

Expert Opinion

Name of Expert: **Dr. Yuval Shany**
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I, the undersigned, Dr. Yuval Shany, have been asked by the Seattle University Ronald A. Peterson Law Clinic to offer my legal opinion on the issues described below which are related to the First Amended Complaint in Civil Action No. C05-5192 that was filed to the United States District Court of the Western District of Washington, at Seattle.

I submit this opinion in lieu of testifying and I declare hereby that I know well that, for the purpose of Israeli or United States Criminal Law regarding sworn false testimony in Court, my opinion, signed by me, has the same effect as if I rendered a sworn testimony in Court.

My professional CV and list of publications is appended as **Appendix A** hereto.

The following is my opinion:

Introduction

1. I have been asked by the aforementioned Law Clinic to provide information to the District Court concerning several aspects of Israeli law related to the case at hand.
2. Specifically, my opinion will address the following questions, and assess whether in the light of them the plaintiffs could have sought in Israeli court proceedings the remedies provided to them under the Torture Victims Protection Act of 1991, the Alien Tort Claims Act of 1789, or other U.S. law instruments or doctrines which grants remedies for violation of international law standards:
 - a) Whether the rules governing the incorporation of international law into domestic Israeli law would enable the bringing of a tort claim before Israeli courts on the

basis of alleged violations of international human rights or humanitarian law norms;

- b) Whether civil tort claims brought before Israeli courts against private actors alleging, either on the basis of domestic or international law, complicity on their part in internationally unlawful house demolition operations undertaken by the Israeli government have any prospects of success in the light of past litigation in Israel challenging house demolition operations; and
 - c) What are the implications of the immunity from tort claims relating to alleged combat activities and other events which take place in the Occupied Territories, which is afforded to the State of Israel under Israeli law, upon the prospects of bringing parallel claims in Israel against non-state actors who were complicit in the same allegedly tortuous conduct.
3. In order to give the opinion, I have been presented by the aforementioned Legal Clinic with the following documents:
- a. First Amended Complaint in Civil Action No. CV-05192-FDB *Corrie v. Caterpillar Inc.*
 - b. Original Complaint in Civil Action No. CV-05192-FDB *Corrie v. Caterpillar Inc.*
 - c. Defendant's Motion to Dismiss in Civil Action No. CV-05192-FDB *Corrie v. Caterpillar Inc.*
 - d. Opinion of Prof. Daniel More in Support of Defendant's Motion to Dismiss in Civil Action No. CV-05192-FDB *Corrie v. Caterpillar Inc.*
 - e. Statement of claim in C.C. (Haifa District Court) 371/05A *Corrie v. State of Israel*

A. The possibility of bringing a civil suit based on international law before Israeli courts

I. The status of international law in Israeli courts

4. The Israeli legal system has adopted the British model for regulating the status of international law in domestic law. According to this model, international treaties to

which the State is party are not part of its domestic law, unless incorporating legislation had been passed by the Knesset.¹ At the same time, customary international law automatically constitutes part of the law of the land,² but is hierarchically inferior to domestic legislation and the latter enjoys, in the event of a normative conflict, legal precedence over international law.³ Finally, there exists a presumption of compatibility (parallel to the U.S. *Charming Betsy* canon of interpretation⁴) which requires courts to construe domestic law whenever possible in accordance with the State's international obligations (under both international treaty and customary law).⁵

5. It may also be noted that international law has a somewhat greater role in the administrative law sphere, and administrative acts which violate international law might be presumed unlawful by the Israeli Supreme Court (which has first and last instance jurisdiction over most such cases).⁶ While this has some relevance to house demolition cases adjudicated under administrative law (most of the litigation which takes place in Israel concerning events occurring in the Occupied Territories is addressed within an administrative law paradigm that views the military as an administrative agency), it has no bearing on civil tort claims, like the one before us, where the general, and less hospitable rules of incorporation of international law into domestic law apply.
6. To date, the Israeli Parliament (the 'Knesset'), has failed to incorporate into domestic law almost all human rights and humanitarian law treaties to which Israel is a party. As a result, international treaties which Israel had ratified that are relevant to the case at hand, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT),⁷ the International Covenant

¹ See C.A. 22/55 *Custodian for Absentees' Property v. Samara*, 10 P.D. 1825.

² See Cr. A. 174/75 *Shtempfer v. Attorney General*, 10 P.D. 5.

³ See Cr. A. 336/61 *Eichmann v. Attorney General*, 16(3) P.D. 2033.

⁴ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

⁵ See H.C.J. 279/51 *Amsterdam v. Minister of Finance*, 6(2) P.D. 945.

⁶ See e.g., A.Cr.R. 7048/97 *Anonymous v. Minister of Defense*, 54(1) P.D. 721; H.C.J. 3239/02 *Mar'ab v. Military Commander of Judea and Samaria*, 57(2) P.D. 349.

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)(hereinafter CAT). Israel ratified the Convention on Nov. 2, 1991.

on Civil and Political Rights (hereinafter ICCPR),⁸ and the Fourth Geneva Convention relative to the Protection of Civilians in Times of War (hereinafter Geneva IV),⁹ are not an integral part of Israeli domestic law – and by implication, not part of the law applied by Israeli courts in civil cases relating to the situation in the Occupied Territories. While, in theory, these treaties may be utilized to some extent by local courts, if deemed reflective of customary international law, such utilization is, as explained below, highly improbable.

7. Indeed, in practice, Israeli courts have often refrained from identifying international treaties as reflective of customary international law, and thus part of domestic law. Most significantly, several Supreme Court decisions have classified Geneva IV as a constitutive treaty – i.e., not reflective of customary law (notwithstanding its universal ratification).¹⁰
8. Furthermore, while a number of Supreme Court decisions have held that the 1907 Hague Regulations concerning the Laws and Customs of War on Land (to which Israel is not a party)¹¹ are customary in nature, the Supreme Court also held that the Defense (Emergency) Regulations 1945, which constituted part of the governing law in the West Bank and Gaza Strip, constitute conflicting domestic legislation – i.e., they apply regardless of the Hague Regulations.¹² Hence, the Israel Defense Forces (IDF) retain, for example, the power to demolish houses pursuant to Regulation 119 of the 1945 Regulations, notwithstanding customary international law on the matter.¹³

⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter ICCPR). Israel ratified the Convention on Jan 3, 1992.

⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 287. Israel ratified the Convention on July 6, 1951.

