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ISRAELI COMPLIANCE WITH LEGAL GUIDELINES FOR TARGETED KILLING

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Content

ABOUT THE AUTHORSII

INTRODUCTION..... 1

THE REQUIREMENTS & SAFEGUARDS SET BY THE HCJ 1

 REQUIREMENT #1: DISCRIMINATION.....1

 REQUIREMENT #2: ALTERNATIVE MEANS OF ACTION..... 3

 REQUIREMENT #3: WITHSTANDING THE TEST OF PROPORTIONALITY 3

 REQUIREMENT #4: PRE-TARGETED KILLING EXAMINATION 4

 SAFEGUARD #1: EX-POST TARGETED KILLING INVESTIGATIVE COMMITTEE..... 5

 SAFEGUARD #2: SUBJECT TO JUDICIAL REVIEW 5

THE CURRENT FINDINGS OF COMPLIANCE..... 6

 COMPLIANCE WITH REQUIREMENT #1: DISCRIMINATION 6

 COMPLIANCE WITH REQUIREMENT #2: ALTERNATIVE MEANS OF ACTION 8

 COMPLIANCE WITH REQUIREMENT #3: WITHSTANDING THE TEST OF PROPORTIONALITY..... 9

 COMPLIANCE WITH REQUIREMENT #4: POST-2006 PRE-TARGETED KILLING EXAMINATION10

 COMPLIANCE WITH SAFEGUARD #1: EX-POST TARGETED KILLING INVESTIGATIVE COMMITTEE....10

 SAFEGUARD #2: POST-2006 JUDICIAL REVIEW.....13

CONCLUSION 14

BIBLIOGRAPHY 16

 ENGLISH16

 HEBREW16

Introduction

In 2006, the Israeli High Court of Justice (HCJ), headed by President (Emeritus) Aharon Barak, President D. Beinisch and Vice President E. Rivlin, delivered its ruling in case 769/02, also known as the "targeted killing case." The Court laid out specific criteria for when a targeted killing might be carried out, and imposed safeguards on the state to assure that each operation complied with these criteria.¹ President Beinisch put it this way: "[...] *in light of the extreme character of 'targeted killing', it should not be employed beyond the limitations and qualifications which have been outlined in our judgment, according to the circumstances of the merits of each case.*"²

This research report presents the current findings on the compliance of Israeli post-2006 targeted killings with the HCJ's ruling. The report has two main sections and a conclusion. The first section presents the requirements and safeguards set by the HCJ for performing targeted killings, and the second presents the current findings.

The Requirements & Safeguards Set By the HCJ

Requirement #1: Discrimination

In order for a civilian to be considered a legitimate target, the Court required the state to obtain a lot of information on the specific individual. The civilian's identity and activities were the most important details to be obtained. The Court emphasized three types of information – or components – as especially significant. The state's findings regarding these three components determine whether or not a specific civilian could be deemed to be a legitimate target for targeted killing.³

The first thing to be determined by the state was whether or not that civilian was taking part in hostilities. The Court defined acts of hostility by a civilian as acts which by their nature reflect the intention to harm military or civilian targets. However, such activities also had to be undertaken within the context of an armed conflict. Hence, a civilian

¹HCJ 769/02 The Public Committee against Torture in Israel v. the Government of Israel [2006], available at: http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

²Ibid, Beinisch's judgement.

³Ibid, § 32-40.

gathering intelligence in preparation for an act intended to harm military or civilians targets in the context of an armed conflict was a civilian taking part in hostilities.⁴

The second thing to be determined was whether or not those acts were of direct participation; if those acts of hostility were of merely indirect participation then the use of lethal force was forbidden. The Court stated that it is the function of the act which reveals whether or not the act is direct or indirect. The function of the civilian's act was to be compared to the acts of combatants; in essence, if the civilian performed acts typically done by a combatant, then the civilian took a direct part in hostilities.⁵

The Court provided some examples of acts which it considered to be of direct participation in hostilities, as well as ones which it considered as indirect. Civilians taking a direct part in hostilities perform tasks such as gathering intelligence on the military, handling or overseeing weapons used by terrorists, or giving any other service conducing specifically to acts of terrorism (regardless of the proximity to the location in which the sides engage in hostilities).⁶ In addition, due to their contribution to the act of hostility, the Court indicated that whoever enlisted or sent another person, or decided and planned an attack, was taking a direct part in hostilities.⁷ Furthermore, civilians choosing to serve as human shields of their own free-will were also taking a direct part in hostilities. However, civilians who were forced to be human shields were not taking a direct part in hostilities.⁸ Moreover, among the civilians who took indirect part in hostilities, and as such were not to be killed in a targeted killing, were those who spread propaganda, who sold food or medicine to terrorists, or who provided aid to the terrorists by "*general strategic analysis, and grant[ed] them logistical, general support, including monetary aid.*"⁹

The third component to be determined by the state was whether or not the civilian who was found to be taking a direct part in hostilities constituted a threat in the present and the future. This time component prohibited the state from launching a targeted killing operation if the civilian taking a direct part in hostilities did not constitute an ongoing

⁴Ibid, § 33.

