



ISRAEL AND THE ADMINISTERED TERRITORIES¹

Introduction

The Attacks on Justice 2002 Report covered a wide variety of legal issues in Israel. Regrettably the proposed Report reflects unacceptable imbalance and one-sidedness against Israel, its institutions and alleged policies. There was no attempt to understand the actions that the Government of Israel has taken in the face of unrelenting terror attacks. Similarly, the Report did not raise the issue of incitement of the Palestinian Authority against Israel, which is supported by a plethora of evidence and is a crime under international law. In order to balance the Report, these issues should be addressed.

In addition, we believe that the Report should be based on facts and not contain political overtones. Therefore we read the Report thoroughly and related to all the points and legal developments as of January 2005, in a professional, impartial and legal analytical manner, and we insist that the updated report will include all of our comments.

Page 205, Paragraph 1 (“The basic laws....humanitarian law.”)

The basic laws of Israel guarantee the independence of the judiciary, which is **highly** respected by legislative and executive powers. The September 1999 landmark judgment of the High Court barring the use of torture and the April 2000 ruling prohibiting the holding of detainees as

¹ A copy of the Attacks on Justice 2002 Report which was given to the International Association of Jewish Lawyers and Jurists is annexed hereto as Exhibit A (hereinafter Report). We have marked each paragraph of the Report starting from Number 1, consecutively. In addition for systemic purposes, we also note for each paragraph the two initial and last words of the paragraph in the Report. In our Comments we have marked all corrections or updates in bold lettering.

We refer to the "Occupied Territories" as "Administered Territories". See *infra*, page 9.

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September 2000 through September 26, 2004, 1,017 Israelis have been murdered by Palestinian terrorists, and over 6,000 Israelis have been injured.³ Over the past four years, the Israeli Security Agency (hereinafter ISA) documented 138 suicide bombing attacks, 13,730 shooting attacks and 313 Kassam rocket attacks during which 460 rockets were fired. According to a study of the Interdisciplinary Center of Herzilya, between September 27, 2000 through May 1, 2004, 985 Palestinians and 715 Israeli non-combatants were killed by the other side.⁴ There is no doubt that terrorist attacks and the ensuing response has led to civilian casualties on both sides.

Israel has adopted a policy of unilateral disengagement from Gaza. This policy has raised the difficult dilemma of how to withdraw from Gaza without empowering the terrorists. It has also led to the problem of how to evacuate over seven thousand Israelis from their homes without tearing apart Israeli society. The government is also analyzing how to withdraw from Gaza without causing unnecessary hardship to the Palestinian population.

HUMAN RIGHTS AND HUMANITARIAN LAW ISSUES

Page 205, Paragraph 4 (“By October...and destruction”)

Israel, the only democracy in the region, has struggled with the question of how to fight terrorism without harming civilians. This balance of fighting terror while protecting civilians is complicated by the fact that terrorists continually violate international law by failing to distinguish themselves from civilians and by acting from within civilian population centers.

³ *Which Came First- Terrorism or Occupation – Major Arab Terrorist Attacks against Israelis Prior to the 1967 Six-Day War* March 31, 2002, <http://www.mfa.gov.il/MFA/Terrorism-Obstacle+to+Peace/Palestinian+terror+before+2000/Which%20Came%20First-%20Terrorism%20or%20Occupation%20-%20Major> (last visited January 31, 2005.) The report traces terrorism against not only back to the inception of the State of Israel in 1948, but to the period before its inception as well.

⁴ Statistics regarding the number of Israeli and Palestinian civilians killed since September 2000 vary widely. Far too many Israeli and Palestinian civilians have been killed. An analysis of some of the studies undertaken to quantify the numbers of civilians killed do not always make the crucial distinction between civilians and combatants. The statistics cited are from the Israel Security Agency (which is available at the Israel Ministry of Foreign Affairs website www.mfa.gov.il) as well as from the International Policy Institute for Counter-Terrorism (ICT) (which is available at



Israel, faced with unrelenting lethal terror attacks reluctantly adopted a policy to build a security fence as it understood it may impose hardships on the local population. However, the fence is specifically designed to stop suicide bombings, which despite taking up only 1/2% of total attacks suffered by Israel, make up over 50% of all Israeli casualties. A comparison of the terrorist attacks committed before the fence was established (from September 2001-July 2002) with the year after the fence was partially built (August 2003-August 2004) reflects a reduction in 84% of people killed and a 92% reduction in the number of people injured.⁵ While the fence has saved the lives of many Israelis, it has also detrimentally affected the daily routines of many Palestinians living nearby. At times land was appropriated to build the fence, separated farmers their land and children from their schools. It has also been alleged that the route of the fence was designed to annex Palestinian territory to Israel.

Israel's Supreme Court has played a pivotal role in examining the legality of the Government's actions in its war against terror. In *Beit Sourik*, Israel's Supreme Court ruled that the balance struck between Israel's security and Palestinian human rights was disproportionate and ordered the government to redraw its plans regarding the route of the fence.⁶ The decision was issued before the Advisory Opinion on the fence issue by the International Court of Justice in the Hague⁷. The Government reviewed the proposed and existing route of the fence, meter by meter, to determine whether the criteria of proportionality had been met, and altered its route accordingly. Nevertheless, recently on the 13th of January 2005, the High Court of Justice again granted an injunction in

<http://www.ict.org.il/>) For example according to the ICT study, of 2806 Palestinians killed, 1326 were combatants and 325 were killed by their own side (totaling 1751).

⁵ Information obtained from the Ministry of Justice, January 2005.

