The Israeli Law Professors' Forum

For Democracy

Position paper 20 – On the Supreme Court's case law relating to security issues and the Occupied Territories

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The Israeli Law Professors' Forum for Democracy, an ad hoc and voluntary group of experts on Israeli law and specifically Israeli public law, expresses its grave concern over the apparent intention to abolish the independence of the judiciary, to subordinate it to the government and to the partisan political considerations of the executive branch, to undermine the independent status of the attorney general and civil service legal counsels, and to violate human rights. In this position paper we examine the case law of the Israeli Supreme Court relating to security and the occupied territories.

We find that:

- The Israeli Supreme Court rarely intervenes and practices extreme restraint as concerns government measures in security matters or in matters relating to Israel's policy in the occupied territories.
- Presenting the Supreme Court's involvement as 'restrictive' in a manner which impedes the government's ability to act is mistaken and misleading.
- Empirical studies over recent decades indicate that despite using human rights rhetoric, the Supreme Court rarely strikes down policy concerning the conduct of hostilities or counterterrorism measures.
- Insofar as concerns active fighting and use of lethal force, the Supreme Court has not restrained the government in a significant manner.
- The Supreme Court has refused to decide on the legality of the settlement policy, effectively paving the way to the expansion of the settlement policy by Israeli governments. .

[1*] We, members of the Israeli Law Professors' Forum for Democracy, hold different academic views regarding the details of the various reforms proposed by Israel's 37th Government to change Israel's democratic regime. However, we are united in the opinion that the host of the government's proposals - which are an unprecedentedly severe attack on the independence of the judiciary, the Attorney General and government legal advisors, the police, the military, and public broadcasting - will seriously damage the rule of law and Israel's democratic character. Therefore, we joined this forum to make our professional opinion available to the public at this fateful time. The position papers or other professional materials produced by us reflect the prevailing position among the members, even if they are not unanimous. The list of Forum's members and all position papers on our behalf are available at https://lawprofsforum.wixsite.com/home. Follow us on Twitter: https://twitter.com/lawprofsforum. Contact us: lawprofessorsforum@gmail.com.

- For decades the Supreme Court has been interpreting the international norms applicable to the occupied territories in a manner which grants the government broad powers, often in contravention of the accepted understanding of these norms in the international community.

Introduction

Public debate over government measures for changing the regime in Israel often mentions the restricting role the Supreme Court has concerning national security policy. It is also stated that in hearing petitions from Palestinian residents of the Occupied Territories, the Supreme Court adopts a pro-Palestinian stance; and therefore, it is argued, its scope of operation must be modified. This position paper demonstrates that contrary to these claims, **the Court rarely intervenes and practices extreme restraint as concerns government measures in security matters or in matters relating to Israel's policy in the Occupied Territories.** While the Court constitutes a monitoring mechanism over the conduct of the security authorities, and thus offers (very limited) assistance to the Palestinian residents of the Occupied Territories who have no other recourse, in matters relating to government policy the Supreme Court has often gone to great lengths to interpret the applicable norms in a manner that expands state authority, at times in complete contravention of accepted understandings in the international community, thereby granting Israel's actions an imprimatur of legality. We therefore believe that presenting the Court's conduct as overly limiting the government in matters of security and policy in the Occupied Territories is not supported by the case law. It can only be presumed that some of those making these false claims do so in order to undermine the Supreme Court's legitimacy in the eyes of parts of the public, thereby paving the way to granting unlimited power to the executive branch.

To be clear, this paper does not support the Supreme Court's case law nor criticize specific elements of it. Its sole purpose is to bring to light the inaccuracies in the claims made by supporters of the 'reform', in order for the public debate to be grounded in facts. Specifically, this position paper discusses Supreme Court decisions that have significantly expanded the state's authority in security issues or other matters relating to Israel's measures in the occupied territories or permitted such a broad interpretation, in a manner that is inconsistent with international law or at least with its common interpretation. Our claim is not that the Supreme Court has had no impact at all on Israel's conduct in matters of security or the Occupied Territories, but only that to **present the Court's involvement as 'limiting' the government's ability to act is false and misleading**.