⁵Ibid, § 34-35.

⁶Ibid, § 34-35.

⁷Ibid, § 37.

⁸Ibid, § 36.

⁹Ibid, § 35.

threat. Otherwise, international law provided protection to civilians. If, for example, a civilian performed a single combatant action and intended nothing more, then his/her civilian immunity from attack would be lost only during the time of the attack (including preparation and return) and restored afterwards. However, a problem often arose because terrorists sought to abuse civilian protection to prepare further attacks. Hence the Court provided guidance on how to determine this time-status; it interpreted “as of such time” broadly with the intention of preventing terrorists from abusing civilian immunity from deliberate attack. It recognized that a civilian whose history exhibited a repeated pattern of directly participating in hostilities represented an ongoing threat (in the present and the future). In such cases, the intervals between attacks were merely resting periods or periods of time used for preparation of the next involvement in hostilities. The Court referred to this pattern of behavior as the “revolving door” phenomenon. According to the Court, such terrorists lost civilian immunity and remained legitimate targets in between attacks.¹⁰

Requirement #2: Alternative Means of Action

Furthermore, the Court required the state to explore and to consider all non-lethal alternatives before proceeding to the option of targeted killing. The priority set by the Court was to capture the individual, conduct an interrogation and, if appropriate, initiate a trial. However, it allowed two exceptions: the first was when an operation to capture a person would endanger the lives of the arresting forces in an unreasonable manner; the second case was when it was believed that an attempt to capture would result in a greater number of civilian casualties than performing a targeted killing.¹¹

Requirement #3: Withstanding the Test of Proportionality

The HCJ also stressed that targeted killings must not violate the international humanitarian law test of proportionality. The test of proportionality requires that anticipated collateral damage – primarily innocent civilian casualties – not be disproportionate to the military advantage expected to be gained by conducting an

¹⁰Ibid, § 38-40.

¹¹Ibid, § 40.

operation.¹² As Justice Barak stated, "... *proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage.*"¹³ Justice Rivlin added that the intention of the test is to minimize collateral damage, and that this matters greatly to the legality and morality of an operation. Its effect may be reflected not only in the prohibition of some operations judged to pose too great a danger to innocent civilians, but also in the choice of smaller and more precise munitions, or by choosing an angle of attack least likely to cause unintended harm, or awaiting a moment when the target is isolated from bystanders, or all of the above.¹⁴ However, he added that in the final analysis it may be difficult to assess when planned operations do or do not breach the rule: "*It is often necessary to consider values and attributes which are not easily compared. Moreover, each of the competing considerations is itself subject to relative variables. None of them can be considered standing alone.*"¹⁵

Requirement #4: Pre-targeted Killing Examination

The HCJ ruling also noted that targeted killings cannot be determined to be legal in advance. In order for each particular operation to be deemed legal, each case needs to be assessed individually in light of its compliance with the foregoing criteria. Hence the Court effectively required that the state establish an administrative process around targeted killing – a pre-targeted killing examination – to ensure that each operation complied with its stipulations and that a record of relevant deliberations and determinations was created. As discussed above, the operation could proceed only if careful examinations confirmed that each of the first three criteria outlined above had been met. For example, a targeted killing could be performed only if the identity and activities of the targeted person were clearly known to the state. The state was therefore required to examine and determine whether the body of evidence that had been gathered was reliable and sufficient to determine the proposed target's identity and activities. The evidence also had to establish that the target was a civilian taking a direct part in hostilities, and represented an ongoing threat. Moreover, the examination was required

¹²Ibid, § 40-46.

¹³Ibid, § 60.

¹⁴Ibid § 1-6 to E. Rivlin's judgement.

