

In the Supreme Court

HCJ 9594/03

sitting as the High Court of Justice

B'Tselem et al.

represented by attorneys Stein *et al.*

The Petitioners

v.

Judge Advocate General

represented by the State Attorney's Office

Ministry of Justice, Jerusalem

The Respondent

The Respondent

Updated Statement on Behalf of the Respondent

In this petition – which was filed in 2003 – the petitioners requested the Honorable Court to require the IDF to conduct a Military Police Investigation Unit (MPIU) investigation into the circumstances of the death of eight Palestinians from Judea and Samaria and from the Gaza Strip, in six different incidents, in the course of IDF activity in those areas.

The court was also requested to order the Judge Advocate General (herein the JAG) to order an MPIU investigation “in every case in which he is informed of the death of a Palestinian civilian, who was not taking part in combat actions, during IDF activity in the areas, within a reasonable time from the day of the incident.”

In the hearing on the petition, the first topic, with the petitioners' consent, which involved the demand to require an MPIU investigation into the specific cases brought in the petition, was deleted. As for the second topic, this remains, and the petitioners and the respondent filed a number of specific responses with respect to it. The arguments of the sides were brought before the Honorable Court also in the framework of three hearings that were held on the petition, the last of which took place on 30 April 2006.

From the time the petition was filed, the area involved – Judea and Samaria and the Gaza Strip – have undergone *far-reaching changes*, both with respect to the security situation and the nature of the operational activity of the IDF and regarding the legal framework that regulates this activity. *As a result of these changes, the petition and the specific grounds presented in support of it no longer relate to the current factual and legal situation, and the relief sought in the petition has essentially become moot.* Due to these changes, this updated statement is being submitted.

As we know, the petition was filed in 2003, on the background of a complex operational and legal reality, in which context – beginning with the outbreak of the armed conflict between the State of Israel and the Palestinian terrorist organizations in September 2000 – *the IDF was involved in intensive combat in areas under belligerent occupation of the State of Israel.* As the Honorable Court noted in one case: “In this situation, in which hostile activity is taking place in area under belligerent occupation, the rules applying to belligerent occupation apply, as do the rules applying to combat actions” (HCJ 7975/04, *Mar’abe et al. v. The Prime Minister et al.*, section 17 of the judgment of President Barak).

The IDF's investigation policy in the cases of death of Palestinians who were killed as a result of operational activity in the context of the said armed conflict, which has taken place since the armed conflict began, was intended to comport with the rules on international law applying to this activity – that is, the laws of warfare in international law, in that territory in which the IDF continued to act as one who steps into the shoes of the “sovereign” was involved, and bore responsibility for their administration and for the

maintenance of public order in that territory; in this framework, it acted *also* under the paradigm of “law enforcement.”

As stated above, there has been substantial change in the operational and governmental situation in these areas in recent years.

Regarding the *Gaza Strip*, the situation changed significantly with the completion of the disengagement plan, in September 2005, and evacuation of all the Israel communities and of IDF forces from the area of the Gaza Strip. In doing so, the State of Israel’s belligerent occupation of the Gaza Strip came to an end, and the IDF ceased to bear responsibility under those laws (see: HCJ 9132/07, *Albassiyuni et al v. The Prime Minister et al.*, section 12 of the judgment; HCJ 5268/08, *Inbar et al. v. OC Southern Command et al.*, section 6 of the judgment).

Another dramatic change took place from the time that the Hamas organization took control of the Gaza Strip, in June 2007 (by means of serious violence against its political opponents), such that since then, the armed conflict in the Gaza Strip is being conducted against a de facto governmental entity having well organized, trained, and armed forces, which are supported greatly by foreign countries (Syria and Iran being the most supportive). *This is a significantly different security and legal reality than the one that existed in the Gaza Strip at the time the petition was filed.*

Operation Cast Lead, which took place in the strip in December 2008 and January 2009, provides a good illustration of the matter. In this reality, many of the grounds that the petitioners raised against the investigation policy on death cases of Palestinians not taking part in hostilities is no longer relevant.