⁶ See *supra* note 2; The Supreme Court's ruling in *Beit Sourik* was recently cited by Louise Arbour, United Nations High Commissioner for Human Rights, in discussing the oversight role of Courts in examining the legality of acts taken by the executive with respect to external threats of terror. (A copy of the speech is available at:

<http://www.unhcr.ch/hurricane/hurricane.nsf/0/3EE6AE0C10AA80C1C1256F4D0058AFD5?opendocument>)

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (July 9, 2004) available at the International Court of Justice website, available at (<http://www.icj-cij.org/icjwww/idocket/imwp/imwppframe.htm>) (last visited February 1, 2005). In our comments we use the term "fence" to describe the security barrier and not wall as did the ICJ, as the term fence more accurately describes the facts on the ground.

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response to a petition filed by the petitioners of *Beit Sourik* halting the building of the fence until a hearing on the petition is held. During the hearing the Court will review whether the altered route satisfies the criteria established by the Court.⁸

As of January 2005, sixty-five petitions have been filed to the Supreme Court relating to the fence. Of these sixty five petitions, 51 relate to the route of the fence.⁹ There are many petitions currently pending before the Court relating to the fence, in one such petition currently pending the Court has requested that the Government submit its views on the advisory opinion of the International Court of Justice regarding the fence.

Torture

Page 206, Paragraph 5 (“In September ... international law”)

Israel is a party to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.¹⁰ In HCJ. 5100/94 *The Public Committee Against Torture in Israel v. The State of Israel*, (9 September 2004) (hereinafter: *The Public Committee Against Torture*) the High Court of Justice ruled that the General Security Service (hereinafter: GSS)¹¹ agents did not have the authority to conduct interrogations. The Court held that any infringement upon an individual’s liberty or dignity, as guaranteed by the Basic Laws, must be sanctioned clearly and specifically by an appropriate statute, passed by the Knesset and subject to constitutional review by the Supreme Court.

⁸ H.C.J. 426/05-A, *Beit Sourik v. Government of Israel et. al.* (January 13, 2005).

⁹ Information obtained from the Ministry of Justice, January 2005.

¹⁰ Israel signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on October 22, 1986 and ratified it on October 3, 1991 (<http://www.ohchr.org/english/countries/ratification/9.htm>).

¹¹ An English translation of the decision is available at the website of the Israeli Supreme Court at www.court.gov.il. The name of the General Security Service has been changed in recent years to the Israel Security Agency (ISA).



The Court held that the GSS has no statutory authorization to employ excessive physical or psychological pressure or to treat a person in a cruel, inhuman or degrading manner. The Court stated:

...[T]he individual GSS officer – like any police officer-does not possess the authority to employ physical means which infringe upon a suspect’s liberty during the interrogation, unless these means are inherently necessary to the very essence of an interrogation and are both fair and reasonable.¹²

The Court rejected the State’s argument that extraordinary interrogation methods are authorized in the case in which lives can be saved by forcibly extracting crucial information from a suspected terrorist held in detention. This is known as “the ticking bomb” scenario. The Court expressed concern that its decision would not make it easier to deal with the harsh reality of fighting terrorism, stating:

This is the destiny of democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back.¹³

P. 206, Paragraph 6 (“In November or punishment”)

According to the ruling of the High Court of Justice, discussed above, the Attorney General does not have the authority to approve the use of exceptional measures. In fact, in accordance with the HCJ ruling, the Attorney General does not grant approvals to use ‘exceptional measures.’ The ISA interrogators operate in accordance with standard operational procedures, detailing acceptable interrogation techniques, and receive extensive training on permissible investigation methods.¹⁴ Furthermore, all individuals detained by the ISA are given written notice of their legal rights in Hebrew or Arabic.

¹² *Ibid.*

¹³ *Ibid.*



Israel has established procedures for addressing complaints lodged against ISA personnel. All ISA detainees are entitled to file complaints concerning alleged mistreatment during investigations. The complaints are thoroughly investigated by MAVTAN, a unit in the Ministry of Justice charged with investigating detainee complaints. The Minister of Justice has granted the Director of MAVTAN the authority of a disciplinary investigator, thereby assuring the independence of MAVTAN from the ISA. No individual in the ISA, including its Director, may interfere with the methods or decisions of MAVTAN. The decisions of MAVTAN are examined thoroughly by the Attorney General, the State Attorney and the Head of the Department for Special Functions in the State Attorney's office. To date, numerous complaints have led to findings that a criminal offence has been committed. However, several disciplinary proceedings have been lodged against ISA personnel. It should also be noted that the decisions of MAVTAN are administrative decisions, subject to review of the High Court of Justice.

Prior to the issuance of the Supreme Court ruling in the *Public Committee Against Torture* in 1999, hundreds of petitions were filed to it regarding interrogation methods. Since 2000, the number of such petitions filed or pending before the High Court of Justice regarding suspect interrogation has been dramatically reduced.¹⁵ The dramatic reduction in petitions filed indicates that the investigations being conducted are fair and lawful, and in accordance with the ruling of the Supreme Court and with international law.

¹⁴ Information submitted by the Ministry of Justice, MAVTAN unit, January 2005.

¹⁵ *Ibid.*



Occupied Territories

Page 207, Paragraph 7 (Israel Occupied...the Commission)

The West Bank, Gaza Strip and Golan Heights came under the control of Israel as a result of Israel acting in self defense in a war waged by Jordan, Egypt and Syria.¹⁶ Aside from East Jerusalem, the territories have been administered by Israel pending a final settlement of their status between the parties. As a result of signing the Israeli-Palestinian Declaration of Principles in 1993, areas containing much of the population came under Palestinian control. However, since the outbreak of violence in September 2000, Israeli forces have made periodic excursions into Palestinian-controlled territory, as an act of self-defense.

