

Selected Updates – March 2016

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Publications and Updates

- **A new opinion article by Amos Yadlin and Asa Kasher** disagrees with the argument that "there is no moral army". The authors assert that moral principles are relevant even in times of combat and that the military forces of any democratic state, including the IDF, operate on the basis of professional, ethical and moral principles. The IDF's morality is grounded in the values of the IDF, which must be applied by its commanders and soldiers in the implementation of military operations (March 30, **There is a moral army. The IDF, for example** [in Hebrew]).
- **An opinion article by Col. (res) Pnina Sharvit Baruch** emphasizes that a key component in the success of the de-legitimization campaign against Israel is framing the issue in legal terms and presenting Israel as a serial law violator and as a war criminal. In order to deal with these arguments effectively, there is a need to understand the fundamental arguments of breach of human rights and war crimes, as well as the manner in which they are grounded on the decisions of international bodies such as the International Court of Justice in the Hague, the UN general Assembly, the Human Rights Council, commissions of inquiry and reports of NGOs (March 28, **This is how Israel is portrayed as a war criminal, Yedioth Aharonoth** [in Hebrew]).

- **Yoram Schweitzer and Oded Eran**, researchers at the Institute, refer in their article to the recent Brussels and Paris terror attacks and the measures Europe will require confronting terrorism while balancing between maintaining zealous individual liberties and security needs. They estimate that, despite the possibility of greater understanding of Israel's harsh measures against terrorists, it cannot be assumed that this will translate into greater acceptance of Israel's policy in the territories. On the contrary, Europe will likely voice increasingly severe criticism of Israel as a means of appeasing Muslim public opinion in EU member countries (March 24, **Insight**).
- An Institute researcher, **Liran Ofek**, refers in his article to the growing discourse of rights in the Palestinian arena, which focuses on the re-framing of the national conflict with Israel as a struggle for self-determination of all Palestinians wherever they may be. According to the article, in the last two years, Palestinian research institutes and think-tanks have begun to emphasize the need to formulate a new national strategy, based on this discourse. The argument in the article is that the discourse of rights will give the Palestinians advantages they currently do not have. This strategy, if realized, adopted, and applied, could have profound ramifications for both Israel and the Palestinian Authority. (March 22, **Insight**).

90 Words on...

The fight against terrorism and balancing human rights and state security

Former Israeli Supreme Court President, Justice Aharon Barak: "In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle." (**HCJ 7015/02 Ajuri v. IDF Commander**).

Inside Israel

Bills

Imprisonment of Unlawful Combatants Law (Amendment No. 3), 2016

On March 21 the Israeli parliament amended the **Imprisonment of Unlawful Combatants Law (Amendment No. 3) (2016)** [in Hebrew]. **The amendment includes a new article (10a), which increases the number of military officials who are given authorities connected to the incarceration of unlawful combatants in situations of warfare**. In order to activate this article, the government must first make an announcement, and the parliament's Foreign Affairs and Defense Committee must approve it. The article is designed to ensure quick and effective incarceration of unlawful combatants in intense situations of warfare. The current amendment is a permanent provision and not a temporary one, as it was in **2008-2010**.

Entry into Israel Law (Amendment No. 26), 2016

On March 14, the Israeli parliament amended the **'Entry into Israel Law (Amendment No. 26) (2016)** [in Hebrew]. **The law stipulates stricter punishments for violations of lodging and employing illegal residents**, and includes minimum fines. In addition, **new administrative tools** against employers of illegal residents have been added. For example, the issuance of decrees restricting the operation of places in which such crimes occurred, as well as the suspension of license to practice of suspects of such crimes. Explanatory Notes to the amendment were published **here** [in Hebrew].

Judgements

Houses Demolition – a call for re-examination

The Israeli Supreme Court has approved the demolition of the house of the terrorist who killed an Israeli civilian in Hebron last December. Justice Fogelman stated in his judgment that house demolitions could be argued to be disproportionate, however due to previous precedents he joined the majority decision. Justice Mazuz, who wrote the minority opinion, repeated the position he expressed in earlier judgments according to which the sanction cannot be used in a way that affects an innocent family member. **Both Justices called for a re-examination of the practice** (**HCJ 1630/16 Masudi v. IDF Commander**, March 23).