At the outset we note the self-evident: the Israeli government is not operating in a legal vacuum with regard to warfare, security measures and its operation in the Occupied Territories. Israel is party to various international treaties that regulate the laws of armed conflict, as well as to international human rights treaties. **It is the government of Israel that chose to join these treaties. Moreover, the government that decided to accede to the principal human rights treaties in 1991 was not a left-wing government but the government led by Yitzhak Shamir,**

comprised of only right wing parties. Furthermore, as any sovereign state, Israel too is bound by customary international law, which in our system (similarly to the Anglo-American system) constitutes part of the domestic law. This relationship has become part of Israeli law through mandatory law, was confirmed by the Supreme Court in the early 1950s and has never been disputed. Accordingly, when deciding on security issues, the Supreme Court is not operating in a void. It is required to interpret and apply international norms that bind Israel both on the international level and domestically. In so doing the Court fulfills its role under law.

A review of the entire case law and issues relating to security and the Occupied Territories that the Court has addressed over the years exceeds the scope of this paper. Our purpose is merely to highlight landmarks. There are numerous other instances that demonstrate the core of our arguments.

Beyond the general issues discussed here, the Court system and the Supreme Court reject, on an almost daily basis, numerous petitions on matters such as administrative detention, punitive house demolitions, freedom of movement (for example, denial of movement from Gaza to the West Bank) and more. In fact, the overwhelming majority of decisions on security matters consist of rejection of individual petitions by Palestinians pertaining to decisions on their personal matters such as family reunion, detention, movement and permits.

Empirical research from recent decades indicates that despite the use of human rights rhetoric, the Supreme Court rarely strikes down policy concerning warfare or counterterrorism measures. Thus, for example, Shamir found that the Court has accepted less than one percent of 492 petitions submitted by Palestinians between 1967 and 1986;[2] and until 1990 it had intervened in three out of 150 orders for punitive house demolitions.[3] Dotan found that the rate of acceptance of Palestinian petitions in the years 1990-1994 was 4.3 percent (out of 3392 petitions),[4] a finding later repeated by Davidov and Reichman in a sample of 439 petitions filed against the military commander in the years 1990-2005.[5] Hofnung and Weinshall found, based on a sample which comprised a third of final rulings issued in the years 1985-2008 with regard to administrative detention, punitive house demolitions, taking of land on security grounds (for example for the construction of the separation fence), due process rights in the criminal process (such as denial of meeting with counsel), curfews lockdowns and operational decisions relating to

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[2] Ronen Shamir, 'Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, LAW AND SOCIETY REVIEW (1990) 781-80.

[3] David Kretzmer, Judicial Review over Demolition and Sealing of Houses in the Occupied Territories, KLINGHOVER BOOK ON PUBLIC LAW (Jerusalem, 1993) 305-57

[4] Yoav Dotan, Judicial Rhetoric, Government Lawyers, and Human Rights: the Case of the Israeli High Court of Justice During the Intifada, LAW AND SOCIETY REVIEW (1999): 319-363.

[5] Guy Davidov, and Amnon Reichman, Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel, 35 LAW & SOCIAL INQUIRY (2010) 919-956.

counterterrorism.[6] It should be noted that according to data by Dotan, Hofnung and Weinshall, despite the low rate of intervention, the Court plays a role in facilitating compromises between Palestinian petitioners and the government. The trend demonstrated here concerns Israeli action in the Occupied Territories, but the Supreme Court's reluctance to intervene extends to issues perceived as security related within Israel proper.

a. Settlements

As is well known, the consistent stance of international institutions such as the UN Security Council and the International Court of Justice in the Hague, of states friendly to Israel, and of the majority of experts on international law, is that an occupying power may not establish civilian settlements for its nationals within the occupied territory, and that this rule applies to territories taken by Israel in 1967.[7] Nonetheless, from the early days of the settlement movement, the Supreme Court has refused to decide on the legality of the settlement policy, effectively paving the way to the expansion of the settlement policy by Israeli governments. This was the combined result of a number of techniques:

First, the main argument against the establishment of settlements in occupied territory rests on Article 49(6) of the Fourth Geneva Convention (GC IV), which states that the Occupying Power "shall not deport or transfer parts of its own civilian population into the territory it occupies".[8] The Court accepted the government's view that this provision does not constitute customary international law and thus is not a part of Israeli law, and therefore the Court is not bound to enforce it.[9] **This conclusion stands counter to the consensus in the international community, which regards the entire Geneva Convention as reflecting customary international law**.[10] To date the Court has not been willing to consider the claim that establishing settlements in the West Bank contradicts Article 49(6). Moreover, while failing to hold the government bound by obligations deriving from GC IV, the Court enabled the government to rely on the Convention to justify certain security measures, including administrative detention and assigned residence, among others.[11]

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[6] Menachem Hofnung and Keren Weinshall Margel, Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice, JOURNAL OF EMPIRICAL LEGAL STUDIES 7.4 (2010): 664-692; Menachem Hofnung et al., "Judicial Rejection as Substantial Relief: The Israeli Supreme Court and the 'War on Terror'", in COURTS AND TERRORISM: NINE NATIONS BALANCE RIGHTS AND SECURITY (2011): 150-168

[7] eg Security Council Resolution 2334(2016).

[8] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV).

[9] HCJ 785/ 87 *'Abed Al- 'Afou v IDF Commander in the West Bank* (10 April 1988).

[10] Theodor Meron, The Geneva Conventions as Customary Law, 81 AJIL 348 (1987); Jean- Marie Henckaerts & Louise Doswald-Beck, ICRC, Customary International Humanitarian Law, Rule 130 (2005).

[11] HCJ 7015/ 02 *'Ajouri v IDF Commander in the West Bank* (3 Feb 2002).

Second, the Supreme Court has held that a settlement may be established on private land if it were proven that the specific settlement would fulfill a security purpose.[12] This decision violates the language of Article 52 of the 1907 Hague Regulations, which Israel applies in the Occupied Territories, which limits the taking of private property only "for the needs of the army of occupation".[13] The Court has also rejected petitions against the establishment of settlements on "state" land, despite the fact that international law requires that public property in occupied territory be held in trust for the local population, and prevents the creation of permanent changes that are not required for the local population's benefit . The Court rejected these claim by holding, among others, that Palestinian residents have no standing to petition decisions concerning the use of public land.[14]

Third, the Court held that it would not consider other legal arguments against the legality of establishing settlements in the Occupied Territories, because given the predominantly political character of the matter, the legality of the settlements is non-justiciable.[15] Note the irony: one of the strongest critiques put forward by proponents of the "reform" concerns the Court's expansion of justiciable issues and standing. Yet in the context that is the most crucial to the political project underlying the "reform" , the Supreme Court has exceptionally relied on non-justiciability and lack of standing.

Fourth, despite the fundamental principle that the military commander must preserve as far as possible the situation on the ground, the Supreme Court has held that the government may carry out extensive changes to infrastructure, such as paving roads and quarrying, in a manner which ultimately furthers the interests of Israelis and not of the Palestinian residents of the territory.[16] This was achieved, inter alia, by holding, contrary to GC IV Article 49(6) mentioned above, that Israeli settlers are part of the local population whose benefit the military commander is required to pursue.[17] Although international law prohibits the occupying power from changing the law in the occupied territory unless absolutely necessary, the Court has allowed the military commander to change local law in order to guarantee the interests of the settlement policy. One of many examples for this was changing the composition of planning committees to exclude participation of Palestinian representatives.[18]

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[12] HCJ 606/ 78 *Ayoub v Minister of Defence* (15 March 1979) PD 33(2) 113; HCJ 390/ 79 *Dweikat v Government of Israel* (22 Oct 1979) PD 34(1) 1,

[13] Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations .Concerning the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 187 C.T.S. 227.

[14] HCJ 285/ 81 *Al- Nazer v IDF Commander in Judea and Samaria* (7 Feb 1982) PD 36(1) 701

[15] HCJ 4481/ 91 *Bargil v Government of Israel* (25 Aug 1993),

[16] HCJ 393/ 82 *Jam'iyat Iskan v IDF Commander in Judea and Samaria* (18 Dec 1983).

