rights law, guaranteeing their implementation, and providing protection for Palestinian civilians in the OPT.

Under these circumstances, Israel does not have the right to self-defence in accordance with the provisions of Article 51. It must meet its obligations as stipulated in international humanitarian law, which gives it the right to establish and maintain security and public order, including the protection of its citizens and forces from enemy attacks.[99] The right to self-defence, as guaranteed by Article 51 of the Charter, allows countries individually and collectively to defend themselves in case an armed force launches an armed attack against a member in the United Nations, until the Security Council makes the necessary arrangements to maintain international peace and security.

The inherent right to self-defence as stipulated in Article 51 does not repeal the provisions of Article 2(4) of the Charter, which prohibit members of the United Nations from the threat or use of force against the territorial integrity or political independence of any state. Further, the use of force for self-defence is conditioned on the other party illegitimately using force.[100]

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[99] Article 43, Hague Regulations.

[100] Hans Kelsen, "Collective Security and Collective Self Defence under the Charter of the UN," *American Journal of International Law,* 1948 pp. 483 - 484; and Hans Kelsen, *The Law of the UN* (London: 1951) pp. 791 - 792. Further, in accordance with Article 1 of the GA Resolution 3314 (XXIX), aggression is defined in Article 1 as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Article 7 of the same resolution states that,

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

The High Court of Justice's Position on the Siege of the Church of the Nativity

While addressing the situation prevailing inside the Church and its vicinity from a legal point of view, the High Court justices commended the Israeli authorities for its stated desire to "respect" and "implement" the humanitarian rules of international law. The justices considered that the measures taken by the Israeli forces against the persons besieged inside the Church did not violate the rules of international law, because the army refrained from using force and breaking into the Church. It gave Palestinian militants the opportunity to leave the place whenever they wanted, and guaranteed not to touch them if they left in a peaceful manner and without using weapons.

The justices believed that that Israel was "keen" to respect the provisions of international humanitarian law in dealing with the besieged Palestinian civilians and armed persons inside the Church. They indicated that Israeli forces were concerned for the unarmed Palestinian civilians trapped inside, but not those who were "wanted," PNA members, or "terrorists."

In deciding how to protect the rights of these civilians, the High Court noted that Israel was allowing civilians to leave the Church, in fact encouraging them to leave, and guaranteeing that they would not be hurt. With respect to providing basic needs inside the Church such as food and water, the High Court adopted the claim of the Israeli occupying forces that food inside the Church was sufficient, and that there was no guarantee that any food allowed in would not reach the militants. They noted that the Israeli forces had allowed civilians such as the priests to leave the Church and obtain necessary food and then return to the Church.

Ultimately, the High Court rejected the petition on the basis that there was a well of water and some food - perhaps insufficient - inside the Church. The justices cited the seriousness with which Israel tried to secure food for the civilians, an effort which persuaded the High Court that Israel had fulfilled its obligations under international humanitarian law, particularly Article 23 of the Fourth Geneva Convention. The justices expressed their hope that the tragedy of the Church of the Nativity would come to an end as soon as possible, because it was very difficult to imagine that such a sacred place was being controlled by Palestinian "militants" who were defiling its holiness and holding civilians as hostages. The High Court mentioned that negotiations continued among parties to find a solution to this situation. It

reiterated that it did not want to interfere in the management of military operations, because that was the business of the Executive Branch and its representatives.

International Humanitarian Law and the Siege of the Church of the Nativity

Israeli occupying forces claimed that among the hundreds of Palestinians who took refuge in the Church of the Nativity were a number of fighters and "wanted" individuals. It is submitted that the purpose of the siege was to pressure these individuals to leave the Church through preventing sufficient supplies of food, water, and medicine to reach the besieged inside. Most of those inside were civilians, priests, religious men, some members of the PNA, and a number of injured and sick persons.