A petition for an additional hearing was rejected by the Supreme Court President (**HCJFH 2624/16 Masudi et al. v. Commander of IDF Forces in the West Bank**, March 31).

See also "The Israeli Supreme Court Debates Counterterrorism Home Demolitions" (**LAWFARE**, March 24).

House demolitions – cancellation of a warrant due to lack of residential connection

The Supreme Court cancelled a warrant for the demolition of a terrorist's home. **Justice Mazuz** stated that there was no "tie of residency" between the house and the terrorist, since the terrorist was a student who lived in his university's dormitory and therefore there was no authority to issue the warrant. He stated that even if one viewed the "tie of residency" as sufficient, it was very weak and, as the family was not involved in the terrorist act, the decision to demolish the house did not comply with the requirements of reasonability and proportionality. **Justice Baron** stated that there is a tie of residency to the parents' home, but accepted the petition since the military commander should have considered that the family members lacked even constructive knowledge of the terrorist attack. **President Naor**, in her minority opinion, stated that there was a residential link between the terrorist and his parents' home and that the fact that they were not aware of his actions should not prevent issuing the warrant (**HCJ 1125/16 - Mer'i et al. v. Military Commander of IDF Forces in the West Bank**, March 31). (See summary of Hamoked – center for defense of the individual)

See also "The Power of Dissent" (**LAWFARE**, April 8).

The shooting in Hebron by IDF soldier – a letter from IDF Chief of Staff, Lieutenant General Gadi Eisenkot

Following the latest events in Hebron, in which an IDF soldier shot a Palestinian attacker who was lying wounded on the ground, **IDF Chief of Staff, Lieutenant General Gadi Eisenkot**, **sent a letter to IDF soldiers** "**Protecting our Home – Maintaining Purity of Arms**". In the letter, he mentions that: "The commanders and I especially, will continue to provide support to every soldier that errs in the heat of battle against an enemy that endangers the lives of civilians and soldiers. However, we will not hesitate to arrive at an appropriate verdict with regards to soldiers and commanders who deviate from the ethical and operational standards under which we operate. **The preservation of the IDF spirit and its values is not a privilege, but an obligation. This maintains the IDF as a nation's army in a Jewish and democratic state**" (IDF Website, March 30).

Report by the State Comptroller - Advertisement of the 66b annual report on the security system

On March 28, the **State Comptroller, Justice (Retired) Joseph Haim Shapira**, published the **annual report (66b) on the security system** [in Hebrew]. The report deals with issues related to the IDF and its activity, the Ministry of Defense, the West Bank region and the security industry. The report includes four chapters:

In Chapter One - Israeli Defense Forces, deficiencies were found in the core areas of training and guidance in military intelligence. In addition, the IDF's ability to **draw conclusions and implement them** was examined. The report found deficiencies in the preparation of military debriefings and a widespread and serious phenomenon of recurrent events in key fields, which were already the subject of an examination, despite lessons learned from similar past events.

In Chapter Two - Management and Organization, deficiencies were found in the activity of the supervision and enforcement unit in the West Bank region in aspects related to land regulation and illegal construction. Deficiencies were also found in the Ministry of Defense's monitoring of procurement of certain goods, as well as deficiencies in the IDF soldiers fundraising array.

In Chapter Three - Human Resources Management, deficiencies were found in the conduct of Rafael Company in communications with experts, as well as serious deficiencies in the process of staffing senior positions in the Ministry of Defense.

Chapter Four - The Atomic Energy Commission, remains confidential and is not being published.

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International Developments Concerning Israel

31st session of Human Rights Council (February 29 – March 24)

Human Rights Council decisions against Israel

In its **31st annual assembly the U.N Human Rights Council accepted five decisions against Israel under Article 7 of its agenda** (an article completely dedicated to Israel and the status of human rights in the occupied territories). A decision about the human rights in the occupied Syrian Golan (**A/HRC/31/L.31**); a decision regarding the Palestinian right to self-determination (**A/HRC/31/L.36**); a decision about the human rights situation in the occupied Palestinian Territories (**A/HRC/31/L.37**); a decision about ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem- calls on Israel to fully cooperate with the preliminary examination of the International Criminal Court and Requests the High Commissioner to conduct a comprehensive review detailing the status of implementation of the recommendations addressed to all parties since 2009 by the relevant Human Rights Council mechanisms (**A/HRC/31/L.38**); and a decision regarding the **Settlements in the West Bank** and the Golan, that condemns Israel and calls for states and companies not to recognize or assist them and in addition calls for the Human Rights Commissioner to produce a database of all business enterprises involved in the settlements activities to be updated annually (**A/HRC/31/L.39**).