Since September 2000, Palestinian terrorists, supported by the Palestinian Authority, breached the peace accords that had been reached with Israel and launched lethal terrorist attacks from the West Bank and Gaza directed against Israeli civilians. After the Palestinian Authority failed to arrest or respond to Israel's extradition requests for suspected terrorists, the Israeli army was compelled to enter Palestinian controlled territories in order to uproot the terrorist infrastructure, and capture suspected terrorists.

In a 2002 Report, entitled: *Erased In a Moment: Suicide Attacks Against Israeli Civilians*; Human Rights Watch stated that terrorist attacks against Israeli civilians are crimes against humanity.¹⁷ It noted that the Palestinian leadership was unwilling to deploy the criminal justice system to stop bombings, in violation of its obligations, and failed to take effective action to bring terrorists who incited,

¹⁶ *The Rule of Law In the Areas Administered Areas*, International Commission of Jurists, Israel Article (1981).

¹⁷ **Erased In A Moment: Suicide Bombing Attacks Against Israeli Civilians**, © October 2002 by Human Rights Watch. Printed in the United States of America ISBN: 1-56432-280-7 Library of Congress Control Number: 2002114404(available at: <http://www.hrw.org/reports/2002/isrl-pa>)



planned or assisted in carrying out bombings and other attacks on Israeli civilians to justice.¹⁸

Human Rights Watch also rejected the arguments of Palestinian armed groups that their suicide bombings are justified due to Israeli military actions that killed numerous Palestinian civilians during clashes, as well as the continuing Israeli occupation of the West Bank and of the Gaza Strip. The Report found

[s]uch excuses are completely without merit. International humanitarian law leaves absolutely no doubt that attacks targeting civilians constitute war crimes when committed in situations of armed conflict, and cross the threshold to become crimes against humanity when conducted systematically, whether in peace or war.¹⁹

It also rejected Palestinian groups' argument that they are engaged in a "liberation war" against Israel's continuing occupation, and so are somehow exempt from the obligation to respect international humanitarian law, as well as the argument that Israeli settlers in the West Bank, by virtue of their presence in an occupied territory, are not civilians, and that because many Israeli adults are members of the military reserve, they, too, are legitimate military targets.²⁰

P. 207, Paragraph 8 (The various ... Israeli Forces)

The various UN Reports have emphasized that as the occupying power in West Bank, the Gaza and Jerusalem, Israel bears *de jure* responsibility for implementing the applicable humanitarian law norms. **The Israeli government has taken the position that the Geneva Convention does not apply *de jure* but has in fact applied the conventions to the territories *de facto*.** Therefore, international humanitarian law obligations, including those contained in the 1949 Geneva Conventions, apply to Israel's role in the occupied Palestinian territories. The treaty bodies have subsequently reaffirmed that Israeli obligations remain applicable to the Occupied Territories. The various UN reports have

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*



identified massive and gross human rights violations committed by the Israeli Defence Forces (IDF), including *inter alia* excessive use of force, and extra-judicial executions/political assassinations.

The statement in the Attacks on Justice 2002 Report that the “fundamental human rights and humanitarian norms of necessity and proportionality have been breached in most reported cases of confrontation between Palestinian civilians and Israeli forces” is a gross over-generalization. Israel has been attempting to balance the need to protect the security of its citizens with its obligation to protect the human rights of Palestinian civilians.²¹ Unfortunately, the correct balance is not always struck, and at times violations of human rights do occur. Soldiers that are found to have breached human rights are investigated, and when indicated placed on trial, although there are those who contend that the Government's response to violations of human rights is insufficient.

Israel's Supreme Court has recently taken a more active role in assuring that the even during times of war, Israel implements its obligation to protect the security of its citizens with the principles of necessity and proportionality.²²

Page 207, Paragraph 9, (In August... affected areas)

On May 23, 2003, the Committee on Economic, Social and Cultural Rights, issued its concluding observations regarding Israel's second periodic report, submitted under Articles 16 and 17 of the Covenant.²³ The Committee welcomed the submission of the report, which was prepared in general conformity with the Committee's guidelines, and stated it appreciated the extensive written replies as well as

²¹ *Israel, the occupied territories and the autonomous territories*, ICRC 2003 report (February 2004), p.273, (available at www.icrc.org) (In its report the ICRC noted progress in including International Humanitarian Law (IHL) courses in secondary school education in Israel. It also noted that the IDF accepted its assistance to incorporate IHL principles into their military training programs, and allowed the ICRC to make direct presentations to IDF operational commanders and border guards, as well as to hundreds of IDF combat unit troops, and that senior officers attended ICRC meetings to discuss the treatment of the civilian population in low intensity conflict).

²² See *supra* note 2.