As for *Judea and Samaria*, although the legal situation that existed at the time the petition was filed remains as it was, there has been, over the years, transformations of one kind or another in the nature of IDF operational activity, in light of the changes in the magnitude of the terror threat that the forces had to face. On this matter, we note that, in recent times, a reality has stabilized in which IDF operational activity bearing a clear combat

character is less than in the past, even though the armed conflict that erupted in October 200 has not yet ended.

Against this background, *the respondent recently decided, following staff work that the Office of the Judge Advocate General has conducted for several months, and in coordination with the Attorney General, to change the investigation policy regarding the of death of Palestinians in Judea and Samaria. Under the new policy, as a rule, in every case from now on in which a civilian is killed, as a result of action of IDF forces in Judea and Samaria, an MPIU investigation will be opened immediately (examples being cases of death incidental to disturbances and incidents of unruly behavior at checkpoints).*

However, in cases in which it is clear that the activity in the course of which the civilian was killed was of a real combat nature (for example, incidents in which there is an exchange of fire, in which a civilian not involved in combat was killed), the decision on whether to open an MPIU investigation would be made following a preliminary study of the facts of the case by means of an operational inquiry and gathering of other relevant material, including complaints filed regarding the incident.

The aforesaid decision of the respondent, in effect, almost completely meets the relief sought in the framework of the petition as regards Judea and Samaria.

Although unnecessary, it is noted that, simultaneous with this change, the State Attorney's Office also decided – in coordination with the Israel Police – to make a similar change in the investigations policy applying to activity of Police units operating in Judea and Samaria in operational activity subject to IDF control (primarily activity by Border Police and special units).

In light of the aforesaid, the respondent believes that *the petition is moot* with respect to the respondent's policy applying in Judea and Samaria.

In conclusion, as for the *Gaza Strip*, given the far-reaching change in the security and legal situation compared with the situation that formed the basis of the petition when it was filed with the Honorable Court, it is clear that the petition should be denied, insofar

as today there is clearly no grounds for opening a criminal investigation in every case in which an uninvolved civilian is injured by operational activity of the IDF directed at attacking the terrorist organizations.

As for Judea and Samaria, as stated above, the respondent's decision on the change in investigations policy relating to cases of death of Palestinians who were not taking part in combat actions, almost completely comports with the relief requested in the petition and renders the petition moot on this subject.

To complete the picture, the respondent wishes to make the following points:

First, the decision on the change in investigations policy regarding death cases of Palestinians in Judea and Samaria *is very closely tied to the situation in the field*, such that changes in the security situation in Judea and Samaria might bring about a reversion to the previous investigations policy, which is the subject of the petition. Of course, in such a situation, the petitioners would have the right to return to the Honorable Court;

Second, it is not superfluous to state that, at the present time, the State Commission of Inquiry into the Maritime Incident of 31 May 2010, headed by Justice (ret.) Yaakov Turkel, is involved in the second half of its report, which will include – among other things – an examination of the question whether the examination and investigation apparatus regarding complaints and claims raised with respect to breaches of the laws of war, generally in practice in Israel, and as applied regarding the maritime incident of 31 May 2010, conforms with the State of Israel's obligations under the rules of international law" (section 5 of Government Decision 1796, of 14 June 2010), attached as Appendix 1). In this framework, the Commission requested various persons – including the respondent – to provide relevant material on this question, as they deem appropriate.

In that the aforesaid change in policy is relevant also this Commission, the Commission, too, will of course be informed of the change in policy.

In closing, the respondent believes that, taking into account the changes that have occurred since the filing of the petition, both with respect to the security and legal

situation in the Gaza Strip and to the security and legal situation applying in Judea and Samaria, which led to the change in investigations policy regarding cases of death of Palestinians in Judea and Samaria, *the petition has been fully exhausted*, and, therefore, *the Honorable Court is requested to order that it be denied*.

Today, 29 Adar B 5771 (4 April 2011)

[signed]

Shai Nitzan

Deputy State Attorney (Special Tasks)