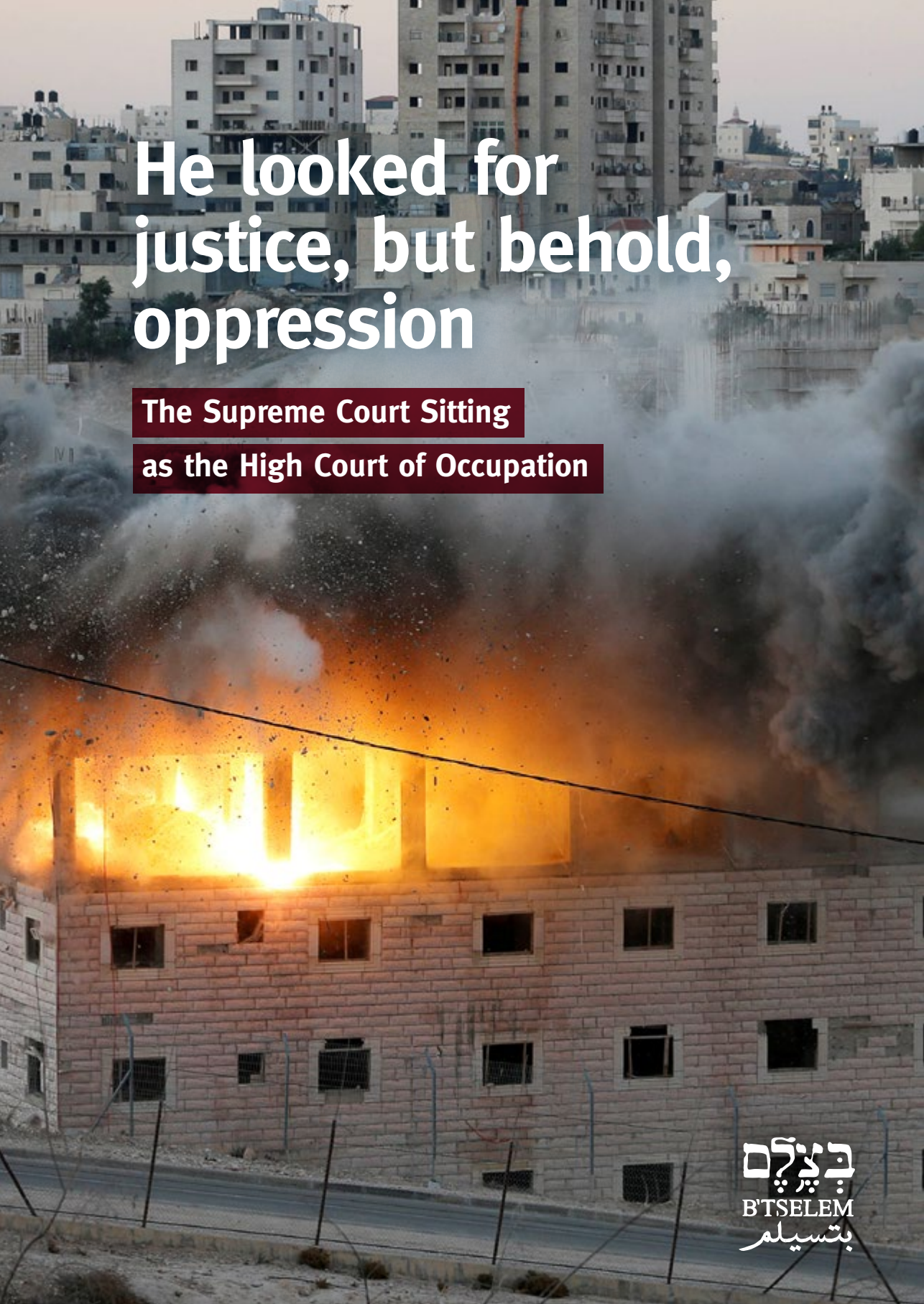

He looked for justice, but behold, oppression

The Supreme Court Sitting as the High Court of Occupation

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B'TSELEM
بتسيلم

He looked for justice, but behold, oppression

Isaiah 5:7

The Supreme Court Sitting as the High Court of Occupation

December 2019

On the Cover: A Palestinian building is blown up by Israeli forces in Wadi al-Humus neighborhood in East Jerusalem, following the approval of the Israeli High Court, July 22, 2019. Photo by Mussa Qawasma, Reuters.

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Table of Contents

Introduction

On 29 January 2019, the president of Israel's Supreme Court, Justice Esther Hayut, spoke at the annual international conference held by the Institute for National Security Studies. In her speech, she emphasized that "the State of Israel, since its establishment, has viewed itself as committed to the rule of law and the defense of human rights, at times of both war and peace". Accordingly, the role of the court is only to supervise how the state fulfills this commitment, and it is not required to "choose between operational possibilities or engage in considerations that require clear professional expertise". Nevertheless, the president clarified, "the court does not hesitate to exercise judicial review when presented with questions of legal principles that justify intervention".

To clarify her distinction between these two types of cases, Justice Hayut cited the court's ruling in a petition regarding the open-fire regulations the military has employed in response to the protests held by Palestinians near the fence separating Gaza from Israel since March 2018.[1] The president noted that the judges studied the open-fire regulation and determined that "they establish criteria for the incremental use of means to deal with the dangers arising from the events", and that "these criteria directly relate to the severity of the danger and the degree of certainty that the danger will be realized". The court further determined that, "according to the regulations, the use of potentially lethal force in a concrete instance is subject to the stringent principles of 'necessity' and 'proportionality' laid out in international law".

That is the court's answer to a "question of legal principle". The way that these regulations are applied is, according to Justice Hayut, a matter of "operational discretion" that the court refuses to discuss: "Examining the way in which these orders are carried out touches on professional considerations which the court may not have the tools to assess – especially as the events that are the subject of the petition are ongoing". In any case, the military carries out "an organized process of learning from mistakes while the events are still underway, following which, the troops on the ground are given further instructions and clarifications. Some incidents are referred to an independent general staff mechanism for the investigation of exceptional incidents".

The president attempts to paint an idyllic, balanced picture of the Supreme Court, as though it honestly and seriously considers all aspects of matters brought before it without intervening in affairs that lie beyond its scope, but does not hesitate to intercede when suspicion arises that the law has been violated. Yet, the president only illustrates how the distinction between cases that raise "questions of legal principles" and cases that require "operational discretion" merely creates an illusion of judicial review. Over the years, the court has used this exact distinction to provide a legal stamp of approval to the ongoing dispossession, oppression, abuse and killing of Palestinians.

The ruling regarding the open-fire regulations clearly demonstrates that the distinction is meaningless. The gap between the state's declarations and the reality on the ground could not be clearer: the petition was heard on 30 April 2018, about a month after the first protest near the Gaza fence. Up to that point, 38 Palestinians – five of them minors – had been killed due to application of these open-fire regulations, and more than 1,900 injured by live fire. By the time the ruling was handed down some three weeks later, on 24 May 2018, another 69 Palestinians had been killed,

1. HCJ 3003/18, *Yesh Din – Volunteers for Human Rights v. The IDF Chief of Staff.*

nine of them minors, and more than 3,600 injured by live fire. Since then, and until today, another 116 Palestinians had been killed, 31 of the minors, and more than 4,000 injured by life fire.

By choosing to determine the open-fire regulations are lawful while ignoring their horrifying results, the president of the Supreme Court publicly declared that the state may engage in unlawful acts and that the court will provide it a stamp of legal approval. This will hold true, however, as long as the state refrains from being truthful with the court, but rather continues to present the justices with irrelevant documents reflecting a theoretical legal analysis that is divorced from the reality on the ground.

This is also true of Justice Hayut's statement that the military provides the troops with "further instructions and clarifications" and investigates "exceptional incidents". Again, this determination is based on documents the state has presented the court, extensively describing the work of the "military law enforcement system". In reality, the so-called "independent general staff mechanism for investigating exceptional incidents" and similar apparatuses have proven time and again to be no more than whitewashing techniques for protecting the persons responsible for formulating the regulations, the commanders who hand them down, and the soldiers who apply them.[2]

This ruling, which the president chose to emphasize, is not unusual. It is just one example of many in which the Supreme Court refrained from giving effective judicial review, and failed to constrain security forces when it comes to Palestinians and the violation of their rights – even in cases of questions of legal principle. The court has proven its willingness to sanction almost any injustice or violation of the human rights of Palestinians. Over the years, it has permitted nearly every kind of human rights violation that Israel has committed in the Occupied Territories. Violations approved by the court include the punitive house demolitions, lengthy detention without trial, the ongoing blockade of the Gaza Strip and the imprisonment of some two million people inside it, the expulsion of entire communities from their homes, and the construction of the Separation Barrier on Palestinian territory, resulting in extensive land grab.[3]

Above all, the Supreme Court chooses to ignore the broader context: The Palestinian petitioners are part of a population that completely lacks representation, whose lives have been governed by a harsh military regime for over half a century, whose political rights are denied, and who can't participate in the most basic decisions concerning their lives. According to both common sense and international law, these circumstances should drive the court to provide increased protection to the very population that needs it so much. Instead, the Supreme Court chooses to defend the perpetrators.