These practices contradict the principles of international humanitarian law. The Fourth Geneva Convention obliges the parties in the conflict to agree on local arrangements to transport injured, sick, elderly, and children from besieged or encircled areas, and allow the passage of all religious men, medical services personnel and medics to these areas. High Contracting Parties to the Convention must allow free passage of all medicine, medical supplies, and objects necessary for religious worship to the civilian population of another High Contracting Party and must freely allow the passage of necessary food, clothes, and protectors of children less than 15 years old, as well as pregnant women. This obligation is subject to the provision that the High Contracting Party is satisfied that there are no serious reasons for fearing that the consignments will be diverted from their destination, or that the enemy shall achieve a clear benefit to his military efforts or economy.[101]

The petitioners asked to provide the besieged inside the Church of the Nativity with food, water and medicine. The ICRC or other humanitarian organisations licensed to operate in this field, offered to take effective control of this operation so that the supplies would not be diverted from their original destinations, and so that the militants inside the Church would not gain a clear benefit to their combat capabilities. The case was heavily based on allowing the passage of additional quantities of humanitarian supplies to the largely civilian people besieged inside the Church. The purpose was to mitigate the suffering they were undergoing as a result of the siege and the shortage of water, food, and medicine. The quality and quantity of required

[101] Articles 17 and 23, Fourth Geneva Convention.

supplies did not contribute in this case to reinforcing the combat capabilities of the besieged militants inside the Church, who were mostly PNA personnel. In addition, such meagre supplies would obviously not strengthen the Palestinian economy.

Unlike in the previous decisions, one justice submitted a consenting opinion, expressing his support for the decision and the interpretations incorporated in it. In this opinion, Justice Englard questioned who was guilty for the entry of militants into the Church, who was supposed to protect the Church, and who was obligated to uphold the international legal provision to protect holy and scientific places from military operations and prohibit using them for military purposes, as mentioned in the First and Second Additional Protocol of the Geneva Conventions. Judge Englard asked if this lay within the responsibilities and duties of the PNA, who took the responsibility to perform these missions? Did the PNA take any measures to forbid this defiling? Did it try to take the people out of this place? He concluded that everyone deserved to have answers to these questions.

It seems that Justice Englard was not aware of the situation prevailing in all Palestinian towns, including Bethlehem and the Church of the Nativity and its perimeter when swept by Israeli forces during "Operation Defensive Shield." Or he might have intentionally ignored the duties of the Israeli occupying forces under international humanitarian law. After the incursion into Palestinian towns, accompanied by excessive use of military force in killing, destruction, and unjustified collective punishment, Israeli forces extended their absolute control over all these areas and undermined the PNA. They announced the termination of the PNA, which became incapable of exercising its duties. Some PNA officials even took refuge inside the Church, in order to seek protection from Israeli troops which tried to kill them. It remains unclear how the PNA could have been able to control the events in the Church of the Nativity or its perimeter.

Use of Palestinians as Human Shields and Hostages by Israeli Occupying Forces

As of this writing, over two years have passed since the submission of the petition related to Israeli occupying forces using Palestinians as human shields. The Israeli High Court of Justice has yet to rule on this matter. Palestinians continue to witness this practice which violates customary international humanitarian law.

Use of Civilians As Human Shields in International Humanitarian Law

International humanitarian law prohibits the use of civilians as human shields or hostages. It obliges the parties of the conflict to respect Protected Persons and to deal with them in a humane way at all times. Further, these provisions prohibit exercising any kind of physical or psychological duress against them. Protected persons shall not be exploited or forced to remain or exist in areas where military operations take place.[102]

The Fourth Geneva Convention prohibits High Contracting Parties from taking measures which might cause physical suffering or death to persons under its jurisdiction; it also prohibits taking them as hostages.[103] Further, an Occupying Power shall not force protected persons to serve in its armed forces or to help them. It also prohibits any pressure or propaganda intended to secure their voluntary enlistment in its forces.[104]

The principle of protecting civilians, and not putting them in places where they might be vulnerable to military attack is enshrined in the First Additional Protocol. The Protocol prohibits all attacks against civilians, whether for deterrence or other reasons. It also stipulates that civilians should not be used to protect certain areas, to attack military targets, or to hinder military operations. The parties of the conflict shall not restrict, control, or direct the movement of civilians to avoid attacks on military targets or to cover military operations.[105] One of the oldest humanitarian legal standards, the Hague Regulations, includes provisions which prohibit the forcing of the occupied population to swear allegiance to the Occupying Power, or collectively penalising residents, financially or otherwise, for actions committed by individuals. The Hague Regulations also call on the occupier to respect the occupied populations' rights to family and life.[106]

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[102] *Ibid,* Articles 27, 28, and 29. The world was shocked by the practices of warring parties during World War II, during which civilians were obliged to stay in strategic locations (e.g., railway stations, energy generation plants, and factories), or to accompany military units so that they were used as human shields to protect them from the enemy. See ICRC, *Commentary, op cit,* p. 208.