¹⁵Ibid § 6 to E. Rivlin's judgement.

to establish that all other non-lethal alternatives had been explored and assessments had been produced which justified turning to targeted killing. Finally, the state and hence the pre-targeted killing examination had to review whether the necessary analysis had been completed to determine whether a proposed operation withstood the test of proportionality.¹⁶

Safeguard #1: Ex-Post Targeted Killing Investigative Committee

In addition, the HCJ required that an independent and objective committee perform a post facto review of every targeted killing operation "[...] *in which it is alleged that harm was caused to innocent civilians who were not taking a direct part in hostilities.*"¹⁷ The investigation was charged with examining how the state conducted the operation from beginning to end, making sure all of the requirements were properly fulfilled in the pre-targeted killing examination – for example, that the identity and activity of the targeted person were rightly determined and consequently that his/her status as a legitimate target was based on well-grounded and verified information; that all non-lethal alternative means of action were considered and prioritized; and that the targeted killing operation met the test of proportionality based on the overall circumstances and information available to the commander leading the operation at the time.¹⁸

Safeguard #2: Subject to Judicial Review

In order to ensure state compliance with the foregoing criteria and safeguard, the HCJ also included a second safeguard in its decision. The Court enabled judicial review to take place in cases it would find appropriate to review. This was by no means meant to replace the ex-post targeted killing examination which was to be conducted by the investigative committee (i.e., Safeguard #1). Rather, it was meant to ensure that the investigative committee functioned appropriately and objectively, fulfilling its purpose as the HCJ intended. Thus, the judicial review would examine the work of the committee through the decision it reached. When and if the Court examined how the state operated, it would check if the state understood the law by which it should have decided whether or not to

¹⁶Ibid § 34-60

¹⁷Ibid, § 54.

¹⁸Ibid, § 40-46.

proceed, and if so, how it performed in relation to the HCJ's interpretation of the law. In particular, the Court would consider the quality of deliberation and decision from the point of view of the commander – asking itself if a reasonable military commander could have made the decision which was made, based on the situation and the knowledge the commander had at that time.¹⁹

The Current Findings of Compliance

Compliance with Requirement #1: Discrimination

Evidence suggests that the procedural requirements of discrimination are being met in Israeli targeting decisions. Reports in the Israeli press suggest that the state has established a formal procedure for taking targeting decisions which (1) benefits from all relevant intelligence, be it from the Israeli Security Agency (the Shin Bet) or IDF intelligence;²⁰ and (2) evaluates this intelligence in terms of the Court's own criteria of direct participation in acts of hostilities. The latter is not only explicitly attested by the International Law Department (ILD) of the IDF,²¹ but also verified in press reports of individual cases in which the target's acts of direct participation are frequently specified.²² For example, the IAF performed a targeted killing in the Gaza strip on the 8th of December 2011. An IDF Spokesperson stated that the target was Issam Tzubahi Isma'il Batsh, a 43 years old Gaza City resident, who was an Al-Aqsa Martyrs' Brigades (Hamass) terrorist cell commander. Batsh was killed as he was making preparations to launch a planned attack along the Israeli-Egyptian border. His past involvement in terrorism was also specified: he trafficked in arms and helped to smuggle terrorists from the Gaza Strip to Sinai and then to Eilat in Israel. One of these operations, which he personally coordinated, resulted in the January 2007 suicide bombing attack in Eilat.²³ As illustrated in this example, the three components (direct participation in hostilities within the context of an armed

¹⁹Ibid § 54-59.

²⁰שי לוי, "סיכול ממוקד: כך סוגרים מעגל קטלני", מאקו, 15 נובמבר 2012. <http://www.mako.co.il/pzm-magazine/Article-498a6e44a430b31006.htm>

²¹מחלקת הדין הבין-לאומי, "תקיפות פעילי טרור מן האוויר – כמה היבטים משפטיים", אתר האינטרנט של הפרקליטות הצבאית, 2 במרץ

2014. <http://www.law.idf.il/163-6581-he/Patzar.aspx?SearchText=%D7%94%D7%A1>.
²²אמיר בוחבוט, "חוסל פלסטיני שתכנן פיגוע בגבול המצרי", ואללה חדשות, 8 דצמבר 2011. <http://news.walla.co.il/item/1883706>

אמיר בוחבוט, "סיכול ממוקד בעזה: פעיל הג'יהאד נהרג בתקיפת חיל האוויר", ואללה חדשות, 27 דצמבר 2011. <http://news.walla.co.il/item/1889056>

²³שם, "חוסל פלסטיני שתכנן פיגוע בגבול המצרי".

conflict and ongoing threat) required by the HCJ in the process of discrimination seem to be realized.