What, then, is the actual function of Israel's Supreme Court sitting as the High Court of Justice, concerning the Occupied Territories? President Hayut provided the answer in her speech cited above, by detailing the benefits of the Court's ruling for the state. In her view, the court's judicial review "reflects the state's commitment to the rule of law" and therefore, regardless of the rulings it delivers, "one of the important side effects is its contribution to Israel's international legitimacy". The Supreme Court's involvement also helps the state "reinforce its 'complementarity' argument when dealing with

2. See B'Tselem, *After a Year of Protests in Gaza: 11 Military Police Investigations, 1 Charade,* March 2019; B'Tselem, *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, September 2016; B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism,* May 2016.
3. See, for example, B'Tselem, *Fake Justice: The Responsibility Israel's High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians*, February 2019.

criminal proceedings abroad, in the international arena or in other countries".

That is the heart of the matter: Israel's Supreme Court believes that one of its roles is to protect the image of Israel and defend its representatives when they violate the law. It faithfully carries out this mission by adopting unreasonable, at times absurd, interpretations of the law that are dismissed by most jurists around the world.

While the justices of the Supreme Court do not write the laws, make policy, or implement it, they have the authority – and the duty – to determine whether a policy brought before them is lawful, and to prohibit its application when the policy unjustifiably harms the human rights of Palestinians in the Occupied Territories and breach the principles of international law designed to protect them. In refusing to do so, Israeli's highest legal authority not only condones these human rights violations – but also the occupation itself.

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Below are four analyses of the Supreme Court rulings that B'Tselem published on its website throughout 2019, on a range of issues: house demolitions, the rights of persons in interrogation, prisoners and their families, and the use of corpses as bargaining chips. These rulings demonstrate how easily the court accepts the state's position and engages in legal acrobatics in order to sanction a severe violation of human rights. In essence, these analyses demonstrate how Israel's Supreme Court does not seek to serve justice, but rather to serve the occupation.

Court-sanctioned vengeance: HCJ upholds ban on family visits for Hamas prisoners from Gaza

Published: 14 July 2019

Family visits to prisoners at Gilboa prison. Photo by Hagai Aharon, AFP/Getty Images

According to figures updated through April 2019, Israel is holding 303 Palestinians from the Gaza Strip in prison facilities with its sovereign territory. Two of them are minors.

Israel makes it unbearably difficult for residents of Gaza to visit family members imprisoned within its territory.[4] In defiance of international law, Israel completely prohibited such visits from 2007 to 2012. When prison visits were renewed in July 2012, the eligibility criteria were so strict that only parents and spouses were allowed to visit prisoners. Gradually, Israel began allowing children up to age 16 to visit incarcerated parents, as well.

Israel has banned family visits to Hamas prisoners from the Gaza Strip, numbering about 100, since 1 July 2017. The ban was instated following a government resolution to impose restrictions on Gaza residents, including downgrading prison conditions, in an alleged bid to put pressure on Hamas. The movement is illegally and immorally holding two Israeli civilians, Avera Mengistu and Hisham a-Sayed, and the remains of two Israeli soldiers, Hadar Goldin and Oron Shaul, to be used as bargaining chips in negotiations for a prisoner exchange.

Following the prison visit ban, in August 2017, four Hamas-affiliated prisoners from the Gaza Strip filed a petition with Israel's High Court of Justice (HCJ). Nearly two years later, in June 2019, Justice Neal Hendel rejected the petition, with Justices Anat Baron and Yosef Elron concurring.

This judgment follows in the footsteps of the HCJ's longstanding jurisprudence in petitions filed by Palestinian residents of the Occupied Territories. The court – which was supposed to provide protection for a population with no representation in the political process that is ruled by a foreign military regime – has consistently provided a legal stamp of approval for the violation of Palestinians' rights, including home demolitions, detention without trial, expulsion of communities, torture in interrogation, road closures and violations of the rights of suspects and due process rights. With these rulings, the justices not only betray their role, but also play a key part in entrenching and maintaining the regime of occupation.

4. For more information, see B'Tselem, *Distant Relatives: Severe Restrictions Imposed on Prison Visits by Immediate Family to Gazans Held in Israel,* 22 January 2018.

The judgment in HCJ 6314/17 Namnam v. Government of Israel:

In the very opening of the judgment, Justice Hendel reiterates the governing constitutional-legal principle relevant to the matter: Prisoners do not lose their rights upon entering jail, and "a prison sentence does not, in and of itself, deny the prisoner's dignity or take away their basic rights". However, he immediately proceeds to find that this principle does not apply in the case before him, since prison visits, including by first-degree relatives, are not a right but a privilege, a "benefit" that the prison commander may grant or deny:

It may be argued that completely severing prisoners' interaction with the outside world in general and their family members, in particular, impinges on the constitutional rights to contact with the world outside the prison walls and to family life... However, so long as other means of communication remain available to the prisoners, the constitutional review of the visit ban concludes at the first stage – since the act does not amount to a violation of a constitutional right and need not be put to the tests stipulated in the limitations clause.

It is clear, Justice Hendel stresses, that the fact that this is a benefit extended to prisoners does not "leave them vulnerable to arbitrary action on the part of the administration" and that any decision to withhold the benefit must be made in keeping with the law, fall in line with the rules of administrative law, be "based on pertinent reasons" and "meet the tests of reasonableness and proportionality".

Justice Hendel analyzes the legal provisions applicable to prison visits and finds that the minister of public security may order the Israel Prison Service (IPS) to withhold visits due to pertinent considerations which "include, alongside maintaining the proper operation of the prison, also general national security considerations". Justice Hendel then considers that, "protecting national security, in its broad sense, is, therefore, considered part and parcel of the proper operation of prisons – and is one of the considerations that the competent authorities may take into account".

While Justice Hendel is aware that in this case, prison visits were denied as a way of pressuring Hamas rather than based on "concrete concern over abuse of the visits by any of the prisoners", he sees no issue with the measure since it was a denial of a privilege rather than a punishment, and therefore, "guilt " is not a requisite. According to Justice Hendel, once the protection of national security was found to be one of the purposes of the law, "the main question in terms of competency is whether the minister's decision serves this purpose, whatever the source of the security challenge it is meant to address may be".

The justice goes on to hold that, "there is no justification for an interpretation that leaves security considerations that are 'external' to the prisoners out of the scope of the relevant security purpose". In support of this finding, he cites a judgment written by Justice Hanan Melcer regarding the blanket ban on security prisoners' studying at the Open University,[5] stating that such an interpretation would curtail "the ability of the State of Israel to 'combat terrorism by way of withholding privileges, including the use of necessary and legitimate leverage against hostage terrorism initiated by terrorist groups for the release of security prisoners affiliated with them', as my colleague, Deputy President H. Melcer, has remarked".

The government decision to ban family visits with Hamas prisoners also meets the requirements of Israeli administrative law, according to Justice Hendel. Hendel is certain that the decision is reasonable since, *it is apparent that the minister of public security was presented with various professional opinions. However,*

5. HCJFH 204/13, *Said Salah v. the Israel Prison Service.*

there is no cause to intervene in his decision to adopt the position of the coordinator for war prisoners and absentees whom the Respondents consider as possessing 'the most suitable knowledge, understanding and tools to assess the impact of visit cessation on Hamas'. Without cause to intervene in this professional pronouncement, I have not found that the balance struck by the minister of public security exceeds the bounds of reasonableness.

Justice Hendel notes further that the harm caused to prisoners is, in any event, "limited" and has a "restricted" impact, both in terms of the number of prisoners affected and in terms of the harm caused to them:
It must be recalled that the minister's decision affects a very small group of prisoners, some 100 individuals, out of more than 6,000 security prisoners and more than 800 Hamas prisoners. The intensity of the impact is also restricted, since even prisoners who do belong to this group have not lost all contact with the outside world. They may correspond with their families, and even meet with religious clerics, representatives of the International Committee of the Red Cross, lawyers and the like.

Justice Hendel goes on to find that the decision is also proportionate:
Given the aforesaid position of the coordinator for war prisoners and absentees, it is not difficult to conclude that the minister's decision does have a rational connection to its purpose – putting pressure on Hamas to advance the return of the civilians and the remains of the IDF soldiers to Israel... In the absence of a vested right to receive visits, and given the alternative means of communication available to the prisoners, which mitigate the intensity of the potential injury to the general rights to contact with the outside world and to family life, this suffices.