[103] Articles 31, 32, and 34, Fourth Geneva Convention.

[104] *Ibid,* Article 51.

[105] Articles 51(6), 57, and 58, First Additional Protocol.

[106] Articles 45, 46, and 50, Hague Regulations.

Israeli Occupying Forces' Use of Palestinian Civilians As Human Shields and Hostages

The Israeli forces' use of Palestinian residents as human shields during military operations, and holding them as hostages in order to be protected from attacks by Palestinian resistance, are such grave breaches of international humanitarian law that they are not merely war crimes, but may fall within the definition and scope of crimes against humanity.[107]

Despite the commitment made by the respondents to the High Court to stop implementing this policy, the use of civilians as human shields and hostages continued. The respondents tried to avoid making a commitment to stop by playing with legal discourse. They denied using civilians as human shields or hostages when they broke into houses. Instead they termed this a type of getting "assistance" from local residents. They argued that this is "allowed" by international humanitarian law because it allegedly aims at alerting residents and giving them prior notice about the occurrence of combat operations in order to protect them and avoid injuries among them.

However, this pretext is not supported in international law, particularly not in conventions of a humanitarian nature. These instruments unequivocally

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[107] The Rome Statute, signed in Rome on 17 July 1998, states in Article 7(1) that,

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 8 of the Statute, which provides a definition of "war crimes," contains in the definition the commission of grave breaches of the Geneva Conventions, including the taking of hostages. See also, Cherif Bassiouni (ed.), The Customary Framework of International Humanitarian Law "Overlap, Gaps, and Ambiguity," in *International Humanitarian Law and Weapons Control,* (1999), pp. 65 - 200.

repeat that the Occupying Power shall deal with protected persons who are under its actual authority in a humane manner. They shall not be forced to protect or help the Occupying Power to carry out military operations.

The respondents argued that the practice of obtaining "Palestinian assistance" had the high-level approval of the Attorney General, because it was "compatible" with international law and with Israeli law, as it aimed to protect Palestinians and help them avoid loss and sufferings. However, this opinion is unsupported by international humanitarian law, which specifically obliges the Occupying Power to send an effective advanced warning in case of attacks which might affect civilians.[108] The Occupying Power shall perform this mission through its own efforts without using residents of the occupied region, or getting their assistance in a manner which threatens their lives and physical safety.

Respondents' "willing assistance" justification for using Palestinian residents as human shields and hostages amounts to playing with concepts and terminology. This justification is without merit. The claim that Palestinian assistants "consented" during "Operation Defensive Shield" is highly doubtful. Further, international humanitarian law does not permit such practices even with the consent of the person. It prohibits compelling Protected Persons to undertake any work which would involve them in the obligation of taking part in military operations. Lastly, there is an absolute prohibition under international law on the use of civilians or exploiting them during military operations.

Demolition of Palestinians Houses Without Prior Notice

House demolitions are among the most widespread collective punishment adopted by the Israeli occupying forces against civilians in the OPT. The policy has been distinguished by slight alterations that have occurred over time, and the occupying forces' obvious desire to continuously implement it in order to deter and terrorise Palestinians.

At first, Israeli forces resorted to demolishing the homes of those accused of violent crimes. However, during the first Palestinian *intifada,* the scope expanded to encompass persons accused of less dangerous violations. These practices reached their peak during the current *intifada,* when the occupation forces drastically began using large-scale demolitions without giving

108 Article 57(2)(c), First Additional Protocol.

prior notice to the inhabitants. This resulted in the deaths of whole families under the debris of buildings because they did not know to leave before the Israeli bulldozers demolished their homes.[109]