¹⁰ See e.g., H.C.J. 785/87 *Affu v. IDF West Bank Commander*, 42(2) P.D. 4; H.C.J. 606/78 *Ayoub v. Minister of Defense*, 33(2) P.D. 113. Although the Supreme Court has recently invoked Geneva IV in a number of administrative law cases relating to the situation in the Occupied Territories (See e.g., H.C.J. 7015/02 *Ajuri v. IDF West Bank Commander*, 56(6) P.D. 352; H.C.J. 4674/04 *Physicians for Human Rights v. IDF Gaza Strip Commander*, 2004(2) Tak-Supreme 2183), it never reversed its holding on the Convention's non-customary status. This prevents reliance upon Geneva IV as a binding source of law in civil tort cases.

¹¹ Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 187 Consol. T.S. 227.

¹² See e.g., H.C.J. 358/88 *Association for Civil Rights in Israel v. IDF Central Command Chief Commander*, 43(2) P.D. 529; H.C.J. 897/86 *Jabber v. IDF Central Command Chief Commander*, 41(2) P.D. 522.

¹³ Article 119 provides the following: “(1) A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the

9. Israeli courts have not determined to date whether the ICCPR or CAT are generally reflective of customary international law. Still, as I shall explain below, it is unlikely that these instruments, or any other non-incorporated international law standards, could be directly relied upon in Israeli tort cases.

II. The controversial applicability of international treaties in the Occupied Territories

10. A further element complicating the possibility of directly relying upon relevant international instruments in tort cases brought in Israel in connection with acts which took place in the Occupied Territories is Israel's reluctance to acknowledge the formal applicability under international law of some of these treaties in the Occupied Territories.
11. Israel has long maintained that Geneva IV is inapplicable to the Occupied Territories because of the non-fulfillment of a prerequisite stipulated in article 2(2) – i.e., that the Convention applies in case of the “partial or total occupation of the *territory of a High Contracting Party*” (emphasis added): Because Israel contends that neither Jordan nor Egypt that controlled before the 1967 war the West Bank and Gaza Strip, respectively, had a valid sovereign title over these territories, it alleges that they cannot be deemed *territories of a High Contracting Party* to the Geneva Convention.¹⁴ Israel did state, however, in a number of occasions, its willingness to apply the humanitarian provisions of Geneva IV to the situation in the Occupied Territories.
12. In a similar vein, Israel has persistently argued before many international fora that various human rights treaties to which it is party, including the ICCPR, have a narrow

inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence ; and when any house, structure or land is forfeited as aforesaid, *the Military Commander may destroy the house or the structure or anything on growing on the land.* (2) Members of His Majesty's forces or of the Police Force, acting under the authority of the Military Commander may seize and occupy, *without compensation*, any property in any such area, town, village, quarter or street as is referred to in sub regulation (1), after eviction without compensation, of the previous occupiers, if any” (emphasis added).

¹⁴ For a short exposition of the Israeli position, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. (forthcoming), at para. 90-93.

- territorial scope of application (i.e., they only cover the sovereign territory of State parties) and do not apply in occupied territories.¹⁵
13. Israel has also argued that, since 1994, areas transferred to Palestinian control under the Oslo Accords should no longer be deemed occupied territories, and that, as a result, Geneva IV and human rights treaties cannot apply with relation to significant parts of the West Bank and Gaza Strip in which most Palestinians reside.¹⁶
 14. Israel's assertions relating to the inapplicability of Geneva IV in the Occupied Territories have been rejected by virtually all international bodies which have addressed them.¹⁷ Still, Israeli courts have been traditionally reluctant to directly discuss the legal propriety of these State assertions, which were made on the international plane. Instead, they tended to evade the question of the formal application of Geneva IV to the Occupied Territories through highlighting its supposed non-customary nature,¹⁸ or, in administrative law cases, by way of relying upon the state's undertaking to apply the humanitarian provisions of Geneva IV regardless of its formal status.¹⁹ As a result, Israeli courts have never decided the question of the *de jure* applicability of Geneva IV in the Occupied Territories and it is highly improbable that they would be willing to make such a determination in the context of a civil tort claim. Hence, it is likely that Israeli courts would strive to find ways to not apply Geneva IV to the Occupied Territories in such cases as well.
 15. With relation to the question of the applicability of human rights treaties in the Occupied Territories, Israeli case law on the matter is too sparse to estimate if and

¹⁵ For an exposition of the Israeli position on the applicability of the ICCPR to the Occupied Territories, see State of Israel *International Covenant on Civil and Political Rights -- Second Periodic Report*, Nov. 20, 2001, para. 8, UN Doc. CCPR/C/ISR/2001/2 (2001).

¹⁶ For a short exposition of the position of Israel on this point, see Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in Occupied Territories*, 37 ISRAEL LAW REVIEW 17, 37-40 (2003-2004)(citing numerous official documents which lay out Israel's 'lack of effective control' argument).

¹⁷ See e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. (forthcoming), at para. 94-101, 104-112.

¹⁸ See e.g., H.C.J. 606/78 *Ayoub v. Minister of Defense*, 33(2) P.D. 113 (since Geneva IV is not customary, one needs not address the question of its international applicability to the Occupied Territories); H.C.J. 591/88 *Taha v. Minister of Defense*, 45(2) P.D. 45 (the case does not raise issues under Geneva IV, and the Court therefore needs not address its applicability to the Occupied Territories).

¹⁹ See e.g., H.C.J. 2056/04 *Beit Sourik Village Council v. Government of Israel*, 2004(2) *Tak-Supreme* 3035. In these administrative law cases, the Supreme Court has used what is an essentially a promissory estoppel doctrine.

how the objections raised by the State on the international plane would effect the Supreme Court's position on the matter.²⁰

III. Additional obstacles to direct reliance upon international law norms in tort cases

16. Even if international human rights or humanitarian law norms were directly applicable as part of customary international law in civil cases brought before Israeli courts, it is unlikely that they could serve the sole basis of a tort claim for three additional reasons.
17. First, the relevant norms do not seem to explicitly create a tortious cause of action. Instead, they refer to inter-state remedial obligations²¹ or to a general requirement to grant individuals effective remedies.²² An exception may be noted with respect to article 14 of CAT, which does seem to envision an individual right to compensation, but even this provision seems to require enabling state legislation.²³ Hence, in U.S. law terms, the relevant human rights and humanitarian law provisions might not be viewed as self-executing – i.e., applicable without enabling legislation. **Indeed, there is no precedent for bringing a tort claim in Israel directly on the basis of these or other international norms.**
18. Second, under Israeli constitutional law, tort claims might be deemed to infringe upon defendants' constitutional right to property.²⁴ Such infringement may be permissible under the terms of article 8 of the Basic Law: Human Dignity and Liberty (the constitutional limitation clause) only if grounded in primary legislation, which meets

²⁰ For a recent survey of the Israeli Supreme Court case law on the matter, see Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in Occupied Territories*, 37 ISRAEL LAW REVIEW 17, 87-96 (2003-2004). In those very few administrative law cases in which the treaties were relied upon by the Supreme Court no mention of the State's objections was made. See e.g., H.C.J. 3239/02 *Mar'ab v. Military Commander of Judea and Samaria*, 57(2) P.D. 3491.