Further along, Justice Hendel states: "The security and human benefit potentially achieved through the policy of denying visits, namely, the return of Israeli civilians (let us refer to them by name, Avera Mengistu and Hisham a-Sayed) and the remains of the IDF soldiers held by Hamas, outweighs the certain degree of injury caused to the Petitioners.

Justice Hendel concludes the judgment by stating, "All that is left, therefore, is to express hope that the decision of the minister, which, at this point in time, does, as stated, meet the tests of reasonableness and proportionality, will in fact aid the safe return of the Israeli civilians held by Hamas and the proper burial of IDF fallen soldiers Lieutenant Hadar Goldin and Staff Sergeant Oron Shaul".

Visit ban severely harms prisoners and families

In his judgment, Justice Hendel accepted nearly all of the arguments put forward by the state, ruling that the decision to deny Hamas prisoners family visits from Gaza was lawful, reasonable and proportionate. However, his findings raise several serious questions.

A. Gaza prisoners have become bargaining chips for achieving a goal that is external to them

Justice Hendel treats the prisoners as "bargaining chips" in negotiations with Hamas, as if they were a tool that can be legitimately used to achieve a goal external to them. The harm is not inflicted on them because of their own conduct or that of their family members. This also means that they are powerless to influence or change the decision.

This particular finding goes beyond what the court has previously ruled. Previous rulings on similar issues focused on concrete concerns relating to the prisoners themselves, even if only as lip service and even if the allegations were unjustified. In a petition filed by security prisoners to revoke the ban on telephone calls, the court accepted the state's argument that the ban had been motivated by concern that prisoners "would maintain telephone communications with hostile elements, possibly compromising national security".

In a petition filed by prisoners against the IPS ban on taking up studies at the Open University, the court ruled that the ban was justified since the organizations covered tuition costs, "both as compensation for the crimes [the prisoners] committed and as an incentive for continued actions against the state", which may threaten national security. In another case, several prisoners petitioned the court to receive visits from non-immediate relatives. Here, too, the court said such visits could reasonably be used to "transmit messages" that would pose a risk to national security.

The court has clearly used "national security" in these cases as a convenient way to uphold violations of prisoners' rights even when there is no evidence that they pose any threat. However, in this most recent case, Justice Hendel removes even this thinnest of veils. The state, with the court following suit, openly admits to using the prisoners and their relatives as a means of pressuring Hamas.

Justice Hendel compares his judgment to a previous judgment in which the Supreme Court ruled that Lebanese citizens could not be kept in administrative detention as "bargaining chips" for negotiating the return of Israeli soldier Ron Arad.[6] Justice Hendel believes the two cases are entirely different since in the previous case, the detention was indefinite, while in the current matter, "no protected constitutional right has been violated, since the prisoners and their families have no vested right to visits. Hence, there is no justification for an interpretation that leaves security considerations that are 'external' to the prisoners out of the scope of the relevant security purpose".

However, the similarities between the two cases outweigh this difference. Both cases focus on using human beings as a means to an end. As Justice Barak noted in the judgment concerning the Lebanese citizens, this is "not a 'quantitative' transition but a 'qualitative' transition". An instrumental approach to human beings, in this case as pawns in a greater game, by whatever means, detention or denial of contact with family, strips them of their dignity and agency.

Justice Hendel cautions that if he were to rule visits could not be denied, "the state's ability to combat terrorism by way of withholding privileges would be compromised". However, prohibiting "withholding privileges" would, in fact, be a welcome result. Treating persons as a means to achieving an end they have no influence over is inherently wrong, and the state would do well to avoid taking that path.

B. The visit ban violates the prisoners' rights

Security prisoners are held in conditions that isolate them from the world and from their families. Unlike other prisoners, they are denied telephone calls, prison leave and conjugal visits. All they had left, until the ban was imposed in July 2017, was the chance to see just a few of their relatives, once every few weeks, for a short time, behind a glass wall.

Without offering a compelling explanation, Justice Hendel plays down the injury the visit ban causes prisoners, referring to it as "restricted" given that they "have not lost all contact with the outside world. They may correspond with their families, and even meet with religious clerics, representatives of the International Committee of the Red Cross, lawyers and the likes". It is difficult to grasp why the honorable justice thinks that exchanging letters with family, or meeting with various individuals in an official capacity, could substitute a face to face meeting with loved ones.

Israel chose to incarcerate these prisoners in its own territory, in defiance of international law. It must, therefore, allow the visits without arbitrary restrictions, in recognition of the fact that contact with family is a fundamental right to which everyone is entitled, including prisoners. Other prisoners held inside Israel receive family visits regularly, including security prisoners from the West Bank. These visits

6. CrimFH 7048/97, *Anonymous v. the Ministry of Defense.*

are not a reward for good behavior, but fulfillment of the prisoners' right to maintain contact with the outside world and to continue to have a minimal level of family life.

Even the justices of the Supreme Court, whose judgments Justice Hendel quotes, have acknowledged how important it is for prisoners to maintain contact with their families – even if they ultimately found it was only a "privilege" that could be withheld and refused to pronounce it was a vested right. In the judgment delivered in the case regarding visits from non-immediate relatives, Justice Danziger held:
The right to maintain the family unit is more powerful than the right to communicate and interact with other parties who are not part of the prisoner's family unit. The reason for this lies in the power of the right to family life and the ability to exercise, to some extent, the right to freedom of speech through contact with family members... The importance of face to face meetings between the prisoner and visitors cannot be underrated, as they enable communication on a level and of a quality unmatched by a letter or a telephone call.[7]

In the same judgment, Justice Procaccia held:
Prison leave and family visits in prison can be viewed as part of the human rights that prisoners continue to have even when in prison, rights that are not negated simply as a result of the deprivation of liberty involved in incarceration, which is the outcome of the punitive sanction. Prison leave and family visits are some of the aspects that make up the contact that prisoners-humans have with the world and with their close environment. They are a human need. They are part of the prisoners' essence as human beings, part of their human dignity. They make an important contribution to their welfare and rehabilitation over the course of their incarceration.

C. The visit ban violates the prisoners' families' rights

Justice Hendel completely ignores the severe injury to the family members who are forcibly cut off from loved ones incarcerated inside Israel's sovereign territory, which the family members cannot enter without Israel's explicit consent. The visits themselves, when they were still allowed, were short and involved and arduous journey. Family members would leave home before dawn, undergo a humiliating security screening before the visits, and return home in the evening. The visits themselves were brief, and visitors were not allowed any physical contact with their loved ones. Still, these visits were the only contact they had with their family members.

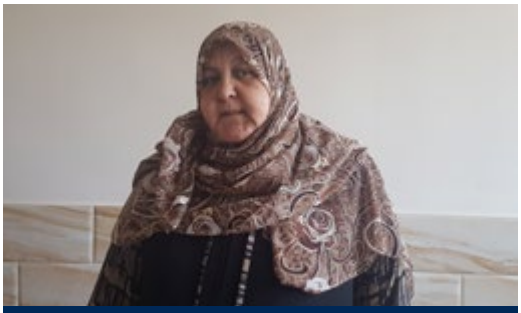
Testimonies collected by B'Tselem from family members in the Gaza Strip shed light on the unbearable hardship caused by the separation.

For example, in a testimony she gave B'Tselem field researcher Olfat al-Kurd, Amneh a-Zawar'ah, 39, a mother of five, described how much she misses her husband, Ibrahim, who was taken into custody in late 2009:
At the beginning of 2013 [after visits were renewed], I began visiting Ibrahim in Nafha Prison. I'd visit once every three months. All the visits were very hard because of the searches, and the prohibition on bringing in clothes, food and water. Even when my little children came with me, I wasn't allowed to bring food and drink for them. The visit was only 45 minutes long, and it was never enough. They wouldn't let even my children go in to see their dad and give him a hug. They only talked to him from behind the glass partition. Sometimes, in the last ten minutes of the visit, they would let Muhammad, my son, who was five years old, go in and sit next to his father and hug him.

My only connection with my husband is letters and pictures he sends with the Red Cross. The kids miss him. They want to hear his voice, to see him. They keep asking when they'll be able to visit their father in prison. My son Firas, who's 16 now, has forgotten what his father's face looks like. I feel like he's not interested in hearing about him.

7. LHCJA 6059/09, *Maher Yunis v. the Israel Prison Service*.

Laila a-Tanani, 53, a mother of seven, described the hardship that the ban on visitation has caused her in a testimony she gave B'Tselem researcher Olfat al-Kurd. Her son Mamduh, 32, has been in Israeli custody since August 2007:



Laila A-Tanani. Photo by Olfat Al-Kurd, B'Tselem

I couldn't visit Mamduh for about five years. I started visiting him only in 2012. During that time, my contact with him was through letters he sent me. His letters would have melted a heart of stone. When I read them, I missed him so much I cried. I couldn't talk to him on the phone, and the letters weren't enough.