²³ *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Israel*. 23/05/2003,



efforts to respond to oral questions, although it noted that some questions remained unanswered.²⁴

The Committee reported the following positive developments: “the steps undertaken by the State party to implement the Multiyear Plan for the Development of Arab Sector Communities (2000), aimed at closing the gap between Jews and Arabs by promoting equality in the enjoyment of economic, social and cultural rights;” the affirmative action measures taken with respect to various disadvantaged sectors such as the Arab Druze, Circassian and Bedouin communities, despite the decline in economic growth in the State Party in recent years; the improvement in the conditions of foreign workers and the system of compulsory health insurance for foreign workers; and, the amendment to the Women Equal Rights Act in April 2000.²⁵ It also noted that although gaps still remain, “the State Party has achieved some positive results towards expanding basic education and special education for non-Jewish sectors; it noted that Supreme Court’s relaxed its rules of standing allowing open access to all persons, regardless of their citizenship status; and that Israel provides plaintiffs seeking remedy for alleged violations of economic, social and cultural rights access to and use of the judiciary system, which provides opportunities for the justiciability of the rights enshrined in the Covenant. The Committee noted with appreciation the efforts undertaken by Israel to address the problem of trafficking and exploitation of persons, such as the criminalization of trafficking, increased penalties for trafficking of minors, and the enhanced cooperation between government agencies to combat trafficking with a victim-sensitive approach.²⁶

The Committee regretted that Israel’s continuing emphasis on its security concerns, “which have even increased in recent years, has impeded the

E/C.12/1/Add.90 (Concluding Observations/Comments) available at:
[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b313a3503107f1e6c1256d33002cea38?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b313a3503107f1e6c1256d33002cea38?Opendocument)

(last visited February 1, 2005).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*



realization of economic, social and cultural rights within Israel and the occupied territories.”²⁷

Page 207, Paragraph 10 (“Extrajudicial executions.... judicial process”)

Since the end of September 2000, Israel is facing an armed conflict, as was recognized by the High Court of Justice in many of the rulings issued in recent months. Accordingly, laws of armed conflict mandate that parties distinguish between the civilian population and combatants, and direct their operations against military objectives. However, Palestinian terrorists defy these rules, disguise themselves as civilians, and operate terrorist activities from within highly populated civilian areas. For example, in January 2005, the IDF located a terrorist bomb-making factory in the basement of a residential apartment house.

Israel’s primary duty is to secure the safety of its citizens and protect their right to life. In doing so, Israel applies a broad range of measures and activities which are compatible with International Law. Amongst these measures Israel operates to capture those that are identified by the security forces as terrorists who actively take part in carrying out lethal terror attacks. In certain cases where the capture of a terrorist who presents a clear danger to life of others is not possible and no other alternative means of prevention exist, Israel targets these terrorists as a last resort.

Judiciary

Page 207, Paragraph 11 (Israeli basic ...by law)

Israel's **Basic Law** guarantees the independence of the judiciary. The independence of the judiciary is **always** respected by the legislative and executive powers. **The judicial authority is one of the three State authorities, along with the executive**

²⁷ *Ibid.*



and legislative. Its independence is both substantive and personal. Substantive independence is ensured due to the fact that in discharging their duties, judges are subject only to substantive law, not to any other authority or person. In this respect article 2 of the "Basic Law: The Judiciary provides: "a person vested with juridical power shall not, in judicial matters, be subject to any authority but that of the Law".

Personal independence is ensured by the manner in which judges are promoted and appointed and is reflected in their term of office, the conditions of service and in matters concerning the discipline and immunity of judges.²⁸ Article 22 of the Basic Law: The Judiciary provides that it [the law] cannot be varied, suspended, or made subject to conditions by emergency regulations.

As is the practice in progressive democratic countries such as the United States, Canada and the United Kingdom, legal proceedings in Israel are held in public, in open court. However, some proceedings may be held '*in camera*' for reasons that are specified by law. Among these are reasons of foreign policy and State security, protection of interests of a minor or one who is helpless, protection of morality, matters of family law; and circumstances where a public hearing might inhibit a witness from testifying freely. The law forbids the publication of a report of a court hearing held *in camera* without prior consent of the court.²⁹

Page 208, Paragraph 12 (Article 1 ...particular case)

Structure

Article 1 of the "Basic Law: The Judiciary establishes that judicial power is vested in the following courts: the Supreme Court; District Courts; Magistrate's Courts; and other courts designated by Law as courts. It also vested judicial power in religious courts. No court may be established for a particular case.

²⁸ Israel Supreme Court website, English, General Information, available at: <http://62.90.71.124/eng/system/index.html> (last visited January 31, 2005).

²⁹ *Ibid.*



Page 208, Paragraph 13 (Magistrate Courts ... District Courts).

Magistrate Courts are courts of first instance. They have jurisdiction over criminal cases, where the penalty does not exceed seven years, and civil suits. **As far as civil suits are concerned Magistrates Courts have jurisdiction over most cases of immovable property with the exception of those cases pertaining to the question of ownership**, or where the value of the claim does not exceed **2.5 million shekels (a sum equivalent to approximately \$570,366.13 USD)**. Cases in Magistrate Courts are usually heard by a single judge, but in certain instances a matter may be heard by a panel of three judges.

There is a right to appeal a decision rendered by a Magistrate Court to the District Court.

Page 208, Paragraph 14 (District Courts ... for election.).

District Courts function both as courts of first instance and as appellate courts. As a court of first instance, District Courts have jurisdiction over criminal cases with a penalty exceeding seven years imprisonment, and over suits where the claim exceed **2.5 million shekels (a sum equivalent to approximately \$ 570,366.13 USD)**.