(**Roundup of Human Rights Council's 31st Session**, OHCHR).

The U.S State Department referred to the Human Rights Council's decisions, and expressed its discontent, especially regarding the decision to establish a database of companies who operate in the settlements, stating that it is "an unprecedented measure outside the mandate of the Council" (March 25, **U.S Department of State**).

Appointment of a Special Rapporteur on human rights in the Occupied Palestinian Territories

At the 31st session of the Human Rights Council, its president **appointed Stanley Michael Lynk from Canada, as the 7th Special Rapporteur on human rights in the Occupied Palestinian Territories**, for the years 2016 – 2022, this, following the resignation of the 6th Rapporteur in January 2016. The appointment of Lynk provoked criticism due to his anti-Israel approach and involvement in the organization of events in which Israel was being condemned. (See for example: the **open letter** of Canadian government officials; the **UN Watch response** to the appointment. For further information, see also the **organization's report** on the role of the Rapporteur and the various candidates, as well as coverage of the appointment in the **NATIONAL POST**).

The state of Palestine joins the Permanent court of Arbitration

On March 15, 2016, the **Permanent Court of Arbitration officially announced its new member state: Palestine**, after 54 countries voted in favor and 24 abstained, including Israel and Canada. The U.S did not participate. The Palestinian application for joining the court was filed in January 2015 but strong opposition from the United States led to the postponement of the vote until March 2016. Palestine has thereby become the 118th Member State of the PCA (**Permanent Court of Arbitration**, March 15). (See also **Global Research**).

Palestinian lawsuit in U.S Federal Court on Israel's war crimes and settlements policy

In early March 2016 a lawsuit was filed by Palestinians in the Federal Court in Washington DC against tycoon Sheldon Adelson, former top Bush administration official Elliot Abrams, megachurch pastor John Hagee and a range of banks, companies and NGOs linked to the settlement enterprise and to alleged war crimes in the three Gaza wars. The lawsuit, in the sum of $34.5 billion, claims that the defendants are guilty of conspiracy, trespass and organized crime, among other things. However, the lawsuit lacks many details, and does not specify the involvement of the defendants in the alleged crimes. Lawyer **Eric Sherby**, vice chair of the international litigation of the American Bar Association, argues that the plaintiffs will have difficulties with establishing standing before American courts, and difficulty in establishing jurisdiction, especially given the fact that there is a trend in American law of rejecting claims relating to conspiracies, especially if they occurred outside the United States. (March 8, **JPOST**).

New Research on Israel's borders and the doctrine of Uti Possidetis

Prof. Abraham Bell and Prof. Eugene Kontorovich published a new research paper named **"Palestine, Uti Possidetis Juris and the Borders of Israel"**. It seeks to answer fundamental questions about the extent of Israel's borders by examining the standard international-law rule used to determine the borders of newly created countries — but one that has been neglected in regard to Israel: the doctrine of *uti possidetis juris* to resolving legal aspects of the border dispute. The doctrine provides that emerging states presumptively inherit their pre-independence administrative boundaries. Applied to the case of Israel, *uti possidetis juris* would dictate that Israel inherit the boundaries of the Mandate of Palestine as they existed in May 1948. The doctrine would thus support Israeli claims to any or all of the currently hotly disputed areas of Jerusalem (including East Jerusalem), the West Bank, and even potentially the Gaza Strip (though not the Golan Heights) (**Washington Post**, March 10).

United States -"Combating BDS Act of 2016"

On February 10, 2016 lawmakers in the US House and Senate introduced the **"Combating BDS Act of 2016"** (**S. 2531** and **H.R. 4514**). The Act affirms, at the federal level, the legal authority of state and local governments to take tangible actions to counter this economic warfare against Israel. The bills will protect state and local governments' right to disassociate pensions and contracts from entities that boycott, divest from, or sanction Israel. The bill was transferred, for the purpose of further discussion, to the Congress committees.