In 2012, families of prisoners from Gaza were allowed to visit their sons in jail in Israel. I was over the moon. I was going to see Mamduh for the first time in five years. On the first visit, at Rimon Prison, I couldn't believe I was going. I went to the prison on my own. When I saw Mamduh, I cried a lot. He asked me not to cry. I told him they were tears of joys at seeing him. The visit lasted only 45 minutes, which didn't feel like it was enough to sit across from him and see him, but I still went home happy.

I kept visiting Mamduh on my own, once every three months, because the Israeli army wouldn't let his father and siblings visit. At the end of 2014, they finally let my husband visit him, too. We kept visiting until they banned the visits to Hamas prisoners.

In September 2016, my husband and I were going to visit my son. When we got to Erez Crossing, the Israeli military took us in for interrogation and wouldn't let us get on the bus with the other family members. They kept us at the checkpoint all day. We didn't get home until evening, without visiting Mamduh. When the bus took off from Erez Crossing to prison with the rest of the families but without us, I felt like my heart went with them. I wanted to be on that bus so badly. I haven't been able to visit my son since then.

This is a difficult time. I spend my days heartbroken and crying over Mamduh and his life that's being wasted in jail. I feel like my heart is literally burning. Sometimes, I hold back the tears, so my husband and children don't see me crying.

During one of the visits, the prison management let me take a photo with Mamduh. I screamed with joy. I went in and hugged him and started crying with happiness. Those were unforgettable moments that I yearn to experience again.

As'ad Abu Saleh, 56, has 12 children, two of whom are incarcerated in Israel. He himself was a prisoner in Israel and was released in the Shalit deal in October 2011. Because he is a former prisoner, Israel did not allow him to visit his sons even when family visits to Hamas prisoners were allowed. In a testimony he gave to B'Tselem field researcher Olfat al-Kurd, he said:

As'ad Abu Saleh with his Grandchildren.
Photo by Olfat al-Kurd, B'Tselem

I keep in touch with my sons through letters. They write and ask how I'm doing and how the family is doing. The

letters aren't enough, though. I miss my sons. I want to hear their voices, see them, understand what they're going through. I long to see them. I've almost forgotten what their faces look like and what their voices sound like. I hope I'll see them released soon.

D. The visit ban is not motivated by "security considerations" but by vengeance, pure and simple

To justify the visit ban, Justice Hendel turns to "general security considerations", including the "security need" to bring back the remains of the Israeli soldiers and the Israeli civilians held in Gaza. However, these considerations were never part of the public debate surrounding security prisoners' conditions as it played out outside the courtroom. This debate focused largely on the desire to get back at Hamas for denying its Israeli hostages visits, and to subject Hamas prisoners held in Israel to the same conditions Hamas forces on its Israeli captives.

A government-backed private member bill proposed by former MK Oren Hazan, which did pass a preliminary reading, sought to ban family visits to Hamas prisoners. The bill expressly referred to the need for "balanced" treatment – if Hamas does not allow visits, neither will we:

Wherein a terrorist organization or a declared organization holds an Israeli who has been kidnapped or taken captive and deprives said person of visits by a representative of the Government of Israel, a humanitarian organization by consent, or a family member, a security prisoner who is a member or sympathizer of said organization shall not receive visits other than visits from a lawyer or a representative of the International Committee of the Red Cross.

The explanatory notes for the bill state:

An untenable situation has developed whereby terrorist organizations have adopted a strategy of kidnapping and holding Israeli citizens without regard for the conditions in which they are held and without allowing visits, which severely harms the morale and national fortitude of the State of Israel. On the other hand, the State of Israel does allow security prisoners who are members of terrorist organizations to receive visits. This bill is designed to address the incongruency between the prison conditions the State of Israel provides for the terrorists who harm it and those provided by terrorist organizations to kidnapped Israelis: Avera Mengistu, Hadar Goldin and Oron Shaul.

In a Knesset debate regarding the bill held in October 2018, Public Security Minister Gilad Erdan made an attempt to argue that the goal behind denying visits is to "dial up the pressure" and "make them want our captives to return home, too". However, the minister soon clarified the true intention of the bill, saying it would allow ending "the absurd asymmetry between the conditions in which Israelis are held captive without trial by Hamas and the conditions terrorists receive here in Israel". Minister Erdan was quick to laud Justice Hendel's recent ruling, noting, "it's illogical and immoral to allow despicable terrorists to receive family visits while Hamas is holding the remains of our soldiers and Israeli civilians".

This is the entire story in a nutshell: not "general security conditions", not "proportionality tests", not a balance between "privileges" and weighty considerations underlying the decision to withhold family visits to Hamas prisoners from the Gaza Strip. At the end of the day, what led to this decision was the "absurd asymmetry", or, more simply, sheer vengeance.

Wadi al-Humos Demolitions: The excuse – security, The strategy – a Jewish demographic majority

Published: 22 July 2019

The demolitions of one of the buildings in Wasi al-Humos. Photo by Sarit Michaeli, B'Tselem

On the morning of Monday, 22 July 2019, the Israeli authorities began demolishing buildings in the neighborhood of Wadi al-Humos, the eastern extension of Zur Baher in East Jerusalem. The move came after Israel's High Court of Justice rejected the residents' appeal, and ruled there was no legal barrier to prevent the demolitions. Israel is planning to demolish a total of 13 buildings, including at least 44 housing units, which are in various stages of construction. Two families were already living in the buildings demolished today. Their 17 members, including 11 minors, are now homeless. Some of the structures slated for demolition were built in Area A, where the Palestinian Authority is responsible for planning and building, and had issued the required permits.

Wadi al-Humos is located in an enclave outside Jerusalem's municipal boundaries, which were unilaterally determined by Israel in 1967 as part of the ambition to illegally annex to Israel as much West Bank land as possible with the fewest number of Palestinians. The neighborhood holds most of the land reserve for future development of Zur Baher. The Zur Baher committee estimates that 6,000 people currently live in that neighborhood – a quarter of the total population of Zur Baher.

In 2003, the Zur Baher committee petitioned the High Court of Justice against the route of the separation barrier, which was also unilaterally imposed by Israel to serve its interests. The route was supposed to run near Jerusalem's municipal boundary, cutting off all of the homes of the Wadi al-Humos neighborhood from Zur Baher. Following the petition, the State agreed to reroute the barrier a few hundred meters eastward into West Bank territory.

The separation barrier in the area was built in 2004 and 2005, using a more moderate design than in other sections. Instead of a concrete wall, as in most of the route of the barrier in East Jerusalem, Israel built a two-lane patrol road with wide shoulders and another fence. The barrier surrounds the neighborhood of Wadi al-Humos, which may not have been cut off from Zur Baher, but was cut off from the rest of the West Bank, even though the land on which it was built was never annexed to Jerusalem's municipal territory.

The barrier's rerouting created an impenetrable bureaucratic maze for Wadi al-Humos residents, some of whom have permanent residency status in Israel, while some are West Bank residents. Following a High Court petition, Israel currently recognizes

all Wadi al-Humos residents as eligible for national health and social insurance coverage - like all other East Jerusalem permanent residents. However, the High Court accepted the State's position in another petition, holding that neighborhood residents with West Bank status are not eligible for permanent residency status in Israel and must renew their stay permits - for their own homes - every six months.

Wadi al-Humos – Houses on both sides of the separation fence. Photo by 'Amer 'Aruri, B'Tselem

The Wadi al-Humos neighborhood is not considered part of Jerusalem, and therefore the Jerusalem Municipality does not provide it with services, except for garbage collection. The Palestinian Authority does not have access to the neighborhood and therefore cannot provide it with any services, except for planning and building permits in the southeastern edge of the enclave, which were defined by the Oslo Accords as areas A and B, meaning the Palestinian Authority has planning and building jurisdiction. Most of the enclave, however, is defined as Area C, where the Civil Administration is responsible for planning and building, and where, just like in the rest of the West Bank, it refrains from drawing up outline plans that would allow the residents to build legally.

Israel's policy, which almost completely prevents Palestinian construction in East Jerusalem, creates a severe housing shortage for Palestinians living in the city, leaving them little choice but to build without permits. Hundreds of housing units (some in multi-story buildings) have been built in Wadi al-Humos since the separation barrier was built, along with a shopping center, a horse farm and swimming pools. A few of the buildings, located in Area A, were constructed after the landowners received building permits from the Palestinian Authority. The neighborhood's residents built its infrastructure themselves, including roads and water pipes from Zur Baher and Beit Sahur.