[17] eg HCJ 794/ 17 *Ziada v IDF Commander in the West Bank* (31 Oct 2017); FHHCJ 9367/ 17. Ziada v IDF Commander in the West Bank (30 May 2018)

[18] HCJ 5667/ 11 *Deirat Rifa'iya Village Council v Minister of Defence* (9 June 2015).

Fifth, the Supreme Court has enforced the property rights of Palestinian residents in the Occupied Territories and thus generally prohibited the establishment of settlements and outposts on private Palestinian land when the settlements had no security justification, including needs connected with ensuring the security of Israeli settlements in the territories.[19] In this vein, for example, the Court struck down the Regularization Law, which sought to infringe extensively on Palestinian property rights in order to validate outposts,[20] a law which the present Government seeks to reinstate. But the protection given by the Court to these rights was far from comprehensive. The Court upheld a substantive change to local law by means of its interpretation of basic principles of private law acquisition,[21] and adopted harmful legal mechanisms such as "quasi-market overt" with regard to transactions carried out by the Custodian of Government Property,[22] in a manner which only affects Palestinian property. It should be noted that the purpose of the change of regime is, among others, to eliminate the remaining fundamental protection for Palestinian property.

b. Unauthorized outposts

The Court's approach to unauthorized outposts – namely settlements that are unlawful even according to Israel's perception, either because they were constructed on private land, or because they were constructed on "state" land without authorization – has contributed to delays in their evacuation. All of the Court's decisions ordering the evacuation of outposts constructed on private Palestinian land were given only after the Government itself admitted that the outpost was constructed on private land and that the law required its removal. In these cases the Court gave the Government numerous extensions before implementing the evacuation, in order to allow it to reach agreement with the residents of the outposts, including the establishment of a new settlement to replace the evacuated outpost (for example, establishing the Amichai settlement for the evacuees from Amona). The Court gave evacuation orders only after the authorities repeatedly failed to carry out their undertakings to the Court, to evacuate the outpost by a certain date. It should be noted that when outposts have been constructed on public land in violation of the Government's decision that settlements may not be established in the occupied territory without its approval and without an official planning scheme and building permits, **the Court refused to intervene in the enforcement policy of the Civil**

[19] HCJ 2618/19 *Abu Salem v Commander of IDF Forces in the West Bank* (2019).

[20] HCJ 1308/ 17 *Silwad Municipality* v *Knesset* (9 June 2020)

[21] Ronit Levine-Schnur, "Property Rights in the Occupied West Bank: Recognition Procedures, Substantive Norms of Recognition, and Rules of Protection" 52 Mishpatim (in Hebrew).

[22] HCJ 6364/20 Minister of Defence Salha (2022); Amichai Cohen and Yuval Shany, "Occupation, Annexation and the Regularization Law", 55 Iyunei Mishpat Forum (2022) (in Hebrew).

Administration, which classifies the enforcement of demolition orders against illegal Israeli construction on public land as low priority.[23]

An example of this general approach is the Amona case, where some of the Supreme Court judges were even willing to recognize in principle the legality of an "agreed" framework whereby alternative private Palestinian land would be taken in lieu of an outpost constructed on private land, so long as the infringement on the right to property was proportionate. To this end the Court interpreted the security need demanded by international law for the taking of private land as inclusive of the wish to reach agreement with the Israeli settlers (despite their being trespassers according to local property law).[24]

c. Security measures and warfare

In the 1980s the Supreme Court allowed the government to deport Palestinian residents of the occupied territory to Lebanon, by holding that GC IV was not customary international law and that the purpose of its Article 49(1) – which prohibits deportation in absolute terms – was to prohibit mass deportation rather than individual deportation on security grounds.[25] Furthermore, even when at issue was the deportation of 415 Palestinians to Lebanon, the Court refused to intervene.[26]