With regards to the third component, the “revolving door” characteristic,²⁴ on September 2012, Ophir Falk interviewed Avichai Mandelblit, the IDF's former military advocate general, and Pnina Sharvit Baruch, former head of the ILD. They corroborated that Israel only performed targeted killing operations on terrorists who posed imminent threats.²⁵ However, a 2008 article by Uri Blau on the June 2007 targeted killing of Ziad Subahi Mahmad Malaisha casts some doubt on Mandelblit's and Sharvit Baruch's insistence that Israel targets only those posing imminent threats. Blau used leaked classified documents to show that the IDF's former chief of staff, Gabi Ashkenazi, as well as Sami Turgeman, the IDF's former head of the operations directorate, suggested postponing an operation against Malaisha, who is described as a “ticking bomb,” due to political matters (i.e. a visit of the U.S. Secretary of Defense to Israel). And indeed, the operation took place only after some time had passed after the visit.²⁶ The implication appears to be that whatever threat Malaisha posed, it was not so imminent that it could not give way to other considerations when politically convenient.

That being said, however, it is important to note that the HCJ did not require the civilian directly participating in hostilities to be an imminent threat, but only an ongoing threat as determined based on past activities and current intelligence.²⁷ In Malaisha's case, he was known to be a senior leader of Palestinian Islamic Jihad who had been involved in the planning of suicide bombings including an attempt at Rishon Letzion four months before his killing.²⁸ Thus, even if Malaisha was not known to pose a specific imminent threat, he seems likely to have fallen under the Court's broader criterion of ongoing threat. To date, the available information on the substance of the state's deliberations over targeting decisions suggests that the court's guideline is being realized.

²⁴HCJ 769/02, supra note 1, § 38-40.

²⁵Ophir Falk, "Permissibility of Targeted Killing," *Studies in Conflict & Terrorism*, Vol. 37, no. 4 (2014): 306, 319.
²⁶אורי בלאו, "מסמכים סודיים של צה"ל: הרמטכ"ל וצמרת צה"ל אישרו לחסל מבוקשים וחפים מפשע", **הארץ**, 28 נובמבר 2008.
<http://www.haaretz.co.il/1.1363895>

²⁷HCJ 769/02, supra note 1, § 38-40.

²⁸Staff reporter, "Israeli journalist Anat Kam under secret house arrest since December", **The Guardian**, 2 April 2010. <https://www.theguardian.com/world/2010/apr/02/israeli-journalist-anat-kam-house-arrest>; אורי בלאו, לעיל הערה 26.

Compliance with Requirement #2: Alternative Means of Action

Here too our findings suggest that the requirement is generally being met. Before resorting to the practice of targeted killing, Israeli security forces prioritize the capture and interrogation of terrorists. In some part no doubt this is because it results in more intelligence. More intelligence, in turn, can lead to the prevention of a larger number of terrorist attacks. In other words, according to the former director of the Shabak, Avi Dichter, the arrest of terrorists – rather than an operation that will lead to their deaths – is the preferred method of action.²⁹ Dan Harel, the former head of the IDF's operations directorate and deputy chief of staff, affirms Dichter's observation, adding that there is an interest in using the information gathered as evidence in Court in order to bring these terrorists to justice.³⁰

Furthermore, even in cases where the state has the physical ability to apprehend the terrorist, the Court allowed the resort to targeted killing under two circumstances.³¹ In 2010, Dan Haloutz, the IDF's former chief of staff, specifically stressed that these specific factors were examined during the process of planning and authorizing an operation.³²

However, there remains some controversy regarding the consistency of compliance with this requirement. Blau's article on Malaisha's targeted killing, for example, raised serious doubts about whether the requirement to favor alternative means of action was met in this case. In light of the information that Blau provided, two Israeli law professors, David Kretzmer and Mordechai Kremnitzer, questioned the legality of Malaisha's targeted killing as it took place within the West Bank, an area in which an arrest was supposed to be feasible.³³ Moreover, on November 2010, Yoav Hess petitioned to the HCJ against the nomination of Yair Neve to the position of the IDF deputy chief of staff (HCJ 8707/10), arguing that Neve's authorization of Malaisha's targeted killing violated the legal guidelines established by the Court in 2006.³⁴ However, in spite of the controversy sparked by Blau's publication, the HCJ ruled that the case was one in which the IDF did

²⁹Ophir Falk, *supra* note 25, p. 307.

³⁰*Ibid.*, p. 307.

³¹HCJ 769/02, *supra* note 1, § 40.

³²דני חלוץ, *בגובה העיניים*, ידיעות אחרונות וחמד, תל אביב 2010, עמ' 227, 232-234.
³³אורי בלאו, לעיל הערה 26.