According to article 40 of Courts Law [Consolidated Version], 5744-1984 District Courts have jurisdiction over every criminal or civilian case which is not under the jurisdiction of the Magistrate Courts. The District Court has authority to hear certain types of administrative petitions. As an appellate court, District Courts hear appeals from Magistrate Courts and Administrative Tribunals. **Certain District Courts are designated to handle specific matters such as maritime and election related issues.**



Page 208, Paragraph 15 (The Supreme...in Jerusalem)

The Supreme Court of Israel sits in Jerusalem. The Supreme Court, which carries the ultimate judicial authority, is both **an appellate court, called the Supreme Court of Appeals, when hearing cases from District Courts, and a court of first and last instance when it sits as a High Court of Justice (HCJ known in Hebrew as a *Bagatz*) in cases challenging the legality of a government action. In its capacity as a Court of Appeals its verdict is final.**³⁰

Cases before the Supreme Court are generally heard by a panel of three judges. However, questions of fundamental importance or those raising constitutional issues can be heard by an expanded panel of judges. Similarly, if a party requests a rehearing of a case already decided by the Court, *for example*, on cases that raise novel judicial issues, the Court may sit in an expanded panel of judges.

The Supreme Court sitting as a High Court of Justice hears petitions by persons who feel that they have been wronged and their rights were violated by one of the State authorities or statutory bodies. The general rule is that all acts of officials and public bodies are subject to judicial review.

The Supreme Court, sitting as a *High Court of Justice*, permits direct access to the nation's highest court. Fees are quite low and many people take advantage of this process. In 2004, there were approximately two thousand and six hundred *bagatz* petitions filed in the Supreme Court. From 2000 to 2004, there was a 60 percent increase in the number of *bagatz* petitions filed to the Supreme Court.

Furthermore, the Supreme Court has permitted residents of the West Bank and Gaza Strip to file petitions for review of any government act, or acts of the Israel Defense Force which affects them. This direct access to the Supreme Court of

³⁰ *Israeli Democracy: How Does It Work*, available at the website of the Israel Ministry of Foreign Affairs,

<http://www.mfa.gov.il/mfa/government/branches%20of%20government/executive/israeli%20democracy%20-%20how%20does%20it%20work> (last visited January 31, 2005).

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Israel on such a broad range of matters surpasses Israel's obligations established under public international law. The supervision exercised by the Court serves as an important tool for the preservation of the rule of law in the administered areas.

In many countries the general rule is that an application for judicial review may only be brought to the court by a person who has a personal interest in the case, a concept known as standing.

In Israel, the Supreme Court held that in matters concerning the rule of law or in cases which raise problems of a constitutional nature it might make exception to this rule. *For example*, in the *Rafah* case,³¹ the Supreme Court sitting as a High Court of Justice, granted standing to four human rights organizations: Physicians for Human Rights; Association for Civil Rights in Israel; The Center for the Defense of the Individual; and, B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, who argued that the IDF, in the midst of an a combat operation in Rafah was not fulfilling its duties under international humanitarian law.

The *Rafah* case also illustrates the expansive interpretation of the doctrine of judicial review in Israel. The IDF was engaged in a military operation in the area of *Rafah*, in the Gaza Strip, aimed at the terrorist infrastructure in that region, whose central objective was to uproot arm smuggling tunnels from the Egyptian to the Palestinian side of Rafah. Petitioners claimed the IDF was not allowing them to evacuate the wounded, and claimed that food; water and medical supplies were not getting through to specific neighborhoods. Petitioners also requested full investigation of an incident where the IDF allegedly fired into a crowd of protesting civilians. An immediate hearing was scheduled. During the hearing the Court acted as a mediator between the human rights organizations and the army and addressed and resolved each of the claims



raised. It found that at the time of the hearing the problems relating to running water and electricity had been largely resolved, and that medical equipment had been transferred through the Karni Crossing.³²

Significantly, the Court rejected the government's argument that it should not intervene in the midst of a military operation. It broadened the concept of judicial activism, thereby opening its gates more widely than do many other Courts in democratic countries that dismiss such petitions as unjusticiable.

In its capacity as the High Court of Justice the Supreme Court has played a pivotal role both in ensuring that official actions comply with the rule of law, and in developing human rights norms. In many such cases, including those involving fundamental issues with immediate consequences, the petitions are heard on an expedited basis, sometimes within hours.

Not only does the Supreme Court play a major role in protecting individual rights, but also in the absence of a Bill of Rights in Israel, the Supreme Court has contributed significantly to the protection and promotion of civil liberties and the rule of law.³³

The Supreme Court's role of protecting human rights must also be viewed in light of Israel's defending itself against terror attacks, which have intensified over the last four and a half years. Under these difficult circumstances, the High Court of Justice has taken an active role in balancing Israel's need for security with the human rights of the Palestinian population.

³¹ See *supra*, fn. 2.

³² On January 14, 2005, Palestinian suicide terrorists attacked the Karni crossing, killing six Israelis.

³³ *Human Rights and the Rule of Law*, (June 1, 1999) available at the Ministry of Foreign Affairs website

http://www.mfa.gov.il/mfa/mfaarchive/1990_1999/1999/6/human+rights+and+the+rule+of+law.htm

(last visited on January 31, 2005).



In a judgment concerning the issue of assigned residence, H.C.J. 7015 Ajuri *et.al.* v. IDF Commander in West Bank (3 September 2002), the Honorable President Barak concluded:

"The well-known saying that 'In battle laws are silent' (*inter arma silent leges* — Cicero, *pro Milone* 11) ...does not reflect the law as it is, nor as it should be. Indeed, '...even when the cannons speak, the military commander must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values' (HCJ 168/91 *Morcos v. Minister of Defence* [34], at p. 470).

...