²¹ See Hague Convention (IV) respecting the Laws and Customs of War on Land, art. 3, Oct. 18, 1907, 187 Consol. T.S. 227.

²² ICCPR, art. 2(3).

²³ CAT, art. 14 provides that: "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

²⁴ Cf. C.A. 6821/93 *Bank Hamizrachi Hameuhad Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 221, 348 (the constitutional right to property encompasses *in personam* obligations).

certain substantive balancing requirements.²⁵ While tort claims on the basis of the existing Civil Wrongs Ordinance (New Version) satisfy this requirement (*inter alia*, because of a constitutional saving clause, which preserves the validity of pre-1992 legislation), it is arguable that new tort claims based upon customary international standards would not satisfy the aforementioned limitation clause requirement, since they are not grounded in primary legislation.²⁶

19. Third, it would be difficult, if not outright impossible to read customary international law into pre-existing domestic tort law. This is because claims brought on the basis of customary international law human rights or humanitarian norms do not seem to fall within the scope of coverage of article 63 of the Civil Wrongs Ordinance (New Version), which permits the bringing of tort claims against parties that had breached their *statutory duties* vis-à-vis the plaintiffs. While article 63 provides a potential basis in tort law for introducing new substantive tort claim grounds pursuant to new statutory provisions (subject to the above mentioned constitutional law constraints), obligations deriving from customary international law do not seem to *prima facie* meet the definition of the term 'statutory obligations' as it is normally understood under Israeli law.²⁷ In other words, unlike U.S. laws, such as the Alien Tort Claims Act, Israeli law does not permit reliance on common law or international law standards, which were not codified in legislation, as the legal basis for a tort claim.
20. In sum, my conclusion is that **it is highly unlikely that Israeli courts would allow tort claims to be brought directly upon international human rights or international humanitarian norms**, by virtue of the following legal problems: a) lack of legislation incorporating international standards; b) the uncertain customary

²⁵ Basic Law: Human Dignity and Liberty, art. 8 provides that: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law".

²⁶ A question may arise, however, whether article 10 of Basic Law: Human Dignity and Liberty, which is a saving clause, permits reliance upon pre-1992 customary norms. This issue was never addressed by Israeli courts and it is unclear whether they would be willing to consider a customary norm, which was not recognized by Israel courts before 1992, as a pre-1992 norm.

²⁷ C.A. 5792/99 *Media and Jewish Religious Family Education (1997) Ltd. – Family Newspaper v. S.B.C. Advertising, Marketing and Sales Promotion Ltd. – Good Family Newspaper*, 55(3) P.D. 933, 951. Under Israeli Interpretation Law, 1981, statutory law exclusively consists of Knesset legislation, pre-1948 Ordinances or secondary norms deriving from Knesset legislation. Cf. C.A. 3684/98 *State of Israel v. Ahleil*, 1999(2) Tak-Supreme 1332 (an instructions booklet issued by the IDF to soldiers in the Occupied Territories does not seem to generate statutory obligations).

law status of the relevant international law instruments; c) doubts over the applicability of international instruments in the Occupied Territories; d) the possible non-self executing character of the relevant international norms; e) potential conflict with constitutional law; and f) *prima facie* inapplicability of the breach of statutory duty tort ground.

21. As a result, it seems that **if a tort claim could be brought in Israel against the defendant in relation to the events described in the plaintiffs' First Amended Complaint, it could only be done on the basis of domestic Israeli tort law-- i.e.,** for its complicity in assault, trespass, unlawful deprivation of property or negligence under the law of torts, as codified in the Civil Wrongs Ordinance (New Version). In parts B and C of this opinion I will explain why, in my view, the plaintiffs' chances of prevailing in Israel even in claims grounded upon domestic law are minuscule.
22. It is beyond the scope of my expertise to assess whether the impossibility of bringing a tort claim in Israel under international law standards, would negate the possibility of meeting any exhaustion of local remedies requirements under sec. 2(b) of the U.S. Torture Victims Protection Act of 1991 or other relevant U.S. legislative acts or legal principles.

B. The possibility of prevailing in a general house demolition claim before Israeli courts

23. The next part of my opinion addresses the success prospects of a claim brought before Israeli courts which alleges that a private corporation is in breach of international law standards as result of its involvement in house demolition operations in the Occupied Territories. As I will explain below, Israeli law, as applied by the local courts, does not prohibit house demolitions in the Occupied Territories, if they meet certain conditions. As a result, the chances for success in a specific tort claim which strives to establish the defendant corporation's responsibility for specific harm caused to specific plaintiffs by reason of its complicity in a *widespread practice* of unlawful house demolitions or *pattern* of unlawful demolition activities is minuscule.

24. According to the jurisprudence of the Israeli Supreme Court, house demolitions in the Occupied Territories may be lawful in three types of security-related situations:
- (a) During combat operations – if house demolitions serve what the Court deems to be urgent military needs in times of combat (e.g., destruction of structures from which fierce enemy fire originates).
 - (b) Accommodation of military needs in non-combat situations – if demolitions are required to facilitate what the Court perceives to be legitimate Israeli military interests in the Occupied Territories (e.g., demolition designed to facilitate the building of fortifications, such as the West Bank separation barrier).
 - (c) Punitive or deterring demolitions – under Regulation 119 of the Defense (Emergency) Regulations the military may demolish houses of individuals involved in violent hostile activities.
25. Note, however, that some legal conditions may appertain to certain house demolition operations, which reflect upon their lawfulness in the eyes of the Israeli Supreme Court. These might include a right to prior hearing before the execution of non-combat demolition operations, proof of residency in punitive or deterring house demolitions and necessity and proportionality (including prevention of harm to adjacent properties). Significantly, if these conditions are met, the demolition operation would be deemed lawful.
26. A survey of the case law of the Israeli Supreme Court on house demolitions in the Occupied Territories shows that the vast majority of administrative law cases that challenged the lawfulness of specific house demolition operations (belonging to all three aforementioned categories) were rejected. In the same vein, to the best of my knowledge, **no tort claim brought in Israel on the basis of a house demolition operation which took place in the Occupied Territories had ever been successful.**
27. In those very few administrative law cases where injunctions against house demolition operations were issued by the Supreme Court, it was by reason of the non-fulfillment of one of the aforementioned legal conditions (prior hearing, residence, excessive harm to adjacent properties, etc.), and not because of the perceived intrinsic illegality of the house demolition in question. To the contrary, the Supreme Court has

reaffirmed time and time again the lawfulness of the *policy* of security-related house demolitions.