International Developments

Laws of War

2016 ASIL Annual Meeting "Charting New Frontiers in International Law" (March 30 – April 2)

- **2016 ASIL (American Society of International Law) Annual Meeting**.
- Keynote Addresses by U.S. State Department Legal Adviser **Brian Egan** on "International Law, Legal Diplomacy, and the Counter-ISIL Campaign" and U.S. Supreme Court Associate Justice **Stephen Breyer** on the importance of international and comparative law to the Supreme Court work. See **2016 Annual Meeting Videos**.

ICRC New Commentary 2016 of First Geneva Convention

- ICRC launches new guidance bolstering relevance of Geneva Conventions (**icrcblog**, March 21). **See Commentary of 2016 for the First Geneva Convention**.

Autonomous Weapons

- Proportionality and Autonomous Weapons Systems (**Opinio Juris**, March 29).

Counter Terrorism

Military Campaign against ISIL

- ISIS/Daesh: the military response in Iraq and Syria (**Briefing Paper 06995**, March 16).

2016 Nuclear Security Summit in Washington (March 30 – April 1)

- **2016 Nuclear Security Summit** (Official Website).
- Obama: How we can make our vision of a world without nuclear weapons a reality (**The Washington Post**, March 30).
- **National Progress Report: Israel**.
- Nuclear terrorist attack would 'change our world', says Obama (**BBC NEWS**, April 2)

International Criminal Law

The ICC Prosecutor v. Jean-Pierre Bemba Gombo

- ICC Trial Chamber III declares Jean-Pierre Bemba Gombo guilty of war crimes and crimes against humanity (**ICC Press Release**, March 21).
- **Summary of Trial Chamber III's Judgment** of 21 March 2016, pursuant to Article 74 of the Statute in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.
- The Bemba Conviction at the ICC: Lessons for the Future (**Just Security**, March 30).

The ICTY Prosecutor V. Radovan Karadzic

- **PROSECUTOR v. RADOVAN KARADŽIĆ** **(**Full Judgment, March 24**)**
- Tribunal convicts Radovan Karadžić for crimes in Bosnia and Herzegovina (**ICTY Press Release**, March 24).
- The Many Significances of the Karadžić Conviction (**Just Security**, March 28).

The Bashir Case: Judgment by the South African Supreme Court of Appeals

- THE SUPREME COURT OF APPEAL OF SOUTH AFRICA (**JUDGMENT**)
- The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States? (**EJIL: talk**, March 29).
- An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue (**EJIL: talk**, March 31).

Remarks by Secretary of State, John Kerry, on Daesh and Genocide

- Remarks by Secretary of State, John Kerry, on Daesh and Genocide (**Briefing Press**, March 17).
- ISIL = Genocide, Per Secretary Kerry (**Just Security**, March 18).
- ISIS committed genocide: Are the gloves off? (**CNN**, March 18).

Report of Secretary General on allegations of sexual exploitation and abuse in the United Nations system in 2015

- **Report of Secretary General** on Special measures for protection from sexual exploitation and sexual abuse.
- 'We must not allow protectors to become predators' – UN field support chief (**UN News Center**, March 4).

International Law and Intra-Party Violence

- Torturing and Raping 'Brothers in Arms': International Law and Intra-Party Violence (**Opinio Juris**, March 15).

Human Rights Law

UN Special Rapporteur on the Right to Privacy

- First Report of the UN Special Rapporteur on the Right to Privacy to the Human Rights Council (**EJIL: talk**, March 18).

Cyber and Internet

National security and the right to privacy: Apple v. FBI

- Justice Department drops lawsuit against Apple as FBI has now unlocked Farook's iPhone (**TechCrunch**, March 28).
- DOJ confirms successful iPhone data extraction, withdraws encryption case against Apple [u] (**apple insider**, March 28).
- Report: Israeli company helping FBI crack iPhone security (**Ynet**, March 23).
- Apple v. FBI - Broader Implications (**LAWFARE**, March 28).

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