Indeed, the position of the State of Israel is a difficult one. Also our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle. Our work, as judges, is hard. But we cannot escape this difficulty, nor do we wish to do so... Even when the cannons speak and the Muses are silent, law exists and operates, determining what is permitted and what forbidden, what is lawful and what unlawful. And where there is law, there are also courts that determine what is permitted and what forbidden, what is lawful and what unlawful. ...we shall do our work. 'This is our duty and this is our obligation as judges.'³⁴

There are those who claim that "members of the judiciary have tended to acquiesce to Government arguments of national security in sensitive cases." However, the Supreme Court's ruling in the September 1999 landmark judgment regarding interrogation methods used by the Israeli General Security Services, (*see supra*) and the April 2000 ruling prohibiting the holding of detainees for use as "bargaining chips" **reflects the Court's new willingness to actively intervene in national security matters. This interventionist approach has continued, on different matters such as the army's humanitarian obligations and the legality of the fence in the High Court of Justice's recent rulings in Rafah and Beit Sourik.**³⁵

³⁴ An English translation of the decision is available at the website of the Supreme Court of Israel (available at www.court.gov.il). A copy of the decision is annexed hereto as Exhibit D.

³⁵ See *supra* note 2.



In *Beit Sourik* the Supreme Court ruled that the balance struck between Israel's security and the human rights of the Palestinian population was disproportionate and ordered the government to redraw the route of the fence. The Government reviewed the proposed and existing route of the fence, meter by meter, to determine whether the criteria of proportionality had been met, and altered its route accordingly. Nevertheless, recently in early January 2005, the Supreme Court again granted an injunction in response to a petition filed by the *Beit Sourik* petitioners halting the building of the fence until hearing on the petition could be held on whether the altered route satisfies the criteria established by the Court.³⁶ There are many petitions currently pending before the Court relating to the Fence, in one such petition the Court has requested that the Government submit its views on the advisory opinion of the International Court of Justice regarding the fence.

Page 208, Paragraph 16 (Various additional...labour relations)

Various additional courts have been established to have jurisdiction over specific subjects, including religious courts, which are vested with jurisdiction to hear cases involving personal status, and labour courts, which have jurisdiction over cases involving labour relations.

Page 208, Paragraph 17 (The Israeli ... of proceedings)

Although delays and excessive case loads exist due to a shortage of judges, the judiciary is attempting to address the problem, on a case by case basis by allowing individuals to file complaints to the Office of the Ombudsman of the Judiciary (*see infra*) and/or to the President of the Court in which the case is being heard.

³⁶ *High Court Halts Fence Construction Around Beit Surik*, Haaretz Newspaper, January 14, 2005 (available at <http://www.haaretz.com/hasen/spages/527158.html>)(last visited January 31, 2005).



The administration of justice has been criticized as discriminatory. According to some human rights organizations, the legal system often imposes far stiffer punishments on Christian, Muslim and Druze citizens than on Jewish citizens. For instance, Israeli Arabs are more likely to be convicted (which carries a mandatory life sentence) than Jewish Israelis. The courts are also more likely to detain Arab Israelis until the conclusion of the proceedings. **However, we would like to emphasize that neither Israeli Penal law nor prosecutorial policy support discrimination. The Supreme Court has played a pivotal role in dealing with issues involving questions of discrimination. In this respect the Supreme Court both as the High Court of Justice and in its capacity as Supreme Court of Appeals has issued a number of precedential decisions that have resulted in modification of past practice. For example, in HCJ 6698/95 Ka'adam v. The Israel Lands Administration, the Court prevented the allocation of State land on the basis of any discriminatory criteria. Although there has been some improvement in this area, the problem of discrimination against Israeli-Arabs exists, and must be comprehensively addressed by all levels of Israeli society.**

Judges

The correct name to be used is: **Basic Law: The Judiciary.**

Please note the corrections in **paragraphs 19 and 21.**

To conclude this article on judges we suggest the addition of a new paragraph on the Israeli Ombudsman of the Judiciary.

In response to your e-mail dated January 16th on the "latest developments", we would like to add that this office of the Ombudsman reflects a recent legal innovation linked to the independence of the judiciary, since the first Israeli Ombudsman was nominated on 1.10.2003.

Page 208, Paragraph 18 (A non-political...appointed judge).

Line 2: Article 4 of the Basic Law: The Judiciary



Page 208, Paragraph 19 (According to ...lower court)

Line 1: **Article 7 of the Basic Law: The Judiciary**

Lines 3-6:

"holders of which are debarred from being candidates for the Knesset; a decision of the Judges' Election Committee prepared by the chairman of the Committee, **the Ombudsman of the Judiciary**³⁷ or the President of the Supreme Court and passed by a majority of at least seven members.

Page 209, Paragraph 20 (Regarding disciplinary..... by law)

Line 4: **Article 14 provides** where a complaint or information is filed....

Page 209, Paragraph 21 (Article 23...judges only)

Article 23 provides, *inter alia*, the following matters to be prescribed by Law: the manner of electing and duration of the tenure of the members of the Judges' Election Committee; qualifications for the posts of judges of the various grades; **the manner of appointing the President of the Supreme Court, the Deputy President of the Supreme Court and the President and Vice-President of a District Court and a Magistrate's Court;** the conditions and procedures for terminating the tenure of a judge, the proceedings for the suspension of a judge from office and review of the suspension...

Page 209 (paragraph to be inserted after paragraph 21)

On 1st October 2003 the first Ombudsman of the judiciary was nominated (hereinafter: the "Ombudsman"). The Ombudsman heads a unit called "Public Complaints Commission for the judiciary." This unit was set up by The Ombudsman for the Judiciary Act, 2002 (hereinafter: the "Act"). The

³⁷ See discussion relating to the Office of the Ombudsman below.



Ombudsman supervises judges by way of investigating complaints lodged by the public relating to conduct in the role of the judge.