28. Before elaborating upon the three grounds for security-related house demolitions approved by the Israeli Supreme Court, it might be prudent to note that house demolitions are also sometimes executed in the Occupied Territories pursuant to zoning laws – for example, with relation to structures built without valid building permits or pursuant to changes in the applicable zoning plans (e.g., in order to pave new roads). Although these demolitions often raise difficulties and allegations of improper motives on the part of the Israeli authorities,²⁸ they do not directly appertain to the case at hand, which deals with what the Israeli Supreme Court perceives to be security-related house demolitions. As a result, I will not address the prospects of prevailing in tort claims relating to this category of house demolitions.

I. Combat operations

29. During the last *intifada*, Palestinians and NGOs attempted on several occasions to challenge before the Israeli Supreme Court specific house demolition operations executed during large scale military operations in the Occupied Territories. The circumstances of these cases are generally comparable to those underlying the complaints of some of the plaintiffs in the present proceedings (i.e., the Al Sho'bi, Fayed and Khalafallah complaints), which would probably be classified by the Israeli Supreme Court as combat-related demolitions.
30. In all cases deemed combat-related, where the State chose to object to the petition, injunctions were refused (note, however, that in a few cases, the State was willing to declare that it had no intention of demolishing the petitioners' houses). The Supreme Court also held that the ordinary rules that require the IDF to provide property owners with a right of hearing prior to the destruction of their property do not apply in

²⁸ See e.g., B'Tselem, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem* (1995); Amnesty International, *Demolition and Dispossession: The Destruction of Palestinian Homes* (1999).

combat-related situations or in other situations which presents a clear and present threat to the lives of IDF service members.²⁹

31. Furthermore, the Supreme Court expressed in some alleged combat-related cases the view that house demolitions operations are justified. For example, it stated, in *obiter dicta*, its following view on the propriety of the house demolitions which took place in Jenin during operation 'Defensive Shield' (which are among the demolitions described in the First Amended Complaint):

“As for house demolitions – it is true that during the military operations private houses were destroyed and property harmed, but not in the scale alleged by the Palestinians. The harm to the houses was required by the use of residential houses by militants to target IDF soldier therefrom... some of the houses were even booby trapped by terrorists. One method to repress terrorism and to minimize harm to innocent individuals was to use bulldozers to demolish the houses after granting the individuals present in the houses sufficient time to leave them, and it was done out of military considerations”³⁰ (unofficial translation).

32. A petition for declaratory judgment brought by *Adala* – an Israeli-Arab NGO – challenging the IDF's excessive reliance upon military necessity justifications and the ensuing widespread demolition of houses was recently rejected by the Supreme Court. One should note that the Court evaded the merits of the petition, but rather based its decision upon the recent cease fire agreement reached between Israel and the Palestinian Authority, which rendered, according to the Court, the petition moot.³¹
33. Still, although the *Adala* petition was not decided on its merits, the Supreme Court's limited ability and willingness to intervene in cases perceived to relate to combat operations, which was demonstrated in a number of cases brought before it during the

²⁹ See e.g., H.C.J. 453/04 *Bassiouni v. IDF Commander*, 2004(2) Tak-Supreme 1288; H.C.J. 4372/04 *Abu Dayed v. IDF Gaza Strip Commander*, 2004(2) Tak-Supreme 1606; H.C.J. 6696/04 *Amer v. IDF West Bank Commander*, 56(6) P.D. 110; H.C.J. 4694/04A *Abu-Atara v IDF Gaza Strip Commander*, 2004(2) Tak-Supreme 1645.

³⁰ H.C.J. 313/03 *Bakri v. The Film Review Board*, 2003(3) Tak-Supreme 353, 365 (the case involved a ban against the screening in Israel of a controversial film accusing the IDF of committing war crimes in Jenin).

³¹ See H.C.J. 4969/04 *Adala – Legal Center for Minority Rights v. IDF Southern Command Chief Commander*, judgment of July 13, 2005 (not yet published).

course of the last *intifada*,³² renders it extremely unlikely that a decision generally prohibiting combat-related house demolition operations would be issued in the foreseeable future.

34. Finally, as I will discuss below, civil tort claims brought against the State which pertain to what might be deemed as combat-related house demolitions would be effectively blocked by a combat immunity provision found in the Civil Torts (State Responsibility) Law, 1952. This immunity arrangement would, most probably, also shield the defendant from combat-related tort claims in Israel.

II. Accommodation of military necessity in non-combat situations

35. In cases involving house demolition operations designed to serve military needs rising outside combat situations, the Israeli Supreme Court has been in the past somewhat more effective in restraining the IDF. In particular, it used to require the IDF to grant Palestinians affected by prospective house demolitions with a prior right of hearing³³ and refrain from causing disproportional harm to property.³⁴ It should also be noted that the IDF offers some financial compensation to property owners in some cases which fall into this category (such compensation is analogous to that offered in eminent domain taking cases).
36. However, in recent years the right to a prior hearing in non-combat cases had been gradually eroded, and the Supreme Court has allowed the IDF to dispense with it where the grant of a hearing might jeopardize the demolition operation or put at risk

³² See e.g., H.C.J. 4674/04 *Physicians for Human Rights v. IDF Gaza Strip Commander*, 2004(2) Tak-Supreme 2183, 2198 (judicial review over the conduct of hostilities is limited); H.C.J. 3114/02 *Baraka v. Minister of Defense*, 56(3) P.D. 11, 16 (the Supreme Court will not review the actual conduct of hostilities); H.C.J. 3022/02 *Canon (Law) – The Palestinian Association for Protection of Human Rights and the Environment v. IDF West Bank Commander*, 56(3) P.D. 9, 10 (the Court cannot order the IDF, as an institutional mater, to refrain from targeting specific targets or using specific means of warfare during active hostilities).

³³ See e.g., H.C.J. 358/88 *Association for Civil Rights in Israel v. IDF Central Command Chief Commander*, 43(2) P.D. 529; H.C.J. 4112/90 *Association for Civil Rights in Israel v. IDF Southern Command Chief Commander*, 44(4) P.D. 626.