Contrary to the determinations of the international Court of Justice in the Hague, that the construction of the separation barrier in the route determined by Israel, which incurs into the depth of the West Bank in order to connect most of the settlements to Israel, was unlawful under international law,[27] the Israeli Supreme Court upheld the legality of constructing the barrier in the territory, even when it diverged from the "Green Line" in order to encompass settlements on the "Israeli" side.[28] Although the Supreme Court examined specific segments of the barrier in terms of proportionality and occasionally required the government to reroute them, the crucial development in this regard was the holding that the authorities had the power to construct such a barrier in occupied territory. In the *Mara'abe* case, Chief Justice Barak held that it was permissible to construct the barrier in order to protect the settlements, while refusing to consider the

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[23] for a comprehensive review see DAVID KRETZMER AND YAEL RONEN, THE OCCUPATION OF JUSTICE: SUPREME COUR T OF ISRAEL AND THE OCCUPIED TERRITORIES, Chapter 10 (2nd ed., 2021).

[24] HCJ 794/ 17 *Ziada v IDF Commander in the West Bank* (31 Oct 2017); FHHCJ 9367/ 17. Ziada v IDF Commander in the West Bank (30 May 2018)

[25] HCJ 785/ 87 *'Abed Al- 'Afou v IDF Commander in the West Bank* (10 April 1988).

[26] HCJ 5973/ 92 *Association for Civil Rights in Israel v Minister of Defence* (28 Jan 1993)

[27] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory - Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

[28] 2056/ 04 *Beit Sourik Village Council v Government of Israel* (30 June 2004).

latter's legality.[29] Moreover, the Court upheld as proportionate various extreme limitations on the lives and liberty of the Palestinians residing in the "Seam Zone" (the area between the barrier and the Green Line).[30]

For decades the Court has been holding that the military commander is authorized to demolish the homes of families of assailants even when the families were not involved in the act. This body of case law contrasts with the common stance worldwide, that house demolition in these circumstances constitutes collective punishment, which is prohibited under international law. The Court held that the practice did not constitute collective punishment because the action was intended as a measure of "deterrence". It further held that these are not prohibited demolitions of private property, contrary to the wording of GC IV Article 53 which prohibits destruction of property only when "such destruction is rendered absolutely necessary by military operation". The Court has repeatedly rejected petitions to revisit the question of the legality of punitive house demolitions.[31]

Recently the Supreme Court rejected a petition to hold that entry of military forces into private Palestinian homes must be authorized by judicial order. It did so despite the petitioner's claim that the fact that entry into the homes of Israeli settlers does require such an order constitutes discrimination. The Court held that the laws of war and international human rights law do not demand that such a judicial order be required.[32] This view, too, is controversial among international law experts, to say the least.

In addition, the Court has recently approved the deportation of Palestinian residents from the Massafer Yata area ino order to use the land for military training, without examining whether it is permissible to establish training areas in occupied territory, and without examining why they had to be established in the particular location where civilian communities reside, and who depend on lands in the area for their subsistence. The decision endorsed entirely the government's position that there is no "permanent" Palestinian community in the area, despite extensive evidence that a Palestinian community has lived in the area for many years.[33]

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29 HCJ 7957/ 04 *Mara'abe v Prime Minister of Israel* (15 Sept 2005)

30 HCJ 9961/ 03, 639/ 04 *Hamoked— Centre for the Protection of the Individual v Government of Israel* (5 April 2011). For commentary on the Supreme Court's decision see hinar, Idealism and Realism in Israeli Constitutional Law, in Constitutionalism and the Rule of Law: Bridging Idealism and Realism (Ernst Hirsch Ballin, Maurice Adams, Anne Meuwese, eds.2017); AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION, Chapter 4 (Cambridge University Press, 2017).

31 FHHCJ 181/ 09 *Abu Dhaim v Officer Commanding Home Front* (6 Jan 2009); 291 6/ 16 *Dwayat v Officer Commanding Home Front* (10 April 2016);

32 HCJ 2189/20 *Hamed v Commander of IDF forces* (2021).

33 HCJ 413/13, *Abu Aram v Minister of Justice* (2022). See further ???, 8 May 2022.

With regard to assigned residence, the Court has held in the past that residents of the West Bank who appear to constitute security risks can be assigned to Gaza, based on the view that the West Bank and Gaza are one territorial unit under the Oslo Accords.[34] Yet when Palestinians seek to move between Gaza and the West Bank, it has been held that those are separate territorial entities, despite the fact that the Oslo Agreements have not been annulled and that they form the basis for the relationship between Israel and the Palestinian Authority.[35]