³⁴בג"צ 8707/10 הס ואחרים נ' שר הביטחון [2010], § 1-2, זמין ב:
<http://elyon1.court.gov.il/files/10/070/087/b04/10087070.b04.pdf>

seek to arrest Malaisha. The IDF also prepared, however, for the possibility that such an arrest would not be possible with a back-up plan of using lethal force. The key point is that the field commander received the authorization to resort to the killing of Malaisha only if circumstances did not enable an arrest.³⁵ In such circumstances, Malaisha's killing would meet the HCJ's targeted killing criteria. Therefore, in spite of some genuine controversy, it is far from clear that Malaisha's case exhibits a failure of compliance with the HCJ's conditions for targeted killing.

Compliance with Requirement #3: Withstanding the Test of Proportionality

The evidence gathered to date suggests that the state of Israel goes to considerable lengths to try to assure compliance with the proportionality rule. Haloutz claims that the comparison of the military advantage versus the collateral damage is taken into account before authorizing each targeted killing operation.³⁶ The decision makers are provided with all available information and assessments in order to determine whether or not the military advantage will be greater than the assessed collateral damage. Also, it seems that a great deal of effort is invested into minimizing the collateral damage. This is done, for example, by examining various methods of action and assessing the collateral damage.³⁷ Moreover, intelligence personnel and performance specialists³⁸ are said to fulfill a key role in how the targeted killing will be performed, if it is at all, as their assessments matter greatly.³⁹

Many reports in the Israeli media affirm this claim. For example, Blau's exposure of IDF protocols and an article published by Yoav Zeitun in 2014 provide additional evidence of care in meeting the test of proportionality. In the former case, various highly ranked officers, among them, the IDF's chief of staff, set the maximum number of innocent civilians which they deemed proportional to be killed during an operation. That was done during several different discussions regarding the targeted killing of Malaisha.⁴⁰ In Zeitun's article he wrote that two high value targets within Gaza – Raed al-Attar, Hamas'

³⁵שם, § 12-13.

³⁶דני חלוץ, לעיל הערה 32, עמ' 227, 232-234.

³⁷שם, עמ' 227, 232-234.

³⁸Performance specialists are collateral damage management (CDM) experts. For elaboration, see Gregory S. McNeal, "Targeted Killing and Accountability", *Georgetown Law Journal*, Vol. 102, no. 3, (2014): 741-743.

³⁹מחלקת הדין הבין-לאומי, לעיל הערה 21.

⁴⁰אורי בלאו, לעיל הערה 26.

Rafah division commander, and Mohammed Abu Shmallah, Hamas' Southern division commander – were under surveillance for months but neither of them was hit due to issues such as lack of intelligence to assess collateral damage and consequent concern about harming innocent civilians. That was especially the case since they both hid in crowded urban areas. Nevertheless, once intelligence of high quality came in – that the two were to meet each other inside the same building, the balance of considerations shifted, and the decision makers deemed the strike to be proportionate.⁴¹

Moreover, in 2012, the journalist Shay Levi interviewed two air-force officers who attest that they plan what platform will deliver targeted strikes, what munition will be used, and at what speed and altitude to shoot in order to achieve both precision and to minimize the overall collateral damage.⁴² Once all such precautions have been taken to minimize civilian harm, the resulting collateral damage estimate could then be compared with the maximum of acceptable (i.e., proportional) casualties established by commanders for eliminating a particular target.

Compliance with Requirement #4: Post-2006 Pre-targeted Killing Examination

As described throughout the second section of this research report, pre-targeted killing examinations are conducted during requirements #1, #2 & #3. Therefore, the state appears to implement this requirement.

Compliance with Safeguard #1: Ex-Post Targeted Killing Investigative Committee

Our current findings regarding the implementation of the safeguard for an independent ex-post targeted killing investigation is complex. In 2008, Aviad Glickman exposed a correspondence between Menachem Mazuz, the then attorney general, and Ehud Olmert, the then prime minister, regarding the delay of the establishment of the ex-post targeted killing investigative committee. It appears that Mazuz had to repeatedly call on Olmert to establish a permanent investigative committee (as opposed to the ad-hoc committee

⁴¹ יואב זיתון, "עשרות שב"כניקים, מסכי פלזמה ופצצות טונה ממטוסים מעל הים: כך חוסלו מפקדי חמאס", *Ynet*, 21 אוגוסט 2014.