³⁴ See e.g., H.C.J. 10356/02 *Hess v. IDF West Bank Commander*, 58(3) P.D. 443; H.C.J. 9252/00 *Al-Ska v. State of Israel*, 2001(2) Tak-Supreme 1678; H.C.J. 4219/02 *Gussin v. IDF Gaza Strip Commander*, 56(4) P.D. 608. Cf. H.C.J. 2056/04 *Beit Sourik Village Council v. Government of Israel*, 2004(2) Tak-Supreme 3035.

the lives of IDF service members.³⁵ Hence, violations of the right to hearing do not necessarily result now in the unlawfulness of the demolition operation under Israeli law.

37. Furthermore, the propriety of the Court's exercise of judicial review in military necessity cases is open to criticism from an international law perspective: The Supreme Court has viewed measures designed to protect Jewish settlements in the Occupied Territories as fulfilling a legitimate long-term military need,³⁶ while the vast majority of international jurists would most probably maintain that the unlawfulness of the settlements under international law³⁷ should also result in the illegality of measures designed to protect them.³⁸
38. Hence, although the Supreme Court exercises some degree of control over house demolition operations designed to promote Israeli security interests, its jurisprudence on the matter seems to fall short of international standards. Furthermore, since almost all administrative law petitions against non-combat house demolition operations undertaken for security needs were dismissed to date (though at times, after the State offered the petitioners some concessions during the course of litigation), including some administrative law cases involving fact patterns comparable to those underlying some of the present plaintiffs' complaints (i.e., the Corrie and Abu Hussein complaints) - it is highly improbable that an Israeli court would regard the IDF's widespread practice of engaging in security-related house demolitions as unlawful *per se*. The rejection of *Adala's* petition for declaratory judgment against the

³⁵ H.C.J. 6696/02 *Amer v. IDF West Bank Commander*, 56(6) P.D. 110; H.C.J. 4969//04 *Adala – Legal Center for Minority Rights v. IDF Southern Command Chief Commander* (provisional measures), 2004(3) Tak-Supreme 1786. Instead, the Supreme Court accepted the IDF's offer to allow any Palestinian who fears that his house might be targeted in the future to approach the authorities and make his case against demolition (even if no notice of planned demolition was served to him or her). The effectiveness of this procedure seems highly questionable.

³⁶ See e.g., H.C.J. 2056/04 *Beit Sourik Village Council v. Government of Israel*, 2004(2) Tak-Supreme 3035; H.C.J. 4219/02 *Gussin v. IDF Gaza Strip Commander*, 56(4) P.D. 608; H.C.J. 10356/02 *Hess v. IDF West Bank Commander*, 58(3) P.D. 443.

³⁷ See Geneva IV, art. 49(6).

³⁸ Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. (forthcoming), at para. 119-122 (holding that the unlawfulness of the settlements render a wall designed to protect them unlawful too). See also *ibid*, declaration of judge Buergenthal, at para. 9 (“segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law”).

government's excessive practice of resorting to security-related house demolitions supports this last conclusion.³⁹

39. So, while tort claims against the State for its part in demolition operations which raise specific allegations of negligence or misconduct might be feasible (though the applicable legal standards might fall short of international law standards),⁴⁰ **it is highly unlikely that a tort claim brought against a private party for its involvement in specific house demolition operations, which challenges the government's extensive practice of house demolitions or its pattern of demolition activities, would be successful.**
40. In addition, new developments relating to the immunity of the State from tort claims over events relating to the Occupied Territories, which are discussed in part C of this opinion, would result, most probably, in the blocking of this category of claims against the defendant too, and the ensuing impossibility of bringing such tort claims in Israel.

III. Regulation 119 house demolitions

41. As already indicated, Article 119 of the Defense (Emergency) Regulations authorizes IDF military commanders to engage in what are essentially punitive house demolitions – i.e., the destruction of suspect terrorists' places of residence, or other more limited sanctions against the property (e.g., sealing of rooms). Since the mid 1990s, the IDF also applied such demolition measures with relation to houses occupied by suicide bombers in order to deter other would-be bombers, who may wish to spare their immediate family members from the serious harm caused to them by demolition operations by desisting from their terror activities. Although none of the plaintiffs in the present claims alleges to be harmed by a Regulation 119 measure, the treatment of Regulation 119 cases by the Israeli courts is indicative of the existing normative gap between domestic law and international law in house demolition cases.

³⁹ H.C.J. 4969/04 *Adala – Legal Center for Minority Rights v. IDF Southern Command Chief Commander*, judgment of July 13, 2005 (not yet published).

⁴⁰ Cf. H.C.J. 2056/04 *Beit Sourik Village Council v. Government of Israel*, 2004(2) *Tak-Supreme* 3035. The Corrie complaint against the State of Israel before the Haifa District Court might have fallen into this category as well. However, the 2005 Amendment to the Civil Wrongs (Liability of the State Law), which is discussed below, would probably block this claim as well.

42. Despite persistent criticism from NGOs, politicians and the academia over the compatibility of punitive house demolitions with article 53 of Geneva IV (protection of private property) and article 33 of Geneva IV (prohibition of collective punishment), the Israeli Supreme Court has on numerous occasions affirmed the lawfulness of punitive house demolitions, asserting that they constitute part of the applicable domestic law, and contesting their alleged incompatibility with international law through highlighting their supposed deterrence, not punitive function. For example, in the 1994 *Nazal* case – the first case in which Regulation 119 was applied with relation to a suicide bomber's house – the Supreme Court rejected the bomber's surviving family members petition and held that:

"The legislature provided military commanders with this tool in order for them to use it as emergency measures for security reasons. And as long as they prudently and reasonably apply this measure and do not exceed the requirements of proportionality, we have no place to intervene in their discretion"⁴¹ (unofficial translation).

43. The disinclination of the Supreme Court to intervene in Regulation 119 cases is amply demonstrated in many other cases, which rejected challenges to demolition orders.⁴² Still, it should be noted that the Court imposed some restrictions upon the army's ability to apply Regulation 119. First, until recently (see *supra* para. 36), it insisted that a right of hearing be granted to the affected individuals before the demolition takes place. Second, it required the IDF to prove the residency of the targeted individual in the property in question.⁴³ And third, it required the military to refrain from harming adjacent housing units, including distinct parts of the housing complex in which family members of the targeted individual, other than his or her immediate family cell, reside.⁴⁴

44. In the light of this jurisprudence, it is most unlikely that tort claims brought before Israeli courts by individuals directly affected by punitive house demolitions could

⁴¹ H.C.J. 6026/94 *Nazal v. IDF Judea and Samaria Commander*, 48(5) P.D. 338, 349.