With regard to active hostilities and use of lethal force, the Supreme Court has not imposed significant constraints on the government. In fact, other than in the "Early Warning Procedure" case, in which the Court accepted that argument the the practice violated the prohibition on the use of human shields, and where the Court upheld the petition due, among other considerations, to concerns regarding international legal intervention, the Court has never upheld a significant petition on such issues.[36] Thus, in the case of intentional killing of Palestinians suspected of hostile conduct, the Court held – thereby creating an international precedent – that Palestinians suspected of hostile conduct may be killed outside the context of active hostilities.[37] The Court refused to intervene with regard to the use of flechette bombs in Gaza;[38] rejected a petition against the Law for the Incarceration of "Unlawful Combatants" that raises complex questions of international law,[39] and recently approved the holding of bodies of Palestinian for negotiations purposes, despite the strong tension between this practice and international laws of armed conflict.[40] Moreover, the Court has rejected a petition against the rules of engagement applied in the "Marches of Return" near the fence with Gaza, despite their unprecedented permissiveness in allowing the shooting of "prominent inciters".[41]

d. Status of the Gaza Strip

In 2005 Israel carried out the "disengagement" from the Gaza Strip. Israel, led by the right-wing government of Ariel Sharon and with the support, among others, of current Prime Minister Benjamin Netanyahu, decided to evacuate the settlements in the Gaza Strip and to withdraw IDF forces from it. Similarly to the many cases reviewed above, in this instance too, the court refrained from examining the constitutionality of government

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34 HCJ 7015/ 02 *'Ajouri v IDF Commander in the West Bank* (3 Feb 2002).

35 HCJ 11120/ 05 *Hamdan v Officer Commanding Southern Command* (7 Aug 2007)

36 HCJ 3799/ 02 *Adalah v Officer Commanding Central Command* (6 Oct 2005)

37 HCJ 769/ 02 *Public Committee Against Torture v Government of Israel* (14 Dec 2006)

38 HCJ 8990/ 02 *Physicians for Human Rights v Commander of Southern Command* (27 April 2003) PD 57(4) 193.

39 CrA 6659/ 06 *A v State of Israel* (11 June 2008).

40 HCJ 10190/ 17 *IDF Commander in the West Bank v 'Alayan* (9 Sept 2019).

41 HCJ 3003/ 18 *Yesh Din v IDF Chief- of- Staff* (24 May 2018)

policy in a political issue, and did not strike down the policy,[42] although it ensured the annulment of provisions of the law that restricted the compensation afforded to the evacuees.[43] Despite the fact that Israel evacuated the settlements and removed its ground forces from Gaza, it still controls many elements of life there, such as sea and air, movement to the West Bank, entry and exit of goods, taxation and more. Numerous actors in the international community continue to consider Israel an occupying power in Gaza, who is consequently bound by positive obligations towards the local population.[44] Although early on the Supreme Court held that Israel continues to bear (limited) obligations based on its long-term control over the Strip and its continuing influence on various aspects in it,[45] the Court seems to have significantly withdrawn even from this position, in a recent decision upholding the constitutionality of a law that grants the state immunity from tort claims by residents of "enemy territory", a term which alludes to Gaza.[46]

e. Administrative detention

The laws of armed conflict allow holding residents of occupied territory who threaten the security of the area in administrative detention, but only in extreme cases. Although the Supreme Court carries out judicial review of such detentions, it accepts that such review be conducted usually *ex parte*. In practice the Court orders the state to release a person from administrative detention rarely, if ever.[47]As a result, administrative detention has become a common practice in the Occupied Territories.

f. Torture

In 1999 the Supreme Court held that under Israeli law, interrogators in the GSS are not authorized to use physical means against interrogees.[48] While this decision is a landmark in the protection of human rights in Israel and it limited the practice of torture in Israel, the Court held that in exceptional cases, an interrogator would be exempt from criminal responsibility following the use of such means, based on the "necessity" defence. Moreover, in the same decision the Court held that the Attorney General could set