<http://www.ynet.co.il/articles/0,7340,L-4561662,00.html>

⁴² שי לוי, לעיל הערה 20.

established due to Salah Shehade's targeted killing). Several meetings and discussions regarding the committee took place throughout the years, and the investigative committee seems not to have begun working at the time of Glickman's publication, that is, nearly two years after the HCJ's verdict had been given. It seems that at that time, the delay was due to Olmert, as he had yet to appoint the members of the ex-post investigative committee.⁴³

However, as part of Hess' petition on November 2010 in HCJ 8707/10, the state's representative stood before the Justices and announced that "[...] a committee was recently appointed to examine cases of targeted killings during which innocent civilians were harmed, as ordered by the HCJ's targeted killing case."⁴⁴ Moreover, Avichai Mandelblit submitted a paper to the Turkel commission in December 2010 stating that such an investigative committee was established, and that it examines targeted killings that occurred after the Court's ruling had been given. There he also clarified which cases of targeted killing are investigated by the committee and which ones are not. For example, it does not investigate targeted killings in which innocent civilians were not harmed. In addition, he stated that the targeted killings of Hamas' terrorists within Gaza do not fit with the case's description of 'civilians taking a direct part in hostilities.' Hence, the investigative committee does not review such killings.⁴⁵ However, while the former justification for not reviewing targeted killings is based on the Court's own clarifications in Hess v. MAG,⁴⁶ the latter proviso does raise doubts about whether or not the committee ever became active and investigates targeted killing operations.⁴⁷ The reason for this is that there do not appear to have been any recorded targeted killings in the West Bank since 2006.⁴⁸ Similarly, we have not found evidence of a targeted killing within the Gaza Strip of a non-Hamas member which resulted in harm to innocent civilians.⁴⁹

⁴³ אביעד גליקמן, "מזוז לרה"מ: להאיץ "ועדת הסיכולים הממוקדים", Ynet, 17 נובמבר 2008. <http://www.ynet.co.il/articles/0,7340,L-3624292,00.html>

⁴⁴ בג"צ 8707/10, לעיל הערה 34, § 12-13.

⁴⁵ הפצ"ר אביחי מנדלבלית, "נייר העמדה השני מטעם הפרקליטות הצבאית לוועדת טירקל", 19 דצמבר 2010, עמ' 71-75. <http://web.archive.org/web/20151116231448/http://turkel-committee.com/files/wordocs/9111emPatzar.PDF> <http://elyon1.court.gov.il/files/03/940/087/n30/03087940.n30.pdf> זמין ב: § 7, 2008].

⁴⁶ בג"צ 8794/03 הס נ' הפצ"ר [2008], § 7, זמין ב: <https://iscuw.org/operations>; B'Tselem, Statistics, <http://www.btselem.org/statistics>.
⁴⁷ עמחי כהן ויובל שני, "צה"ל חוקר את עצמו: חקירת חשדות להפרת דיני מלחמה, גרפוס פרינט, ירושלים 2011, עמ' 109-110.

⁴⁸ The Institute for the Study of Counterterrorism and Unconventional Warfare, UMass Dartmouth, Israeli targeted killing database, <https://iscuw.org/operations>; B'Tselem, Statistics, <http://www.btselem.org/statistics>.
⁴⁹ While it does seem that most cases of targeted killings within the Gaza Strip are of Hamas' members, there were targeted killings of, for example, Islamic Jihad members which directly participated in hostilities (e.g. fired rockets).

Of course it remains entirely possible that targeted killings have been performed in the West Bank but are unknown to the public. This might particularly be the case where the state offers the explanation that its intent had been to arrest a civilian taking direct part in hostilities but where it also authorized targeted killing should the arrest prove impractical.⁵⁰ In order to expose such a targeted killing within the West Bank post-2006, one would either need access to classified documents or, perhaps, to find a case in which a person that fits the HCJ's guidelines was killed there by Israeli forces with concrete and reliable evidence that the Israeli forces did not kill the person-in-question in self-defense. In such cases (where lethal force was not justified by individual self-defense), the Court's ruling would clearly require review by the investigative committee. Both Ashkenazi and Turgeman explicitly refer to arrangements being made so that the investigative committee will examine such targeted killings.⁵¹

Nonetheless, to date, no evidence was found to show that the ex-post targeted killing investigative committee has actually examined any targeted killing operation. Alarmingly, after action reviews⁵² are mentioned with regards to targeted killings, but there is absolute silence regarding the activity of the investigative committee. So while it is clear that the IDF conducts post-operational inquiries, this may also suggest that the ex-post investigative committee is either not active or effectively marginalized.