⁴² See e.g., H.C.J. 7473/02 *Bekher v. IDF West Bank Commander*, 56(6) P.D. 488; H.C.J. 10467/03 *Sharbati v. IDF Home Front Commander*, 58(1) P.D. 810; H.C.J. 6288/03 *Seada v. Home Front Commander*, 58(2) P.D. 289; H.C.J. 8575/03 *Azadin v. IDF West Bank Commander*, 58(1) P.D. 210.

⁴³ H.C.J. 6026/94 *Nazal v. IDF Judea and Samaria Commander*, 48(5) P.D. 338, 344.

⁴⁴ See H.C.J. 1730/96 *Sabih v. IDF West Bank Commander*, 50(1) P.D. 353, 362.

succeed. This has been recently confirmed by a Tel Aviv first instance court decision that rejected a claim by a Palestinian for *incidental* damages inflicted upon him by an allegedly negligent application of a Regulation 119 measure (the sealing of rooms, which harmed movables and other parts of the building). In explaining his decision, the judge wrote:

"A confiscation order under Regulation 119 to Defense (Emergency) Regulations is issued when suspicions of a security-related offence exist against any one of the building's residents. The sanction in Regulation 119 is a measure of deterrence. As such, no compensations are justified and that it is why it is explicitly stated (Regulation 119(2)) that no compensation would be granted because of an order issued and actual use executed pursuant to Regulation 119(1)."⁴⁵

45. It should be noted that the IDF had recently announced a freeze on all Regulation 119 demolitions, citing the dubious efficiency of this policy.⁴⁶ While the precise effects of this change of policy are yet to be ascertained, it is very unlikely that it would lead to reevaluation of the lawfulness of past Regulation 119 demolitions, many of which authorized by the Supreme Court itself.
46. So, in sum, the chances for success of a tort claim brought before Israeli courts, which challenges the practice of punitive or deterring house demolitions, are extremely low.

Conclusions

47. The analysis of the case law of the Israeli courts in assessing the lawfulness of various house demolition operations deemed to be security-related shows that Israeli courts have rejected the vast majority of administrative law petitions which were

⁴⁵ C.C. (First Instance, Tel Aviv) 4105/00 *Barigit v. State of Israel*, 20 Dinim-Shalom 211, at para. 18. It may be noted that three Regulation 119 tort claims are currently pending before first instance courts in the Jerusalem First Instance Court (C.C. (Jerusalem First Instance Court) 9326/04 *Tahiana v. State of Israel*; C.C. (Jerusalem First Instance Court) 9327/04 *Mazri v. State of Israel*; C.C. (Jerusalem First Instance Court) 2038/05 *Kassem v. State of Israel*). However, these claims mainly challenge *incidental* damages caused by Regulation 119 demolitions to movable property and adjacent houses. It may be presumed that this shift of emphasis from suing for the actual demolition operation to suing for the associated incidental damages stems from the claimants' assessment that their prospects of succeeding in a tort claim focusing on the demolition act itself are minuscule.

⁴⁶ See H.C.J. 7733/04 *Nasser v. IDF West Bank Commander*, judgment of June 20, 2005 (not yet published).

brought before them against house demolition operations in the Occupied Territories. Even in the few administrative law cases where the petitioners enjoyed some degree of success, the practice of engaging in house demolitions was never held to be unlawful *per se*. To the contrary, Israeli courts have granted time and time again their explicit or implicit approval of the policy of house demolitions.

48. Furthermore, to the best of knowledge, **no tort claim brought before Israeli courts for damages associated with what the courts regard as security-related house demolition operations in the Occupied Territories has ever succeeded.**

49. As a result, it is safe to assess that **the plaintiffs' chances of prevailing in a tort claim brought before Israeli courts against the defendant for its responsibility as an accomplice to the IDF's widespread practice of unlawful house demolitions or pattern of unlawful demolition activities are close to non-existing.**

C. The Effects of the State's Combat Immunity on the Exhaustion of Local Remedies

50. A final international law-related factor which affects the prospects of bringing a tort claim in Israel against the defendant on the basis of their alleged violations of international law is the immunity that the State of Israel enjoys from tort claims related to combat activities.

51. Article 5 the Civil Wrongs (Liability of the State) Law, 1952 provides that: "The State is not civilly liable for an act done in the course of a war operation of the Defense Army of Israel". This clause has been authoritatively interpreted by the Supreme Court in the 2002 *Benni Uda* case, where the Court held that:

"An act is a war operation if it constitutes combat action or is an army military operation action. There is no requirement that the act should be directed against a State army. Acts against terror organizations may also constitute a war operation. So, for instance, the war-like character of the act which is directed against an enemy (be it an organized army or terror groups) that wishes to harm the soldiers might create the special risk which justify the grant of immunity to the state."⁴⁷

⁴⁷ C.A. 5964/92 *Benni Uda v. State of Israel*, 56(4) P.D. 1.

52. This definition was codified in a 2002 legislative amendment which introduced to article 1 of the Civil Wrongs (Liability of the State) Law, 1952 the following definition of a "war operation" – "any act of combating terror, hostile actions, or insurrection, and also an action as stated that is intended to prevent terror, hostile actions, or insurrection committed in circumstances of danger to life and limb" (unofficial translation).
53. It is important to appreciate that the rationale given by the Supreme Court for the grant of legal immunity to the State in war-like situations was the perceived unsuitability of tort law to govern the special risks of combat.⁴⁸ The same perceived unsuitability would most likely block claims alleging the defendant's liability for houses demolished in the course of the same combat operations, since it would be equally unsuitable to assess the lawfulness of combat-related acts from a tort law prism.
54. It should be noted that Israeli tort law seems to take the general position that where the principal tortfeasor enjoys immunity from claims, his or her accomplices would enjoy similar immunity.⁴⁹ This is especially so when the law creates a substantive no-liability standard (i.e., absolves from shouldering legal responsibility), as opposed to specific exemption arrangements of an essentially procedural nature.⁵⁰
55. Significantly, the State's immunity from combat-related tort claims over events in the Occupied Territories has been augmented in recent years by various legislative initiatives. In 2002, several procedural requirements were added – most notably, a shorter period of limitations (two years) and a short initial notification period (sixty days), which plaintiffs must meet in order to be eligible to bring a claim.⁵¹ These legislative amendments, which impede the plaintiffs' ability to sue the Israeli government, also complicate their chances of bringing a claim against the defendant, as an accomplice to the government, before Israeli courts.

⁴⁸ *Ibid*, at p. 5.

⁴⁹ See C.A. 558/84 *Carmeli v. State of Israel*, 41(3) P.D. 757, 790.

⁵⁰ *Cf.* Civil Wrongs Ordinance (New Version), art. 9(a) ("a claim may not be filed against a person for a wrong he committed before he reached the age of twelve"). This formulation suggests a procedural, rather than a substantive bar against liability.