The House Demolition Policy

Israeli occupying forces demolish or seal Palestinian houses in accordance with Article 119(1) of the 1945 British Defence (Emergency) Regulations, which state that any military commander may issue an order to confiscate any house, building or land, if he suspects that a bullet was fired from it in an illegal manner, or that a bomb, shell, explosive, or incinerating material was thrown from it in an illegal manner. He may also confiscate any house, building, or land located in an area, city, village, or a street, if he is convinced that some or all of its citizens committed a crime or attempted to commit a crime involving violence or terrorism. Confiscation may be utilised if a person conducted or attempted to conduct any crime which qualifies for a trial before a martial court, of if the person assisted, helped those who committed the crime, or was a partner after its occurrence. If such house, building, or land has been confiscated for the above reasons, the military commander may demolish the house or the building, or destroy any project cultivated or growing in the land.[110]

Since its occupation of the OPT, Israeli forces have demolished or sealed thousands of Palestinian homes in order to repress their actual or supposed opposition to occupation policies. The policy of punitive house demolition and sealing is a serious violation of international human rights law because

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[109] See Al-Haq Affidavit No. 739/2002 regarding the killing of eight members of the al-Shu'eibi family inside their home in the old city of Nablus, most of whom were women and children. Heavy bulldozers belonging to the Israeli occupying forces demolished the house, without enabling members of the al-Shu'eibi family to leave. This resulted in the death of eight members of the family: Nabila (mother, 40); Anas (4); 'Azzam (6); 'Abdo (8); Fatima (56); 'Abir (37); Samir (46); and 'Umar (85). The bodies of Nabila and her son Anas were found together as Nabila had him on her lap.

[110] Great Britain enacted the Emergency (Defence) Regulations for the first time in 1937 during its mandate of Palestine. The purpose was to repress the Palestinian revolution against its rule. The British Government cancelled these regulations prior to its withdrawal from Palestine in 1948. However, Israel still considers these regulations to be applicable, on the false ground that they were part of the applicable laws when the State of Israel was established. When Israel occupied the OPT in 1967, it put the Emergency Regulations back into enforcement. See Al-Haq, *Israeli Demolitions, op cit,* p. 6.

it represents a pattern of collective punishment applied by the Occupying Power against the civilian population of the OPT. Demolitions and sealings are considered to be war crimes, and represent a violation against property rights, and illegitimate penalties against third parties.[111]

Despite the fact that house demolition is a collective punishment, the Israeli High Court of Justice continues to uphold the legality of the policy. The High Court admits the validity of the provisions of Article 119(1) of the Defence (Emergency) Regulations but ignores the Article's provisions which state that it shall not be implemented before convicting the person accused of conducting security violations, or proving that the house to be demolished has been used by the person who committed the violation. Accordingly, the High Court allows the demolition of Palestinian homes even if the person connected with the house was merely suspected of crimes, or if the house was only suspected of being used in the commission of a violation.[112]

The High Court treats the Defence (Emergency) Regulations as part of Israeli law, on the basis that they were valid and implemented when the State of Israel was proclaimed in 1948. Immediately after the occupation of the Palestinian territories in 1967, Israel started to implement the Emergency Regulations in an unlawful manner in the OPT. It should be noted that the British Mandate Authorities cancelled these regulations after its withdrawal from Palestine in 1947.[113]

Position of the High Court of Justice Towards the Demolition Policy

In considering Palestinian claims regarding the demolition of their homes by Israeli occupying forces, the Israeli High Court fell into a pattern compatible with the policies of the military authorities. The opinion of the jus-

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[111] For more information on this matter, see *Ibid,* pp. 6 - 16; and Al-Haq, *Israel's Punitive House Demolition Policy, op cit,* pp. 37 - 55.

[112] Kretzmer, *op cit,* pp. 153 - 155.

[113] In light of the cancellation of the Emergency Regulations by the British Mandate Authorities before its withdrawal from Palestine, and their non-implementation in the West Bank and Gaza Strip between the years 1948 and 1967, the Israeli implementation of these Regulations is illegitimate, because it has in this way implemented new laws which contradict its obligations as an occupying force. According to international law, an Occupying Power must continue the implementation of valid and applicable rules in the occupied region. For more information, see Al-Haq, *Israeli Demolitions, op cit.*

tices considered the demolition of houses a "legitimate" measure because it is in line with Article 119(1) of the Defence (Emergency) Regulations.[114]

The amount of damage inflicted on innocent family members due to the demolition of a house is enormous. It leaves the family of an accused person without shelter, often living in a flimsy tent. Despite knowing that this is the result of the policy in almost every instance, the High Court justices refuse to admit the illegality of this policy, which is clearly a form of collective punishment prohibited by international law.