Furthermore, it is unclear whether the Court's requirement that the ex-post targeted killing investigative committee be independent and objective are being met.⁵³ In 2010, Mandelblit, the IDF's Military Advocate General (MAG) at the time, stated that according to the Court's ruling, the investigative committee was not required to be of 'institutional' independence, but of 'functional' independence. That means the committee can be within the same institution which conducts the targeted killing.⁵⁴ However, no further information was given to suggest that the investigative committee indeed has this 'functional' independence. Therefore, it is not without reason that Cohen & Shany said

⁵⁰אורי בלאו, לעיל הערה 26.
⁵¹שם.

⁵²After action review or post-operational inquiry [Hebrew: תחקיר מבצעי] is a regular examination of an operation, usually done by the operating force itself in order to learn & to draw conclusions so it could improve in the future.

⁵³HCJ 769/02, supra note 1, § 40-46.

⁵⁴הפצ"ר אביחי מנדלבלית, לעיל הערה 45, עמ' 64-69, 74.

that *"in fact, the MAG's position paper, submitted to the Turkel Committee, demonstrates the state's attempt to evade its duty to investigate cases of civilians' deaths in targeted killings, in external commissions of inquiry."*⁵⁵

More recently, however, some evidence supportive of functional independence has emerged. Specifically, a 2014 article in Haaretz by Amir Oren shed some light on the independence, objectivity and professional capability of the ex-post investigative committee. He quotes the answer received from the Ministry of Defense to his question regarding the members composing the investigative committee. The state's response was: *"A committee was set up headed by a former president of a magistrate's court and among its members are senior expert in international law, a former member of the Shin Bet and a reserve General. [...]"*⁵⁶ If this truly is the case then it suggests that the committee holds the professional capability to review targeted killing operations. Additionally, while it does not assure the committee's independence, it does support Mandelblit's argument for functional independence.

As has been indicated, it is currently difficult to determine the level of compliance with the safeguard of an independent ex-post targeted killing investigative committee. To date, there is no evidence to show that the investigative committee is active, or proof of the identities of the committee's members. Also, evidence to clearly establish their independence is lacking, although there are a number of reports which suggest that it has been formed and which provide very general indications of what its composition might look like.

Safeguard #2: Post-2006 Judicial Review

While further research is required to confirm this, it does not appear that the court has reviewed (at least publicly) any decision of the ex-post targeted killing investigative committee. Moreover, as of December 2011, the Court's statements lead Cohen and Shany to believe that if a petitioner wishes the Court to review a specific decision reached by the committee or the military advocate general regarding a specific targeted killing, then that

⁵⁵עמ"ח כהן ויובל שני, לעיל הערה 47, עמ' 109-110.

⁵⁶Amir Oren, "Israeli Military Hiding Targeted Killing Investigative Panel", **Haaretz**, 31 May 2014.
<http://www.haaretz.com/israel-news/1.596339>.

petitioner would need to bring some new concrete information or evidence that would lead the Court to entertain doubts as to the decision made by the committee.⁵⁷ In addition, in order to make things as clear as possible, it should be emphasized that the HCJ did not review the decision of the investigative committee in HCJ 8707/10, but the MAG's decision.⁵⁸ It therefore differs from the judicial review safeguard as had been set out by the Court in 2006. The reason for this is that according to the ruling in HCJ 769/02, the Court's review will examine the work and the decision made by the ex-post investigative committee,⁵⁹ not the MAG.

Conclusion

In 2006 the Israeli High Court of Justice delivered its ruling in case 769/02. There the Court set requirements and safeguards for the state to follow in each targeted killing operation in order to perform these in a lawful manner.⁶⁰ This research report presents preliminary findings as of August 2017 as to the state's implementation and compliance with the restrictions set by the Court. It points to some evidence suggesting that the state has made efforts to operate in accordance with the Court's requirements. However, the extent to which the State implements safeguard #1, the independent ex-post targeted killing investigative committee, remains unclear. In particular, there is some suggestion that the state has sought to avoid triggering this safeguard by exploiting a legal interpretation that due to Hamas' status as an organization – one which is of state-like structure and exercising effective control within the Gaza strip – the targeted killings of Hamas' members do not fall within the HCJ's ruling. That is, Hamas' members are to be seen as combatants and not as civilians taking a direct part in hostilities.⁶¹ In addition, the committee's composition and independence has yet to be verified. Finally, there is no public evidence that any judicial oversight of Israeli targeted killings has actually occurred. At this moment, therefore, despite some tangible gestures towards implementation, the state's compliance with the safeguards set out in the 2006 targeted

⁵⁷עמ"ח כהן ויובל שני, לעיל הערה 47, עמ' 106-108.
⁵⁸בג"צ 8707/10, לעיל הערה 34, § 12-13.