⁵¹ Civil Wrongs (State Responsibility) Law, 1952, art. 5A.

56. Furthermore, on July 28, 2005 the Knesset passed a new bill which imposes drastic limitations upon the ability of Palestinians to bring tort claims against the State of Israel.⁵² A new provision to the Civil Wrongs (Liability of the State) Law 1952 – article 5C - now provides that the States shoulders no legal responsibility for claims brought by individuals for events which took place in areas designated by the Minister of Defense as 'conflict zones'. Instead, such claims are referred to a special Ministry of Defense committee which is authorized to grant in special cases *ex gratia* compensation. This new law applies retroactively to events which took place in the second *intifada* (from Sept, 29, 2000 onwards) that have not yet been litigated (i.e., no evidence had been produced before the court). Once the Minister of Defense exercises his power to issue retroactive 'conflict zone' designations to all or part of the Occupied Territories, **it would seem to result in the blocking of all of the present plaintiffs' potential court cases in Israel.** As explained before, such a no-liability arrangement would most probably also block claims against the defendant.

Conclusions

57. In the light of the aforementioned considerations, the plaintiffs' prospects of bringing a successful tort claim before an Israeli Court, pursuing remedies comparable to those that might accrue to them under the Torture Victims Protection Act, the Alien Tort Claims Act or other U.S. law instruments or doctrines which grants remedies for violation of international law standards, are negligible. This is because of the following legal factors:

- a. The weak status of international law before Israeli courts, which renders direct reliance upon most of the relevant treaty provisions or customary law norms impossible.
- b. The clear propensity of Israeli courts to reject house demolition petitions and the ensuing minuscule prospects of a tort claim against the defendant which challenges the IDF's general practice of house demolitions or pattern of demolition activities, even if such a claim were to be brought under domestic Israeli tort law.

⁵² Civil Wrongs (State Responsibility)(Amendment No. 7) Law, 2005.

- c. The blocking effect created by the State's immunity in tort cases relating to combat situations or the situation in the Occupied Territories, which extends most probably also to the State's accomplices.

58. Specifically, it is my opinion that it is extremely unlikely that Israeli courts would find in the context of the plaintiffs' complaints that the defendant was responsible under Israeli law or international law for aiding and abetting, or having another form of involvement in a generally unlawful practice of house demolitions or a pattern of unlawful house demolitions. Furthermore, new developments relating to the scope of the State's immunity from tort claims over events which have taken place in the Occupied Territories would most probably block all of the plaintiff's potential tort claims against the defendant in Israel.
59. It is therefore my conclusion that the plaintiffs have no reasonable prospects of obtaining in Israeli court proceedings remedies analogous to those provided under the U.S. laws and legal doctrines which grant remedies for violations of international law standards.

I declare under penalty of perjury under the laws of Israel and the United States of America that the foregoing is true and correct.

Dr. Yuval Shany

y.s. A

Appendix A

Curriculum Vitae

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MEMBERSHIP IN BARS AND ORGANIZATIONS

The Israeli Bar, 1996
The American Society of International Law, 1996
The British Institute of International and Comparative Law, 1997

EDUCATION

University of London, School of Oriental and African Studies,
Department of Law, London, U.K.
Ph.D. in International Law, 2001.
Supervisor: Prof. Philippe Sands
Area of Research: The competing jurisdictions of international tribunals

New York University School of Law, New York, NY, U.S.A.
LL.M. in International Legal Studies, May 1997.

Hebrew University, Jerusalem, Israel
LL.B. in Law, *Cum Laude*, April 1995.

PROFESSIONAL EXPERIENCE

Amsterdam University, Amsterdam Center for International Law,
Amsterdam, the Netherlands
Visiting Researcher, 2004

Harvard Law School, Human Rights Program, Cambridge, MA, USA
Visiting Fellow, 2003-2004

Hebrew University, Jerusalem, Israel
Senior Law lecturer (full-time appointment), 2005-
Visiting Lecturer, 2000 to present (Law Faculty), 1999-2002 (Social Sciences Faculty)
Minerva Center for Human Rights, Academic Director, 2006-; NGO training seminar coordinator 2002-2003
Teaching Assistant to Prof. Ruth Lapidot, 1995-96 (Law Faculty), Prof. Michla Pomerantz (Social Sciences Faculty), Dr. Moshe Hirsch, 1994-95 (Law Faculty)
Teaching subjects: introduction to international law, international human rights law, international humanitarian law, international courts and tribunals.

The College of Management Academic Studies, Law School, Tel Aviv, Israel

Senior Law lecturer (full-time appointment), 1997-2005

Visiting Lecturer, 2005-

Teaching subjects: introduction to international law, international human rights law, international humanitarian law, international dispute settlement, natural resources law.

Executive Board, CONCORD Research Institute, 2003 to present

Editor of Hamishpat Law Review, 2000-2003

Head of ADR cluster of courses, 2001 to present

Tel Aviv University, Faculty of Law, Tel Aviv, Israel

Visiting Lecturer, 2001-2005

Teaching subjects: introduction to international law

Project on International Courts and Tribunals (PICT)

Rapporteur for PICT/ILA Study Group on Int'l Courts and Tribunals, 2002-

Associate Researcher, 1998-

Ministry of Justice, State of Israel

Counsel for the State of Israel before the UN Committee on Economic, Social and Cultural Rights, November 1998

Law Clerk, Supreme Court Division, 1994-95

Meridor-Nehushtan Law Firm, Jerusalem, Israel

Associate, 1996

Law Clerk, 1995-96

Areas of Practice: civil and commercial law.

- On a number of occasions provided advisory services for a variety of clients, including the Israeli Ministries of Foreign Affairs, the Israeli Ministry of Justice, the Israel' Prime Minister's Office, the Israel Defense Forces, the Association for Civil Rights in Israel, Amnesty International (Israel), the Center for Constitutional Rights, the Harvard Program on Humanitarian Policy and Conflict Research and private law firms in and outside Israel.