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[42] HCJ 1661/ 05 *Gaza Coast Regional Council v Knesset of Israel* (9 June 2005)

[43] Ronit Levine-Schnur, Constitutional Property Rights in Israel and the West Bank (July 10, 2021), in OXFORD HANDBOOK ON THE ISRAELI CONSTITUTION (Aharon Barak, Barak Medina and Yaniv Roznai, eds., Oxford University .Press, Forthcoming), Available at SSRN: https://ssrn.com/abstract=3884024

[44] eg Human Rights Council, Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, (Mar. 18, 2019), U.N. Doc. A/HRC/ 40/CRP.2.

[45] HCJ 9132/ 07 *Al- Bassiouni Ahmed v Prime Minister and Minister of Defence* (30 Jan 2008).

[46] HCJ 939/19 *A v Minister of Defence* (2022).

[47] Shiri Krebs, Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court, 45 VAND. J. INT'L L. 639 (2012).

[48] HCJ 5100/ 94 *Public Committee Against Torture in Israel v Government of Israel* (6 Sept 1999)

guidelines for instances in which such an exemption would be given.[49] In practice, this decision did not prevent the GSS from institutionalizing "necessity interrogations", thereby circumventing the prohibition on such means. In a number of cases the Court refused to intervene in the Attorney-General's decision not to open investigations against interrogators that used force against Palestinian detainees.[50] In addition, the Court has refused to strike down the Attorney-General's guidelines regarding exemption from criminal responsibility for GSS interrogators. It did so even though the government acknowledged that these guidelines constituted the basis for internal GSS guidelines that regulate the use of physical means, in prima facie violation of the Court's decision that the exemption based on necessity may not be used to authorize use of physical force *ex ante*.[51] The Supreme Court gave further legitimacy to the use of violence against interrogees in security matters in the case of Amiram Ben Oliel, when it refused to invalidate a confession given by an interrogee 36 hours after being subject to physical means in interrogation.[52]

Finally, the Court upheld the constitutionality of legislation that allows the forced feeding of detainees and prisoners held on security charges, based on "considerations of risk to human life or real risk of grave harm to state security".[53] This decision was given despite the view of the Israeli Medical Association and other organizations that the practice violates medical ethics and the international law prohibition on torture.[54]

Summary:
This non-exhaustive review demonstrates that contrary to claims made in current public debates regarding the Supreme Court's intervention in "security matters" and matters relating to the Occupied Territories, the situation is , in fact, very different. For decades the Supreme Court has been interpreting the international norms applicable to the occupied territories in a manner which grants the government broad powers, often in contravention of the accepted understanding of these norms in the international community. Moreover, critics of the Court from a human rights and international law perspective maintain that often the Court has effectively granted legal legitimacy to conduct that the overwhelming majority of the international community regards as

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[49] HCJ 5100/ 94 *Public Committee Against Torture in Israel v Government of Israel* (6 Sept 1999), para 48.

[50] HCJ 5722/ 12 *Abu Ghosh v Attorney General* (12 Dec 2017); HCJ 9018/ 17 *Tbeish v Attorney General* (26 Nov 2018).

[51] HCJ 5722/ 12 *Abu Ghosh v Attorney General* (12 Dec 2017); HCJ 9018/ 17 *Tbeish v Attorney General* (26 Nov 2018).

[52] HCJ 7388/21 *Ben Oliel v State of Israel* (2022).

[53] Law for the Amdendment of the Prison Ordinance (No 48), 2015, section 19(14)(5).

[54] HCJ 5304/15 *Israeli Medical Association v the Knesset* (2016).

unlawful, and allowed the security authorities excessively wide berth.[55] The important public debate currently taking place in Israeli society should be grounded in accurate facts, and we hope that this document will assist in this endeavor.

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[55] eg Aeyal M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?, 18 EUR. J. INT'L L. 1 (2007); DAVID KRETZMER & YAËL RONEN, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES, Ch. 8 (2d ed. .2021); AEYAL GROSS, THE WRITING ON THE WALL (2017).