In regards to the claim that punitive house demolition constitutes a form of collective punishment, the justices stated that acceptance of this claim would severely limit the demolition operations. Israeli forces would only be able to demolish houses inhabited by single occupants accused of a crime. The justices rejected this and stated that the purpose of the current policy was to deter criminals by showing them that great damage would be inflicted on their families as a result of the action they might commit. The High Court reasoned that Israel's house demolition policy would force people to refrain from committing such violations.[115]

House Demolition in Modern International Law

Israel's house demolitions policy in the OPT is unlawful because it violates international humanitarian and human rights law. These actions, which often predate any trial, violate the accused's right to property and due process in criminal proceedings. Moreover, house demolition affects more than just the accused's basic rights, it also violates the rights of the homeowner and all inhabitants of these houses. House demolition causes unjustified damage and pain to the family members of the accused. Clearly, Israel's policy of house demolition should be considered a collective penalty.[116]

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[114] For more information, see Al-Haq, *Israel's Punitive House Demolition Policy, op cit,* p. 37; and *Kretzmer, op cit,* pp. 145 - 148.

[115] For more information, see Al-Haq, *ibid,* p. 38 and Kretzmer, *ibid,* pp. 149 - 150.

[116] For more information, see Al-Haq, *Israeli Demolitions, op cit,* p. 15.

House Demolition as a Grave Breach of the Fourth Geneva Convention

House demolition violates the provisions of international humanitarian law, particularly the Fourth Geneva Convention,[117] under which house demolition (as a form of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly) is deemed a grave breach. There is no need during occupation for such measures.[118] In addition, house demolitions violate an individual's right to be tried before an independent, fair and impartial court which provides the accused the opportunity to submit his statement, summon witnesses, and defend himself.[119]

Because of the serious consequences resulting from grave breaches, High Contracting Parties to the Fourth Geneva Convention must undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, such breaches. All High Contracting Parties must search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring them, regardless of their nationality, before its own courts.[120]

In accordance with Article 146 of the Fourth Geneva Convention, the act of house demolition is deemed to be an international crime. This article requires all High Contracting Parties to invoke mandatory universal jurisdiction to ensure that those responsible for such breaches are brought to justice - in short, they must try all those who planned, executed, participated in, or ordered houses demolished.

House Demolition as a War Crime under the Rome Statute

In accordance with the provisions of international criminal law, large-scale house demolition is considered a war crime.[121] Article 8(2)(a)(iv) of the

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[117] House demolitions also violate the Hague Regulations, in particular Articles 46 and 50, which call for the respect of family honour and rights, the life of persons and private property; prohibit the confiscation of private property; and prohibit all types of collective penalties against the population for actions committed by individuals.

[118] For more information, see Al-Haq, *A Thousand and One Homes: Israel's Demolition and Sealing of Houses in the Occupied Palestinian Territories* (Ramallah: Al-Haq, 1993) p. 45.

[119] Articles 146 and 147, Fourth Geneva Convention.

[120] *Ibid,* Article 146. For more information, see Al-Haq, *Israeli Demolitions, op cit,* p. 17.

[121] The Rome Statute defines "war crimes" as, *inter alia,* grave violations of the Geneva Conventions.

Rome Statute states that extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly is a violation of international criminal law.[122] The punitive house demolition policy has all the elements of the war crime of destruction and appropriation of property, as defined by the International Criminal Court, notably:

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[123]

[122] The current *intifada* (Al-Aqsa *intifada*) is accompanied by a series of practices which constitute grave violations of international humanitarian law, and lie within the scope of war crimes. These practices include house demolition on a large scale, for no military necessity, and which are often conducted without giving prior notice to the inhabitants.

[123] Elements of Crimes for the International Criminal Court.

EPILOGUE AND CONCLUSIONS

The cases discussed here prove that the policy adopted by the Israeli High Court of Justice is one of hands-off respect for the Israeli occupying forces and disrespect for the individual and collective rights of Palestinians living in the OPT. The High Court does not recognise the validity of international humanitarian or human rights laws in the OPT.