The purpose of this supervision is to improve the unique service given by judges to the public while maintaining judicial independence. In order to achieve this integration between judicial independence and accountability, the Act establishes the Ombudsman as a neutral and independent body and provides it with efficient means to investigate complaints.

Basically, the Ombudsman devotes its activity to the following problems: (a) Unrealistic prolongation in the processing of cases pending before the courts; (b) Delay in awarding judicial decrees, judgments and decisions; (c) Inappropriate behavior of a judge, which may cause an unnecessary insult to a party to the trial or to a lawyer; (d) Infringement of the basic principles of justice, such as the right to be heard before the court or the court's duty to refrain from any bias or prejudice; (e) Erroneous processing, such as undue management of the protocol. The investigation of complaints contributes to improving the unique service given by the courts to the public and is crucial in maintaining the basic right to due process.

In sum, the independence of the judiciary also serves to inspire and bolster public confidence in it. Public trust is based on the feeling that a judicial ruling is carried out honestly, with objectivity and is not biased. Public critique of the judiciary is permissible and acceptable.³⁸

Military Courts

Page 209, Paragraph 22 (Military Court...legal training)

Page 209, Paragraph 23 (Israeli Military....at checkpoints)



While it is true that military courts are situated in military bases, as of the Summer of 2003, they are no longer attached to settlements. Palestinian lawyers have free access to the Military Courts that are now located in military camps. Palestinian lawyers are in the military courts, visiting and representing their clients regularly, many on a daily basis. It is possible that at times, due to the security situation (in which the State of Israel is on heightened alert due to a threat of a Palestinian terror attack), that there are delays or problems of access through roadblocks in the region. However, these delays are not related to the specific location of the Military Court, nor do Palestinian attorneys encounter difficulties accessing the court Complex itself. Palestinian lawyers do not require authorization to enter the military courts.

Page 209, Paragraph 24 (Military Courts.... the sentence)

Military Court trials do meet international standards for fair trial. Trials are conducted under strict procedural safeguards, and pursuant to the rules of evidence applicable to Israeli courts.

Recently, on October 12, 2004, Israel has undertaken a major organizational and substantive overhaul regarding the employment and appointment of Military Judges. While judges are *formally* nominated by the IDF Regional Commander, they are now selected by an *independent professional selection committee*, quite similar in its composition, *mutatis mutandis*, to the selection committee of Judges serving within IDF military courts inside Israel.

The independent professional selection committee is comprised of seven individuals: The President of the Military Court of Appeals; The IDF Chief of Personnel; The Coordinator of Government activities in the territories; The Vice President of the Military Court of Appeal; The President of the Court of Appeals in the Territories; a retired civilian

³⁸ Information submitted by the Israeli Ombudsman of the Judiciary, January 2005.



Judge and a representative of the Central Committee of the Israel Bar Association.³⁹

The appointment of Military Judges is not limited in time. Military Order 1550 also bestows Military Judges with security of tenure, stipulating that they may be removed from office *only* by a decision of the nominating committee, by a *majority* of its members. In addition, promotion of Military Judges is no longer dependent on the Military Prosecutor General; the committee is vested with the authority to select judges to be promoted to the Appellate Chamber.

Under the new law the IDF Regional Commander no longer has authority to dismiss Military Judges, the Selection Committee is now the only body possessing the power to dismiss a judge. Except in the event of organizational changes necessitating a reduction in the number of judges, in which case the President of the Military Court of Appeals in the Territories has the authority to dismiss a judge.⁴⁰

In early 2004, the Military Courts were separated from the Military Advocate General's Corps, and placed under the auspices of the Military Courts Unit. These changes placed Military Judges in the Territories under the command authority of a professional Judge - the President of the Military Court of Appeals, a Major General (actually outranking the Military Advocate General) - as opposed to the previous system where Judges were under the authority of the Military Advocate General. This change was made in order to provide the Military Judges with absolute independence from the Military Prosecutor's Office and to avoid any appearance of impropriety which may have resulted from the Judge being part of the Military Advocate's General's Corps.

³⁹ See Military Order 1550 enacting the 89th amendment to the Order on Security Provisions (No. 378) 1970).

⁴⁰ *Ibid.*



The allegations relating to torture of detainees are unfounded. The State of Israel is bound by the Supreme Court decision in this matter and is in compliance with the established guidelines.⁴¹ For a full discussion of the issue please refer to the *Torture* section, *supra*, page 4.

Administrative Detention

Page 210, Paragraph 25 (In Israel....cross-examine witnesses)

In Israel and the Occupied Territories, administrative detention is a procedure under which the detainees are held without charge or trial. In Israel and East Jerusalem, the Minister of Defense issues administrative detention order, specifying the term of detention. In the Occupied Territories, except for East Jerusalem, military commanders issue such orders. Before the term expires, the detention order may be renewed. The process may continue indefinitely. **Administrative Detention Orders are valid for six months *at the most* and many are issued for shorter periods. *Every single order is brought for judicial review within eight days of the arrest, automatically, with no action required from the detainee. All decisions relating to detention orders are subject to judicial review and to appeal to the Military Court of Appeals. Indeed, as of January 2005, 74% of detainees exercised this right of appeal. Moreover, detainees may receive leave to appeal the decision of the Military Court of Appeals to the Supreme Court of Israel.***⁴² Israel's detention procedure complies with and actually surpasses the protections to the rights of detainees as provided for in Article 78 of the IV Geneva Convention. No time limit is proscribed by Article 78, which calls only for periodic review, with the possibility of a hearing once in 6 months, *if possible* In addition, as discussed earlier administrative detention orders are valid for six months *at the most* and many are issued for shorter periods. Israel grants a hearing *automatically* after *eight days to every detainee*.