In December 2011, about six years after the separation barrier was erected in the area, the Israeli military issued an order forbidding construction in a strip measuring 100-300 meters on either side of the barrier. The military claimed the order was necessary for creating an "open buffer zone" for its operations, because the Wadi al-Humos area is a "weak point of illegal entry" from the West Bank into Jerusalem. According to the military's figures, at the time the order was issued, 134 buildings already stood on the land designated as a no-building zone. Since then, dozens of additional buildings were built, and by mid-2019 there were already 231 buildings in the zone, including multi-story structures built only dozens of meters from the barrier, and scattered across areas designated as A, B and C.

Four years after that, in November 2015, the military announced its intention to demolish 15 buildings in Wadi al-Humos. About one year later, in December 2016, the military demolished three other buildings in the neighborhood. In 2017, the owners and tenants of the 15 buildings under threat of demolition petitioned the Hight Court through the Society of St. Yves – Catholic Center for Human Rights. The petition argued, among other things, that most of the buildings had been built after receiving building permits from the Palestinian Authority, and that the owners and tenants were not even aware of the order prohibiting construction.

During the hearings in the petition, the military agreed to lift the demolition orders against two of

the buildings. The military also argued that four of the 13 remaining buildings would be only partially demolished. On 11 June 2019, the High Court accepted the State's position and ruled that there was no legal barrier preventingthe demolition of the buildings.

The High Court ruling, written by Justice Meni Mazuz, fully accepted the State's framing of the issue as merely a security matter, completely ignoring Israel's policy that almost completely prevents legal Palestinian construction in East Jerusalem, and the planning chaos in the Wadi al-Humos enclave that allowed the massive construction in the area – of which the Israeli authorities were fully aware.

Like in many similar rulings in the past,[8] the justices did not discuss the Israeli policy that almost completely prevents legal Palestinian construction in East Jerusalem, with the purpose of further engineer the Jewish demographic majority in the city – a policy that forces the residents to build without permits. The severe building shortage in East Jerusalem, including in Zur Baher, was central to the village's demand to reroute the separation barrier eastwards. Instead, the judges ruled that the home demolitions were necessary for security reasons, because construction near the barrier "can provide hiding places for terrorists or illegal aliens" and enable "arms smuggling."

The judgment also clarifies the extent to which the "transfer of powers" to the Palestinian Authority in areas A and B as part of the interim agreements has no practical meaning – except for the need to promote Israeli propaganda. When it suits its purposes, Israel relies on that "transfer of powers" to cultivate the illusion that most of the residents of the West Bank do not really live under occupation, and that actually, the occupation has ended. When it doesn't serve Israel interests, as in this case, Israel casts aside the appearance of "self-government," raises "security arguments," and exercises its full control of the entire territory and all of its residents.

The justices rejected, almost flippantly, the petitioners' argument that they did not know of the existence of the order forbidding them to build, and that they built after they relied on permits they received from the Palestinian Authority, ruling that the residents "took the law into their own hands." The court claimed that the residents should have known, based on the provisions of the order requiring that its contents be brought to the knowledge of the residents "to the extent possible", by posting it, along with low-resolution, difficult-to-understand maps, in the District Coordination Office, as well as on arguments presented to the court by counsel for the state. In doing so, the justices completely ignored the relevant facts: that the military took no action to inform the residents regarding the content of the order before November 2015, that the order was issued years after the construction of both the barrier and the buildings, and even then – nothing was done in the early years to enforce it, and no real effort was made to ensure that the residents knew the order existed – not even as obvious and simple an action as posting a notice on residents' homes.

This High Court ruling may have far-reaching implications. In various places in East Jerusalem (such as Dahiyat al-Bareed, Kafr 'Aqab, and Shu'fat Refugee Camp) and other parts of the West Bank (such as a-Ram, Qalqiliyah, Tulkarm, and Qalandia), numerous residential buildings were built near the separation fence. Furthermore, as a result of the Israeli planning policy that prevents Palestinians from receiving building permits, many other buildings were built without permits, with no other choice. The latest ruling gives Israel legal backing to demolish all of these structures, hiding behind "security considerations" in order to carry out its illegal policy.

8. See B'Tselem, *Fake Justice: The Responsibility Israel's High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians,* February 2019.

Testimony of Isma'il 'Abidiyah, 42, married and father of five, resident of Wadi al-Humos

I'm originally from the Um Lison neighborhood in Jabal al-Mukabber. I got married in 1998, and lived with my wife in a 50-square-meter unit. We had five kids, and we started to suffer from crowding. I felt we had to find a bigger house.

Isma'il 'Abidiyah. Photo by 'Amer 'Aruri, B'Tselem

In 2015, I bought a plot in Wadi al-Humos and got a building permit from the Palestinian Authority, since the land was in Area A and part of Bethlehem District. I built a two-story house, 300-square-meters each. The first floor is still under construction, and we live on the second floor.

We received the demolition order in 2016, and we're still in shock over the fact that the appeal we filed with the High Court wasn't accepted. We've all been going through a very hard time emotionally since the decision was delivered. I stay up until dawn. I keep thinking where we would go after the demolition, what we would do. These thoughts keep me up at night. Even my son, who's taking the matriculation exams this year, can't focus on his studies. God only knows if he'll even pass the general exam.

I borrowed a lot of money to buy the land and build the house. I have a lot of debt. If the house gets demolished, I'll become poor. I don't think I'll be able to get myself out of this situation. I'm a simple laborer, and my income is very limited. We'll have to rent another house and pay back the debt at the same time. Right now, I can't even think about it logically and can't plan what'll happen after the demolition.

Testimony of Munther Abu Hadwan, 42, married and father of five, resident of Wadi al-Humos:

I got married in 2001. I'm originally from Shu'fat Refugee Camp, and that's were three of our children were born. We couldn't go on living there because of the overcrowding, lack of safety and the crumbling infrastructure. I felt that my children's future was in danger. Our house was also crowded. There was only one room, a kitchen and a bathroom, all in 40 square meters. We moved to Ras al-'Amud temporarily, which is better than the refugee camp. We had a 50-square-meter home there.

My brothers, father and I looked for a cheap place to build in, and we found Wadi al-Humos. I bought the land and we got a building permit from the Palestinian Authority in Bethlehem, because the land is in Area A in the West Bank. We built two stories - a garage and a residential floor above it with two units. We were planning to build a third floor with two more units for my brothers Ashraf and Ahmad.

The demolition order the Civil Administration issued dashed our hopes and dreams of settling there. The order instructs us to demolish the house ourselves by 18 July 2019. We have been tense ever since, unable to think about anything else. Every time I look at my children, I get sad. Where will we go after the demolition? I have no idea! Maybe the street.

I'm a poor man. I'm a day laborer working in construction. I can barely provide for my family. I can't afford to rent an apartment, not even for USD 500. I think once the demolition happens, we'll have no choice but to put up a tent on its wreckage and live there. We have five kids: Ousamah, 17; 'Abd a-Rahman, 15; Iman, 13; Adam, and Adham, 21 months.

Every time the kids see a military car entering Wadi al-Humos, they think the demolition is about to happen and they panic. They live in a state of tension, anxiety and confusion.

"We are satisfied that preventing the meeting is vital to regional security"

Published: 10 October 2019

On Monday, 7 October 2019, a three justices of Israel's High Court of Justice (HCJ) ruled to uphold an injunction denying Samer 'Arbid, a Palestinian from the West Bank, the right to meet with legal counsel. 'Arbid had been interrogated by the ISA (Shin Bet) with "special means" and admitted to hospital unconscious. The Court justified the decision by "a certain improvement in his medical status", of which 'Arbid's family and lawyers were not informed.

Samer Arbid

The sequence of events

On 25 September 2019, Israeli soldiers arrested Samer 'Arbid, 44, a married father of three from Ramallah. According to eyewitnesses, they severely beat him and took him to the Russian Compound in East Jerusalem. There, he was interrogated using "special means." The next day, 'Arbid was brought to court and remanded in custody without the presence of his lawyer, after an injunction was issued denying him the right to meet with legal counsel.

On Saturday, 28 September 2019, an ISA agent called the lawyer appointed 'Arbid by the Addameer association to tell him that 'Arbid had been admitted to Hadassah Mt. Scopus Medical Center and was unconscious and on artificial respiration. It later came out that 'Arbid had been transferred to hospital the day before, but nobody had bothered to inform his family or lawyer. His wife managed to visit him there together with his lawyer, but the hospital refused to provide either them or Physicians for Human Rights basic information about his medical status.[9]

On Sunday, 29 September 2019, Israeli media reported that the Inspector of Complaints by ISA Interrogees at the Justice Ministry was looking into the case and would submit recommendations to the State Attorney's Office and the Attorney General whether to open a criminal investigation against the interrogators.[10]

'Arbid's lawyers demanded that the military court release him and provide them with information about his medical condition. On Wednesday, 2 October 2019, the military gave the court and 'Arbid's lawyers a medical report, which served as the basis for a ruling by Maj. Merav Hershkowitz Yitzhaki that there was a "gradual improvement" in his condition and that "in the coming days it may be possible to interrogate him again." She decided to remand him in custody, explaining: "I found that the suspect's threat to regional security is unquestionable and requires his remand in custody at this point."