Palestinian resort to the High Court for the last three decades has not persuaded the Court to stop Israeli violations of basic rights and freedoms, or order Israeli forces to refrain from practicing collective punishment, deportation, houses demolition, seizure of Palestinian land to erect settlements, and administrative arrests.

Several Palestinian and Israeli human rights organisations submitted dozens of petitions to the Israeli High Court of Justice in order to prohibit these actions which violate international humanitarian law. These violations include:

- Attacks against civilians, shelling of residential areas and population concentrations, and inflicting serious losses and damages to Palestinian civilians and their property;
- Open-fire regulations which permit the deliberate and intentional killing by Israeli forces, when their own lives are not in danger, of Palestinian civilians, including children, the elderly, and women;
- Military attacks by Israeli occupying forces on Palestinian towns, villages, and refugee camps, encircling them for long periods of time; hindering the arrival of humanitarian assistance, and preventing crews of medical services, ambulances, and relief organisations from performing their humanitarian duties;
- Continuation of assassination operations and killing Palestinian activists without a trial;
- Collective punishment against Palestinians such as siege; restriction of travel; curfews; house demolition; and deportation of Palestinians from the West Bank to the Gaza Strip simply because of their blood relationship to an accused or activist; and
- Use of Palestinian civilians as human shields and hostages.

This study has focused on the fact that the Israeli High Court of Justice

adopted its usual approach to Palestinian requests that violations cease. The High Court refused to consider these cases in light of international humanitarian or human rights law. Instead, it dealt with these legal provisions in a selective and nominal manner. The High Court rejected Palestinian claims using two standard justifications. First, the Court stated that international law was not applicable to the OPT, even though it did not hesitate to use parts of international law to justify Israeli actions. Second, the High Court believed that it was necessary to refrain from interfering when military commanders decided on combat operations and weapons to use in their occupation of the Palestinian people. The Court's refusal to deal fairly and legally with Palestinian human rights raises doubts about the benefit of submitting such claims and cases to this body.

In light of the cases considered above, Al-Haq has come to the following conclusions:

1. Resort to the Israeli High Court of Justice by Palestinian and Israeli human rights organisations as a means to respect, protect, and fulfil Palestinian basic rights and freedoms became routine during the current *intifada*, but has clearly failed. The High Court rejected all such petitions submitted to it.
2. The High Court continued its policy of refusing to consider Palestinian cases in accordance with international humanitarian and human rights law. It adopted the claims of the Israeli government, and ruled on the petitions accordingly, in order to find "legal" justifications for the war crimes committed by Israeli occupying forces.
3. The High Court justified the practices of the Israeli occupation government and its forces by saying that they conform to the provisions of international human rights and humanitarian law, even though these practices actually violate Palestinian human rights. In fact, most of these practices fall with the scope and definition of war crimes and some are considered to be crimes against humanity.
4. Not only did the High Court refuse to consider Palestinian cases in accordance with international law, its statements contradicted international law in the majority of its decisions and insisted that the OPT were "part of the land of Israel," and that the nature of Israel was both "Jewish and democratic." These statements make the Court seem far from independent and impartial, weaken the legal foundation of its

decisions, and undermine its credibility.

5. The High Court justified Israeli violence and human rights violations by insisting on the need to fight Palestinian "terrorism." In excusing Israel's actions, it ignored several matters, such as the fact that Israel is an Occupying Power, and that the Palestinians are victims of this occupation, its repression, and unlawful practices.
6. In justifying the Israeli practices against the occupied population, both the Israeli government and the High Court of Justice mistakenly depicted the conflict as a symmetrical one between two equal armies, Israeli and Palestinian. On the contrary, the conflict is actually hugely asymmetrical and unbalanced in favour of Israel.

Finally, the experience of Palestinians with the Israeli High Court of Justice and the policies followed by the Court so far, require those working in human rights to seriously consider whether to resort to this body. The decision to appeal to the High Court can be an additional step after exhausting all means and alternatives. Lawyers and legal experts who take into consideration the patterns and methods of the High Court in reviewing Israeli practices, and providing "legal" cover for them, should discuss the advantages and disadvantages of appealing. They should take into consideration the apparent adoption by the High Court of a policy which refuses petitioners' claims, and consistently accepts the claims of the State of Israel. Thus far, High Court decisions have merely become strong "legal" precedents legitimising the illegal practices of the Occupying Power.