⁴¹ See pages 7-8 of this Report which refers to recent developments regarding investigatory procedures relating to complaints alleging the use of illegal investigatory techniques

⁴² Data received from the Israeli Defence Forces in January 2005.



There are cases in which classified evidence is not disclosed to the defense for security reasons. Israel's Supreme Court has been an active watch guard in reviewing and evaluating classified evidence to ascertain whether such disclosure would harm State Security. The Court has ruled if disclosure would not harm state security the evidence should be disclosed in whole or in part to the petitioner.

The Court has the discretion to deny the defense attorney the right to cross examine witnesses, in the event that security concerns mandate that the identity of the witness(es) remain secret. The Court also has the discretion to review classified security information *in limine*⁴³. (See Article 87-87 *et* in the Order on Security Regulations; Order No 1226, the Order on Administrative Detentions (Temporary Order)

It should be noted that Israel's Administrative Detention Law applies to Israeli citizens as well. Its purpose is to allow Israel's Security Agency to detain *any* individual that poses a threat to public safety or to State security. The Supreme Court has issued rulings upholding the detention of Israelis who endangered public safety.

Page 210, Paragraph 26 (The number of... be released)

Lawyers

Page 210, Paragraph 27 (The Legal ...National Council)⁴⁴

The Israel Bar was established in 1961 as an autonomous entity, whose main organs are elected democratically by the members of the profession, pursuant to

⁴³ See Article 87-87 *et* in the Order on Security Regulations; Order No 1226, the Order on Administrative Detentions (Temporary Order).

⁴⁴ The first paragraph of the lawyers section is largely correct, however, there are now 28 Members of the National Council elected by other members of the profession and not 25. In addition the Central Committee has 16 members that are elected by the National Council from its members. The Bar also operates from more than two organs. However, we suggest adding or incorporating the information



the Chamber of Advocates Law, 5721-1961, in order to incorporate Israel's advocates and supervise the standards and ethics of the profession. The Bar's functions are defined in the Chamber of Advocates Law: to register, supervise and examine legal interns; to qualify new advocates; and to exercise disciplinary jurisdiction over advocates and legal interns. There are over 28,000 advocates currently practising law in Israel.

The Israel Bar is headed by the Bar President, who is also the Chairman of the Central Committee. The Bar operates through the following organs: the Bar President, the Central Committee, the National Council, the District Committees (Jerusalem, Tel Aviv, Haifa, North and South), the National Court of Discipline, the District Courts of Discipline and the Bar Comptroller.

The Bar President heads the Central Committee. The President is elected once every four years by all the Bar's members, namely all Israel's advocates, in general, direct and country-wide elections, by secret ballot, on the basis of equal suffrage and on the principle of proportional representation.

The National Council is the Bar's legislative arm and deals with proposals for modification and amendment of the Chamber of Advocates Law and the rules made pursuant thereto, which are referred to the Minister of Justice for approval. The Council's functions are to elect the members of the Central Committee and the Bar's representatives are on various statutory committees; make rules concerning the Bar's organization and activities; establish membership dues; and determine the Bar's budget.

The Central Committee is the Bar's executive organ and manages its affairs. It is comprised of 16 members. Professional sub-committees operate alongside the Central Committee and thousands of advocates actively participate in them, on a voluntary basis.

The role of the Disciplinary Jurisdiction branch is to maintain professional standards and to protect the public's confidence in the profession. The Bar has

below which is excerpted from a recent 2003 Report of the Israeli Bar Association entitled: *Profiles*



disciplinary courts operating in various districts, and a national court of discipline that serves as an appeals court. An advocate convicted of a disciplinary offence, even of an offence committed abroad, is subject to penalties, the most serious of which is disbarment. The Bar's disciplinary jurisdiction also extends to legal interns.

In 2002 the Bar launched a "pro bono" program which provides legal assistance on a volunteer basis to needy persons meeting the determined criteria. Israeli law provides for legal aid for specified civil matters for its citizens who cannot afford a lawyer. Citizens that meet the financial eligibility criteria are appointed a lawyer. Services provided include an analysis of the client's problems, legal advice, as well as representing the client before Israeli Courts. Legal aid is given free of charge, with the exception of the payment of fees, pursuant to a sliding scale based on the applicant's income, as established by the relevant regulations.

The Public Defenders Office, established in 1995, represents all suspects, detainees, and convicted prisoners who are deemed eligible for legal assistance in criminal matters. The Public Defenders Office is comprised of permanent staff of attorneys. Private attorneys may also accept cases pursuant to the Public Defenders Law, in accordance with a fee schedule established in the regulations.

Page 211, Paragraph 28 (The Bar's structure...access to a lawyer)

The Bar's structure and administration ensures that the legal profession maintains a sufficient degree of independence from the executive and properly represents the interests of its clients. **In clarifying these matters with the Israeli Prison Service, it was pointed out that some Palestinian lawyers abuse the right to meet with their client to transfer information that may endanger public safety or security. The authority of the Prison Warden or the Director of the Israel Prison Service to deny such meetings was challenged in a petition filed to the Supreme Court of**



Israel.⁴⁵ The Court directed the authorities to amend the current law to address such situations, and the amended legislation is currently being drafted.⁴⁶

Cases

If the Attacks on Justice 2005 Israeli Chapter will include a section on cases, we respectfully request that we be notified of the cases to be included and offered an opportunity to investigate the facts and to respond.

⁴⁵ Regulations of the Israeli Prison Service, No. 29.

⁴⁶ Information obtained from Israel Prison Service, January 2005.