The HCJ ruling

After a new injunction was issued preventing 'Arbid from meeting his lawyers, Addameer petitioned the HCJ to cancel it. On 7 October 2019, Justices

9. See Physicians for Human Rights-Israel, "Hadassah MS Hospital Refuses to Provide Information to the Relatives of Sameer Arabeed", 2 October 2019.
10. Yaniv Kubovich and Jack Khoury, "Israel's Justice Ministry Investigating Palestinian Suspects' 'Torture' by Shin Bet Officers", *Ha'aretz*, 30 September 2019.

Isaac Amit, George Kara and Yael Willner rejected the petition in a brief ruling, only a few paragraphs long, signed by all three.[11]

In the ruling, the judges first state that "the situation at hand is unusual" given the petitioner's medical status. They go on to note that, according to the information provided by the state, the injunction against 'Arbid's meeting legal counsel was removed "due to his medical condition." However, the judges add, "due to a certain improvement in his medical status, and as the petitioner has begun to communicate again, we have decided to reinstate the injunction." They note that they "reviewed the material ex parte," and conducted "dialogue with security officials". This concludes the description of the circumstances and the course of the hearing.

Next, the judges announce their decision: "We are satisfied that preventing the meeting [with legal counsel] is indeed vital to regional security, and that the material presented to us is unequivocal." This concludes the ruling.

At the end of the ruling, the judges note that "the petition before us is based on the assumption that the petitioner was subjected to severe torture, which caused his grave medical condition, to the point of real danger to his life." Yet they quickly brush this aside, stating only that "on this matter, an inquiry is underway by the Inspector of Complaints by ISA Interrogees, and it behooves the Court to avoid any conclusion or statement so long as that inquiry is underway."

In practice: The ISA can continue torturing 'Arbid in interrogation

The right to consult a lawyer is a basic right of detainees, which may only be denied under special and exceptional circumstances. Conferring with counsel is vital for detainees, as their lawyer is the party authorized to advise them on their rights, assess their situation and take suitable legal steps in their defense. For detainees in interrogation, who are cut off from the world and physically and mentally weak, legal counsel is crucial. Yet the HCJ justices ignore this in their ruling and do not explain why they upheld the injunction preventing 'Arbid from meeting with his lawyer.

The statement that the situation is "unusual" appears to have no bearing on the justices' decision. They imposed no restrictions on the conduct of ISA agents in further interrogation, including the means permitted for use against 'Arbid; they did not demand external oversight of the interrogation; and they didt not require regularl, independent medical supervision of 'Arbid's condition to ensure no futher harm comes to him. The ruling alone, without the context provided by the media, makes no connection between the ISA interrogation and 'Arbid's admission to hospital.

Interrogated with "special means"

The judges are surely aware of the argument that there is a causal connection, which is what makes the situation "unusual". They note claims regarding violence used against 'Arbid in interrogation but refrain

11. HCJ 6565/19, *Samer 'Arbid v. the Israel Security Agency.*

from addressing them, making do with a declared investigation by the Inspector of Complaints by ISA Interrogees. Yet this is a false recourse: as the judges and the whole world know full well, the investigation of complaints regarding violence and torture in ISA interrogations is most likely – as the facts indicate – a sham. Inquiries by the Inspector of Complaints by ISA Interrogees are not intended to uncover the truth or ensure measures against those responsible for violations to prevent their recurrence. Many detainees do not lodge complaints and for the those who do, the benefit is negligible: since theunit was established in 1992, it has looked into hundreds of complaints yet closed all cases but one with no consequences – i.e, without launching an investigation or taking measures against interrogators and their superiors.

This reality makes the HCJ ruling horrifying in its significance. Without restrictions on the conduct and methods of interrogators, external oversight or a real system of investigating complaints, the Court's decision to prevent 'Arbid from consulting with his lawyers – who are supposed to defend his rights – allows the ISA to continue interrogating him under torture unchecked.

'Arbid is not an exception: the ISA's interrogation policy

'Arbid's case is exceptional only because he was interrogated with "special means" and submitted to hospital unconscious. The reality is that every year, as a matter of routine, hundreds of Palestinians are interrogated by the ISA with methods that constitute cruel, inhuman and degrading treatment, and even torture.

In September 1999, the HCJ ruled that Israeli law does not empower ISA interrogators to use physical means in interrogation and disqualified specific methods the ISA used, such as painful binding, shaking, and placing a sack on a person's head for prolonged periods of time. However, it also held that ISA agents who used violent means of interrogation would not necessarily bear criminal responsibility for their actions, based on the "necessity defense."

The immediate consequence was a drastic drop in the use of the methods specifically forbidden by the ruling. However, by using the Court's recognition of the "necessity defense", the ISA instituted an alternative system of interrogation that is still based on physical and psychological abuse designed to cut detainees off from the world. Detainees are held in inhuman conditions, including narrow, windowless cells that are sometimes moldy and foul-smelling and are constantly lit with artificial lighting that is painful to the eyes. Some are held in solitary confinement, completely cut off from their surroundings. Some report exposure to extremes of heat and cold, as well as sleep deprivation. Many describe abominable sanitary conditions and inedible food. In the interrogation room, they are forced to sit bound to a chair, without moving, for hours and even days on end. Interrogators threaten the detainees, including threats to harm their relatives, as well as shouting and employing violence against them.

This system of interrogation is not the personal initiative of any particular interrogator. It was designed by state authorities, which collaborate to facilitate it: the Israel Prison Service (IPS) designed the inhumane prison cells, physicians greenlight the interrogation of Palestinians who arrive at the facility, soldiers and police officers abuse detainees while transporting them to the ISA, military judges almost automatically sign off on motions for remand in custody to allow continued interrogation, and, finally, HCJ justices regularly reject petitions seeking to overturn the denial of detainees' rights to meet with legal counsel, clearing the way for continued abuse. Above all this is a law enforcement system that allows this system of interrogation to continue and does not take measures against anyone involved, allowing it to continue unimpeded.

Human rights?

'Arbid's case clearly demonstrates the vulnerable and defenseless position of Palestinians who are detained for interrogation, and shows how all the entities that are supposed to safeguard their well-being collude in ongoing harm to them, even when the terrible results are known.
This case reflects the extent to which Israel renders the protections afforded to Palestinian detainees by Israeli law and international law, which it repeatedly claims to uphold, meaningless. International law does not recognize terms such as "ticking bomb" or "special permits", and determines unequivocally that the prohibition on torture and abuse in investigation is an absolute prohibition with no exceptions, whatever the circumstances.

According to the ISA, 'Arbid is a senior operative in the Popular Front for the Liberation of Palestine (PFLP) and personally detonated the explosive device next to the settlement of Dolev that killed 17-year-old Israeli Rina Shenrav, seriously injured her 19-year-old brother and inflicted medium injuries on her father. If 'Arbid did indeed carry out the attack, he is guilty of grave crimes. But at this stage, he has not been convicted of anything and is only a suspect. Moreover, 'Arbid – like any other suspect or prisoner, and all human beings – has rights. Some of these rights can never be denied – such as the right not to be subjected to torture – while others can be withheld under clearly-defined, limited conditions.

This relies on a profound understanding that should be obvious, certainly to law enforcement agencies, regarding the meaning of being human, of human rights, and of Israel's undertaking to uphold these rights. In the case of Samer 'Arbid, all the involved parties – from the soldiers who arrested him, through the ISA interrogators, to the HCJ justices – overlooked all these considerations. Instead, they decided to treat 'Arbid as if he were not a human being.

Israeli High court greenlights holding Palestinian bodies as bargaining chips

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Palestinian protesters at Bethlehem. Photo by Faiz Abu Rmeleh, Activestills

According to B'Tselem figures, Israel is currently holding the bodies of at least 52 Palestinians who carried out attacks against Israelis, or whom the military claims attempted such attacks since September 2015, and is refusing to return them to their families. This causes immense suffering to the families, as they are unable to bury their loved ones and perform the mourning rituals.

Holding the bodies of Palestinians as bargaining chips for future negotiations is a long-standing practice in Israel, but the policy has always been vague. At times, it seemed as though decisions were made in every case separately and on an ad-hoc basis in response to pressure put on the establishment and according to political considerations. At other times, Israel generally refused to return the bodies of Palestinians, and there were also times when Israel did return them. When the wave of attacks began in October 2015, Israel resumed its practice of holding onto the bodies of Palestinians who had perpetrated attacks or had been suspected of committing them. Some were returned to the families after being kept by Israel for several months.