PRIZES AND SCHOLARSHIPS

Silbert Center Grant, Hebrew University Social Sciences Faculty, 2005

Certificate of Merit for Pre-Eminent Contribution to Creative Legal Scholarship, American Society of International Law, 2004

Minerva Human Rights Research Grant, Minerva Human Rights Center, Hebrew University, 2003

Law School Research Fund Scholarship, The College of Management Academic Studies, Law School, 2002-2003

Israeli Academic Research Institute for Conflict Resolution and Mediation – research grant, 2002

Advanced studies scholarship, The College of Management Academic

Studies, Law School, 1996-1999

Rubin prize - best international and comparative NYU Law Review student note, 1997

Spears prize - international law students, Hebrew University, Law Faculty, 1995

Dean's list, Hebrew University, Law Faculty 1992 - 93

Board of Editors

Liber Amicorum Shamgar (5 vol.; 2003)

New Thinking in International Law (Series of Books, Cavendish Publishing)

Hamishpat Law Review

IDF Law Review

CONFERENCES AND SEMINARS (Selective list)

Reinterpreting International Humanitarian Law, United States Military Academy at West Point, NY, 2005 (presentation of paper)

International Humanitarian Law and Compliance Inducting Agents
Concord Research Center, College of Management, Israel, 2005 (presentation of paper)

Bilateral Investment Treaties, BIICL, London, 2004 (presentation of paper)

Terrorism and Rogue State, Bar-Ilan University, Israel, 2004 (presentation of paper)

Democracy and Occupation, Concord Research Center, College of Management, Israel, 2004 (presentation of paper)

Use of Excessive Force, Hebrew University and Tel Aviv University, 2004 (comments on paper by Prof. Klabbers)

The Occupied Territories: A blessing or a curse, Van Leer Institute, Jerusalem, 2004 (presentation of paper)

International Conference on Interplay between Legal Regimes in time of Conflict, ICRC/ San Remo Institute for Humanitarian Law, 2003 (lecture on self-help)

International Seminar for Military Legal Officers, San Remo Institute for Humanitarian Law, 2003 (lecture on the war against terrorism)

International Seminar for Military Legal Officers, San Remo Institute for Humanitarian Law, 2002 (lecture on Israeli perspectives on the war against terror)

New Developments in International Criminal Law, Hebrew University, 2002 (presentation of paper)

International Committee of the Red Cross/Graduate Institute of International Studies Seminar on International Humanitarian Law, Geneva, 2000 (participation in one-week seminar for university professors)
1999 (presentation of paper)

Multilateral Diplomacy and International Affairs Management Programme UNITAR, Geneva, 1999 (two lectures on international courts and tribunals)

ASIL Annual Conference, Washington D.C., 1999 (presentation on the activities of the Project on International Courts and Tribunals)

MISCELLANEOUS

The Alternative Dispute Resolution Center,
Mediation clinic, Tel Aviv, 2002

LIST OF PUBLICATIONS

Books

- *Handbook on International Court and Tribunals* (P. Sands, ed., London: Butterworths, 1999,.)(Co-Assistant Editor with Ruth Mackenzie) 346 pp.
- *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: OUP, 2003) 348 pp.
- *Economic, Social and Cultural Rights in Israel* (Tel Aviv: Ramot, 2004)(co-editor with Dr. Yoram Rabin)(in Hebrew)(1020 pp.)
- *Introduction to Public International Law: Between Peace and War* (Tel Aviv: Ramot, forthcoming in 2005)(co-written with Dr. Orna Ben-Naftali)(in Hebrew)(est. 500 pp.)

Articles and notes

- *Chromalloy: U.S. Law and International Arbitration at the Crossroads*, 73 *New York University Law Review* 1650-1693 (1998)(Co-written with Stephen T. Ostrowski)
- *The Right to a Satisfactory Environmental as a Human Right under International Law*, 6 *Hamishpat - The Law* 297-328 (2001) (in Hebrew)
- *Domestic Violence as a Form of Torture under International Law*, 7 *Hamishpat - The Law* 151-191 (2002)(in Hebrew)
- *Bargaining under the Shadow of the Court: Domestic and International Perspectives*, 1 *Nekudat Mifgash - The Israeli Conflict Resolution Journal* 46- 74 (2003) (in Hebrew)
- *The Entry into force of the Rome Statute: What are its implications for the State of Israel*, 15 *Hamishpat - The Law* 51-84 (2004)(in Hebrew)
- *The Sharon Case: Revisiting the Doctrine of Command Responsibility*, 34 *NYU J.I.L.P.* (2002) 797-886 (co-written with Keren Michaeli)
- *Israeli Counter-Terrorism Measures: Are They 'Kosher' under International Law? Terrorism and International Law: Challenges and Responses* (San Remo, M.N. Schmitt ed., 2003) 96-118
- *International Economic, Social and Cultural Rights: How can they be Invoked by Israeli Court?* in *Economic, Social and Cultural Rights in Israel* 297-346 (Tel Aviv: Ramot, 2004)(co-editor with Dr. Yoram Rabin)(in Hebrew)
- *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37(1) *Israel Law Review* 17-118 (2003-2004)(co-written with Orna Ben-Naftali)
- *Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the light of the Statutes of other International Criminal Tribunals*, 2(2) *International Criminal Justice* 338-346 (2004)
- *The First MOX Plant Award: Coordinating between Competing Environmental Regimes and Dispute Settlement Procedures*, 17 *Leiden Journal of International Law* 815-827 (2004)

- ***The Israeli Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37(2) Israel Law Review 299-345 (2004)(co-written with Dr. Yoram Rabin)**
- ***Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38(1) Israel Law Review (forthcoming on 2005)(est. 15 pages)**
- ***Toward a General Margin of Appreciation Doctrine* (accepted for publication in the **European Journal of International Law**)(est. 40 pp.)**
- ***Contract Claims v. Treaty Claims: Mapping the Conflicts between ICSID Decisions on Multi-Sourced Investment Claims* 99 **American Journal of International Law** (forthcoming in Oct. 2005)(est. 30 pp.)**
- **Head against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories**, 7 in **Yearbook of International Humanitarian Law** (forthcoming in 2005)(est. 16 pp.)

Miscellaneous

- ***Report on the State of Israel (2001)* in **Yearbook of International Humanitarian Law** (T.M.C. Asser, 2004)**
- ***Report on the State of Israel (2002)* in **Yearbook of International Humanitarian Law** (T.M.C. Asser, 2004)**
- ***Report on the State of Israel (2003)* in **Yearbook of International Humanitarian Law** (T.M.C. Asser, forthcoming in 2005)**
- ***Report on the State of Israel (2004)* in **Yearbook of International Humanitarian Law** (T.M.C. Asser, forthcoming in 2006)**
- ***Report on Israeli compliance with incorporation obligations under human rights treaties* (co-written with Prof. Ruth Lapidoth and Dr. Orna Ben-Naftali)(est. 50 pp.)**
- ***An interdisciplinary look at the separation barrier – Symposium* (co-edited with Prof. Frances Raday)**

PhD Dissertation

The Competing Jurisdictions of International Courts and Tribunals: Which Rules Govern (University of London, 2001)