⁵⁹HCJ 769/02, supra note 1, § 54-59.

⁶⁰HCJ 769/02, supra note 1.

⁶¹הפצ"ר אביחי מנדלבלט, לעיל הערה 45, עמ' 71-75.

killing judgments remains unclear, especially with regards to the independent ex-post targeted killing investigative committee.

Bibliography

English

- Falk, O. (2014). Permissibility of Targeted Killing. *Studies in Conflict & Terrorism*, 37(4), 295-321.
- HCJ 769/02 The Public Committee against Torture in Israel v. the Government of Israel. (2006). available at: http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.
- Oren, A. (31 May 2014). Israeli Military Hiding Targeted Killing Investigative Panel. **Haaretz**. Retrieved 1 July 2017 from: <http://www.haaretz.com/israel-news/1.596339>.
- Staff reporter. (2 April 2010). Israeli journalist Anat Kam under secret house arrest since December. **The Guardian**. Retrieved 7 August 2017 from: <https://www.theguardian.com/world/2010/apr/02/israeli-journalist-anat-kam-house-arrest>.

Hebrew

- בג"צ 8794/03 הס נ' הפצ"ר. (2008). זמין ב: <http://elyon1.court.gov.il/files/03/940/087/n30/03087940.n30.pdf>
- בג"צ 8707/10 הס ואחרים נ' שר הביטחון. (2010). זמין ב: <http://elyon1.court.gov.il/files/10/070/087/b04/10087070.b04.pdf>
- בוחבוט, א'. (8 דצמבר 2011). חוסל פלסטיני שתכנן פיגוע בגבול המצרי. **ואלה חדשות**. נדלה 7 ליולי 2017 מ: <http://news.walla.co.il/item/1883706>
- בוחבוט, א'. (27 דצמבר 2011). סיכול ממוקד בעזה: פעיל הג'יהאד נהרג בתקיפת חיל האוויר. **ואלה חדשות**. נדלה 7 ליולי 2017 מ: <http://news.walla.co.il/item/1889056>
- בלאו, א'. (28 נובמבר 2008). מסמכים סודיים של צה"ל: הרמטכ"ל וצמרת צה"ל אישרו לחסל מבוקשים וחפים מפשע. **הארץ**. נדלה 6 ליולי 2017 מ: <http://www.haaretz.co.il/1.1363895>
- גליקמן, א'. (17 נובמבר 2008). מזוז לרה"מ: להאיץ "ועדת הסיכולים הממוקדים". **Ynet**. נדלה 6 ליולי 2017 מ: <http://www.ynet.co.il/articles/0,7340,L-3624292,00.html>
- הפצ"ר מנדלבליט, א'. (19 דצמבר 2010). נייר העמדה השני מטעם הפרקליטות הצבאית לוועדת טירקל. דו"ח הפרקליטות הצבאית. נדלה מ: <http://web.archive.org/web/20151116231448/http://turkel-committee.com/files/wordocs/9111emPatzar.PDF>
- זיתון, י'. (21 אוגוסט 2014). עשרות שב"כניקים, מסכי פלזמה ופצצות טונה ממטוסים מעל הים: כך חוסלו מפקדי חמאס. **Ynet**. נדלה 2 ליולי 2017 מ: <http://www.ynet.co.il/articles/0,7340,L-4561662,00.html>
- חלוץ, ד'. (2010). **בגובה העיניים**. תל אביב: ידיעות אחרונות וחמד.
- כהן, ע'. ושני, י'. (2011). **צה"ל חוקר את עצמו: חקירת חשדות להפרת דיני מלחמה**. ירושלים: גרפוס פרינט.
- לוי, ש'. (15 נובמבר 2012). סיכול ממוקד: כך סוגרים מעגל קטלני. **מאקו**. נדלה 27 למאי 2017 מ: <http://www.mako.co.il/pzm-magazine/Article-498a6e44a430b31006.htm>
- מחלקת הדין הבין-לאומי. (2 במרץ 2014). תקיפות פעילי טרור מן האוויר – כמה היבטים משפטיים. **אתר האינטרנט של הפרקליטות הצבאית**. נדלה 18 למאי 2017 מ: <http://www.law.idf.il/163-6581he/Patzar.aspx?SearchText=%D7%94%D7%A1>