It is not just the policy that is shrouded in ambiguity, but also the exact number of bodies Israel has held onto and returned since 1967. Various estimates put the number at the hundreds. According to information provided to the court in petitions concerning the capture of bodies by the state, between 1991 and 2008, Israel made deals in which it handed over 405 bodies in return for the bodies of deceased soldiers.

On 1 January 2017, for the first time, the Security Cabinet passed a resolution entitled Uniform Policy on the Handling of Terrorist Bodies. The resolution states that, as a rule, "Terrorists' bodies will be returned subject to restrictive conditions set by security officials". However, the bodies of "terrorists associated with Hamas" and of "terrorists who perpetrated a particularly heinous terrorist attack" will be kept by Israel and not returned to their families.

The relatives of six Palestinians who perpetrated, or were suspected of perpetrating, attacks and whose bodies Israel refused to return filed a High Court petition against this decision. The state claimed that it draws the power to retain the bodies from Regulation

133(3) of the Defence (Emergency) Regulations, which sets forth:
Notwithstanding anything contained in any law, it shall be lawful for a Military Commander to order that the body of any deceased person shall be buried in such place as the Military Commander may direct. The Military Commander may by such order direct to whom and at what hour the said body shall be buried. Such order shall be full and sufficient authority for the burial of said body, and any person who contravenes or obstructs such order shall be guilty of an offence against these Regulations.

The petition was accepted by the majority opinions of Justice Yoram Danziger and George Karra, with a dissenting opinion by Justice Neal Hendel.[12] Justice Danziger found that Regulation 133(3) does not grant the state the power to hold onto bodies for the purpose of negotiations. Despite this finding, Justice Danziger stopped short of ordering the state to return the bodies to the families. Instead, he gave the state six months to pass a law that would allow it to hold bodies. If no such law is passed within this timeframe, the state will have to return the bodies to their families.

Rather than passing the law, the state filed a motion for a further hearing before an extended panel, arguing that the existing law allows it to hold bodies. The motion was granted and the extended panel presiding over the further hearing held, by majority opinion, that the existing law does, in fact, grant the state the power to hold bodies for the purpose of negotiations.[13]

The lead judgment in the further hearing was penned by Supreme Court President Justice Esther Hayut, with concurring judgments, using similar arguments, by Justice Neal Hendel, Yitzhak Amit and Noam Sohlberg. Justices Uzi Vogelman, George Karra and Daphne Barak-Erez gave dissenting opinions.

The opinion of Supreme Court President Justice Esther Hayut

President Hayut opens her judgment with a clarification that since holding bodies "involves a certain violation of respect for the dead and their family", the power to do so must be expressly granted in law: "No statute can be interpreted as sanctioning a violation of fundamental rights, unless it clearly and unequivocally grants such powers". Does Regulation 133(3) expressly grant the military commander the power to order a temporary burial of terrorists' bodies for the purpose of negotiations? That was the question on which the court was required to rule.

The President concedes that "the language of the regulation makes no reference to temporary burial for the purpose of negotiations", adding that "the language is ambiguous" and hence, the interpretation proposed by Justice Danziger in the original proceeding is "textually feasible". However, President Hayut adds, "where the language supports varying interpretations and remains ambiguous, its purpose must also be considered, i.e., the values, goals and policy it is intended to fulfill".

From here, the President proceeds to examine the subjective purpose of the regulation – in other words, the intention of the legislator. She finds that the Defence Regulations, which were enacted by British authorities, constitute, "security-military emergency law that includes broad enforcement powers and a variety of administrative and punitive tools to combat all manner of terrorism." Regulation 133(3) itself has undergone several amendments over the years. It originally referred only to "the burial of prisoners who were executed and whose bodies remained unclaimed". However, in its current version,the power granted to the military commander was expanded from 'the body of a prisoner' to 'the

12. HCJ 4466/16, *Muhammad 'Alayan v. the IDF Commander in the West Bank.*
13. HCJFH 10190/17, *the IDF Commander in Judea and Samaria v. Muhammad Alayan.*

body of any deceased person'; the provision to bury the deceased in their community's cemetery, included in the original version, was omitted; and the power to deny the return of the body was transferred from the district commissioners to the military commander.

President Hayut views these changes as indicative of "an expansion of the powers concerning burial within the Regulations, whose purpose, as stated, is clearly security related". The President goes on to say that the purpose of the Regulation is "to provide the military commander with a flexible tool to address issues concerning burial in a security context".

The President follows this with an examination of the objective purpose of the Regulations, including reference to the goals and fundamental principles of the Israeli legal system, assuming the law "is intended to uphold human rights, maintain the rule of law and the separation of powers, ensure justice and morality and protect the state and its security". According to Hayut, the primary purpose of the relevant regulation is solely "to protect national security with a focus on counterterrorism". However, she does clarify, based on a previous ruling she handed down, that, "in fact, terrorism does not respect any of the rules of the game the old world put in place in the laws of war. This reality forces not only security forces, but also jurists, to rethink these laws in order to reshape them and adjust them to the new reality". Therefore, "even if the Mandatory legislator did not envision a situation of bodies kept for the purpose of negotiations with terrorist organizations, the objective purpose of the Regulation must be examined according to current reality and the challenges it poses."

The President summarizes the purpose of Regulation 133(3) as follows:
The objective purpose of the Defence Regulations is to provide the nation's leadership with effective tools for combatting terrorism and protecting the security of the country and its citizens. Our obligation to perpetually seek the retrieval of remains of Israeli citizens and fallen IDF soldiers held by terrorist organizations lies at the heart of protecting national security, and therefore, at the heart of the objective purpose of Regulation 133(3). In my view, as part of this purpose, Regulation 133(3) grants the military commander the power to hold, including by way of temporary burial, the remains of terrorists for the purpose of protecting national security or upholding the dignity of fallen enemies that cannot be returned.

To support this conclusion, President Hayut notes that until the judgment was delivered, the state had conducted itself as if Regulation 133(3) gave it the power to hold onto bodies. While the court does have the final word on the proper interpretation of the law, President Hayut notes that, "it has often been ruled that one of the considerations justices must take into account when faced with two possible interpretations for a piece of legislation is the position of the public authority on the proper interpretation and its practice in this context". The President also relies on the fact that some of the provisions of the Defence Regulations were revoked in the process of drafting the Counterterrorism Law, as the powers they bestowed had been incorporated into the law. Regulation 133(3), however, was not one of the provisions that were revoked, and during a session of the Knesset Constitution, Law and Justice Committee on 23 May 2016, the Ministry of Justice said the Regulation remained in place since it was "the source of powers on questions related to the burial of terrorist and all such arrangements".

President Hayut does mention that holding the bodies entails an impingement on human rights, but maintains the issue is nearly insignificant:
Israel's holding of the bodies of terrorists does entail an impingement on the deceased's dignity and the dignity of their families. However, in the matter at hand, I believe the harm done does not touch on the core of the right to respect for the dead or on the core

of the right to family dignity. We must bear in mind that the bodies are held temporarily; that they are interred in a respectful manner in a metal coffin, in a cemetery; and that genetic identifying markers are taken to facilitate future identification of the remains. These circumstances blunt the force and scope of the impingement.

Finally, the President reviews the provisions of international law and finds that the fact they contain no explicit prohibition on holding bodies for the purpose of negotiations implies that this is permitted. President Hayut examines the articles relating to the treatment of human remains during armed conflict and finds that none contain a duty to return bodies or a prohibition on keeping them. The articles merely address the obligation to handle the remains properly and ensure they are identifiable once hostilities end. President Hayut agrees that the ICRC commentary regarding the First Geneva Convention "does state a preference that bodies be returned to their families. However, the conclusion that arises out of the commentary is that there is no such duty under the First Geneva Convention". President Hayut dismisses any parallels drawn between the question before her and decisions made by the UN Human Rights Committee and the European Court of Human Rights, holding that the circumstances of those cases were entirely different from those before her, and that therefore, the cases are irrelevant.

President Hayut repeats her statement that "in fact, terrorism does not respect any of the rules of the game the old world put in place in the laws of war", which forces jurists to "rethink these laws in order to reshape them and adjust them to the new reality". Therefore, she concludes, "so long as international law has not adjusted itself to this new reality, I believe we must interpret existing provisions 'in a dynamic manner that is sensitive to the changing times' – as wisely advised by my colleague Justice Hendel."

Several flaws in President Hayut's decision

1. Unreasonable interpretation of Regulation 133(3)):

President Hayut follows an untenable interpretative path in order to reach the conclusion that Regulation 133(3) of the Defence Regulations allows the state to hold on to bodies as bargaining chips. This path defies the basic tenet of judicial interpretation, which requires choosing the option that is least injurious to human rights and to the rule of law.

President Hayut reviews the legislative history of the Regulation and claims she relies on this history in search of the subjective purpose of the Regulation. In reality, however, she ignores this history and rests her conclusion that the Regulation provides the military commander with a "flexible tool" for handling bodies on the final version of the Regulation. The legislative history, on the other hand, actually indicates that the Regulation addressed the issue of handling bodies of prisoners who had been executed in cases where objective, technical difficulties arose with respect to returning the body to the family. The Regulation is aimed at resolving this difficulty.

President Hayut's analysis of the objective purpose of the Regulation is similarly incomplete. The President begins her remarks on this issue by clarifying that the objective purpose includes an examination of "basic tenets of the system", which include the promotion of human rights and the rule of law. However, she immediately proceeds to ignore these, noting only that the purpose of the Defence Regulations and the values underlying them "relate primarily to national security and public order concerns". The President projects this general purpose of the Defence Regulations as a whole onto Regulation 133(3), holding that, "our obligation to perpetually seek the retrieval of remains of Israeli citizens and fallen IDF soldiers held by terrorist organizations lies at the heart of protecting

national security". This sets the stage for the finding that the objective purpose of Regulation 133(3) is to grant "the military commander the power to hold, including by way of temporary burial, the remains of terrorists for the purpose of protecting national security or upholding the dignity of fallen enemies whose bodies cannot be returned".

There is no doubt the state must tirelessly seek the retrieval of citizens' and soldiers' remains, or that this goal is essential. Nor is there any doubt that the suffering experienced by the deceased's families is unbearable and that the state has an obligation to take immediate action to end it, out of deep commitment, and with sensitivity both to the complexity of human emotions in such agonizing situations and to its responsibilities toward its citizens and soldiers as a whole. Yet concluding that the issue is a matter of security, and one that "lies at the heart of protecting national security" at that, is quite a leap. In fact, the state itself, in its motion for a further hearing, avoided showcasing the security argument and merely contended that holding the bodies might help "outline the details of a future agreement, namely, assist in improving the conditions of a concrete deal reached at the end of the negotiations and reduce the security risk involved in said deal".

President's Hayut's contention that the fact that the state has thus far relied on Regulation 133(3) to hold onto bodies, and has refrained from revoking the Regulation in the course of drafting the Counterterrorism Law, serves as evidence that this power is contained in law – must also be rejected. This argument obviates the role of the court and gives the state a free hand to break the law, as the end result is that the state's contention that it has always acted in a particular manner and that its actions are lawful is sufficient to legitimize its actions. Accepting this argument would obviate the President's own ruling, which focuses on whether or not Regulation 133(3) does, in fact, grant the state the power to hold bodies as bargaining chips.

In the judgment, President Hayut postulates that the drafters of the Regulations might not have considered the possibility of holding bodies for the purpose of negotiations, but "the objective purpose of the regulation must be examined according to current reality and the challenges it poses". Thus, according to the President, it is possible to choose a "creative" interpretation that would give the state the powers it seeks. This ignores the finding in her own opening remarks, whereby any violation of human rights must be expressly sanctioned in law.

2. Disregard for the provisions of international law

In contrast to the President's flexible approach, one might even say judicial activism, regarding the Defence Regulations, when it comes to international law she adopts a patently conservative approach. "Legislative history", "objective purpose", "legislative intent" – none of these features here. As opposed to the question she posed in examining the Defence Regulations, President Hayut does not think the question here is whether international law grants the military commander the power to hold bodies for negotiations, but whether it expressly forbids it. In the absence of such a prohibition, although the President does establish that international law clearly favors returning bodies, she finds no impediment to keeping them. President Hayut makes no effort to explain why she takes almost contradicting interpretive approaches to the Defence Regulations and to international law.

Moreover, the President focuses on a handful of provisions that relate to how bodies should be treated, but ignores specific provisions that prohibit holding bodies as bargaining chips. The petitioners addressed these provisions in their original petition and in their response to the motion for further hearing. The President herself listed these provisions in the opening of the judgment, where she presented the parties' arguments. Article 43 of the Fourth Geneva Convention prohibits taking hostages, which implies that bodies should not be held for bargaining, either.

Also, Article 33 of the Convention and Article 50 of the Hague Regulations prohibit collective punishment. These prohibitions derive from fundamental moral principles, and are therefore rare examples of absolute prohibitions for which international law tolerates no exceptions.

President Hayut also ignores the provisions of international law that limit the latitude afforded to the military commander within the occupied territory and require that the commander's actions benefit the local population and protect its interests and rights. The only exception is cases in which the immediate military needs of the occupying power, within the occupied territory itself, necessitate otherwise. In ignoring this, the President sets aside the principles laid down by the Supreme Court itself. In one of the court's most quoted judgments, former Supreme Court President Justice Aharon Barak outlined the boundaries of the military commander's discretion: *[T]he considerations of the military commander are ensuring his security interests in the Area on one hand and safeguarding the interests of the civilian population in the Area on the other. Both are directed toward the Area. The military commander may not weigh the national, economic and social interests of his own country, insofar as they do not affect his security interest in the Area or the interest of the local population. Military necessities are his military needs and not the needs of national security in the broader sense.*

President Hayut's choice to apply different interpretive approaches and ignore some of the relevant provisions may be attributed to her overall approach to international law. Hayut holds that the provisions of international law do not reflect the reality that is Israel is facing and therefore must be "rethought" employing "dynamic" interpretation. This approach exempts the state from abiding by international law, creating a dangerous opening for sweeping human rights abuses, including the retention of dead bodies as bargaining chips.

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3. Holding bodies entails severe violation of the rights of the deceased and their families

Denying families the right to bring their loved ones to burial, practice religious and traditional death rituals, and visit graves causes them indescribable pain. When referring to the families of soldiers whose bodies are held by Hamas, President Hayut expresses deep understanding and sensitivity for this pain – a natural, appropriate human reaction. Yet when it comes to Palestinian families, she callously minimizes the anguish, even though in most of these cases, no one argues that the families were involved in the acts perpetrated by the deceased or bear any responsibility for them.

Aside from dismissing the pain suffered by certain families, the President's contention that the state upholds the dignity of the dead and properly handles the bodies, so that their future identification will not be an issue, is incongruent with the state's practices so far – a fact of which the court is well aware. Petitions filed by dozens of Palestinian families, represented among others by JLAC and HaMoked: Center for the Defense of the Individual, whose loved ones' bodies Israel refused to return, have been pending before the Supreme Court for years. In one of these hearings, Justice Danziger described the state's handling of bodies as "not optimal, to say the least".

Over the course of the proceedings in these petitions, the state admitted it was unable to locate the bodies or identify ones it had located, argued that the process

would require a significant investment, and notified that the State Attorney's Office had held a meeting to "devise how the location and identification of bodies should be pursued and by what government agency". The state undertook to provide the court with an update on the developments but has since repeatedly asked the court for extensions – and received them. Currently, the state is expected (Hebrew) to provide the court with an update on this issue in December 2019.[14]

4. The main issue: Not lack of power, but extreme unreasonableness

In her opening remarks, President Hayut clarifies that the main question on which she is asked to deliberate is whether Regulation 133(3) gives the state the power to hold onto bodies as bargaining chips. She concludes that it does and that therefore, the Cabinet decision is lawful. The dissenting justices in the further hearing also addressed the question of power, as did Justice Danziger in the original hearing. Having found that no such power is granted under existing law, Justice Danziger gave the state six months to pass a law that would give it this power.

Justice Amit, who concurred with the President in the further hearing, clarified this position, stating: "This is purely a question of power, not discretion. In this context, we are not required to examine the reasonableness or wisdom of the policy concerning the return of terrorists' bodies". While it is true that the court is not charged with examining whether a certain policy is proper or desirable, but only whether it is lawful or not, lawfulness does not boil down to identifying a legal source of power. If that were the case, the Knesset could pass a law that red-headed Palestinians cannot receive permits to enter Israel, or that Israeli citizens born in EU countries may not open a bank account.

Any injustice can be legislated, but formal power is only the first criterion for the legality of an act by a state authority. Determining legality also requires considering whether the policy meets the principles of administrative law. As part of this examination, the court considers whether the decision was made in pursuit of a proper purpose, whether it falls within the bounds of reasonableness, whether it meets the proportionality tests, and other questions. Otherwise, the role of the court becomes technical and devoid of any substance.

These principles feature in some Supreme Court judgments. They are partly why some legislators call for restricting the court's powers. In this case, however, the justices chose to ignore these principles and stick to technical, almost dry, rules in order to justify an unlawful, immoral and improper policy.

14. HCJ 4241/15, *Anonymous v. the IDF Commander in Judea and Samaria.*