Editor's Note Regarding Translation

The original Hebrew document is on file with the Haifa District Court and serves as the official legal record. The English translation was requisitioned by the Plaintiffs, using professional translator services in Israel.

Italicized footnotes are from the translator/editor and were not part of the original Hebrew text. All other footnotes are translated directly from the original.

A change in translators is footnoted within the document, minor stylistic variances may occur. For readability of the English translation, minor formatting edits have also been made.

In the District Court in Haifa

Civil Lawsuit 371/05

Before the Honorable Judge Oded Gershon

In the case of:

The Plaintiffs:

The estate of the late RACHEL ALIENE CORRIE of blessed memory et al.

Represented by H. Abu Hussein (license number 8195)

and/or S. Abu Hussein, and/or Muhammad Labib, attorneys

P.O. Box 290, Umm al-Fahm 30010

Tel: 04-6313640, Fax: 04-6312915

VERSUS –

The Defendant:

State of Israel, Ministry of Defense

Represented by the State Prosecutor's Office, Tel Aviv District

1 Henrietta Szold, Hadar Dafna

Tel Aviv

Updated Written Summaries on Behalf of the Plaintiffs

Table of Contents:

| Subject | Page ¹ |
|---|-------------------|
| ♣ Preliminary Note | 6 |
| ♣ Introduction to Summaries | 6 |
| Discussion of Evidence | 10 |
| Evidence Presented by the Plaintiffs | 12 |
| Analysis of the plaintiffs' evidence pertaining to the incident | 12 |
| > Interim summary and conclusions | 21 |
| Lesson Service Presented by the Defendant | 23 |
| • Introduction | 23 |
| Discussion of the defendant's evidence | 24 |
| Command hierarchy | 25 |
| Nature of the clearing work as a routine task | 26 |
| The briefing and the presence of the foreigners | 26 |
| Interim summary and conclusions | 32 |
| The start of work and the arrival of the foreigners | 32 |
| Use of crowd dispersal measures and the reporting of the | 33 |
| incident in the operations log | |
| Interim summary and conclusions | 33 |
| The story of the incident according to the operations log | 34 |
| Interim summary and conclusions | 35 |
| Characteristics of the terrain and execution of the work | 35 |
| Did any of the soldiers see the deceased prior to the incident? | 36 |
| Interim summary and conclusions | 37 |
| The occurrence of the incident | 38 |
| Interim summary and conclusions | 40 |
| • Did Y. P. or E. V. see people approaching? | 40 |
| Did Y. P. or E. V. see people near the bulldozer? | 41 |

¹Page numbers listed in the Table of Contents were formatted to correspond with those found within this English translation. They will not align with the page numbers from the original Hebrew text.

| The blind spot in front of the bulldozer | 41 |
|---|-----|
| • The tossing of a grenade | 42 |
| • The time of the incident | 44 |
| The location of the body after it was hit | 44 |
| The discovery of the body according to E. V. | 46 |
| The position of the deceased's body | 51 |
| Interim summary and conclusions | 53 |
| • Reference to the photos (P/33) and (P/34) | 54 |
| The withdrawal to the rear after the incident | 55 |
| Did they move the deceased? | 56 |
| What killed the deceased? | 57 |
| Interim summary and conclusions | 58 |
| Safety instructions: safety instructions for operating mechanical | 59 |
| engineering equipment in a limited confrontation and civilian | |
| safety instructions | |
| • The halting of the work | 73 |
| Interim Summary and conclusions | 76 |
| Exiting the vehicles is absolutely prohibited according to a | 79 |
| situation assessment that is not based on intelligence information | |
| Interim summary and conclusions | 81 |
| Discussion of the Opinion of the Experts Asban and Manshuri | 81 |
| ♣ The Normative Basis | 88 |
| ❖ Constitutional Torts | 88 |
| The right to life in constitutional law in Israel | 89 |
| International human rights law | 89 |
| International humanitarian law | 90 |
| Emergency situations and proportionality | 92 |
| ❖ The Tort of Negligence | 96 |
| The tort of negligence and the responsibility of public servants | 98 |
| • "A black flag" | 102 |
| Responsibility of the Military Police Investigation Unit for the Tort | 107 |
| of Negligence | |

| Responsibility of the military police for damages – the normative | 107 |
|--|-----|
| level | |
| ❖ The Tort of Assault | 110 |
| ↓ Evidentiary Damage | 111 |
| • Introduction | 111 |
| The order to investigate the incident and the investigation team | 113 |
| Receiving the court order for an autopsy | 114 |
| Violation of the court order | 118 |
| Interim summary and conclusions | 118 |
| Visiting the scene of the incident | 119 |
| > The importance of arriving at the scene in real time – interim | 122 |
| summary | |
| • The 'Paskal' tape - Introduction | 123 |
| Confiscation of the tape | 124 |
| Existence of the tape | 126 |
| Who is responsible for recording and how is it conducted? | 127 |
| Where are the lookout personnel? | 129 |
| Questioning of the witnesses regarding the content of the | 129 |
| 'Paskal' | |
| Transcribing of the tape | 130 |
| Where is the radio communication (the soundtrack) for the | 132 |
| five hours prior to the incident in which the deceased was injured? | |
| Summary and conclusions pertaining to the investigation | 135 |
| team, the 'Paskal' tape and radio communication | 133 |
| Interference in the investigation | 138 |
| Operational debriefings | 140 |
| Summary and conclusions regarding the operational | 140 |
| debriefings and the interference in the investigation | 143 |
| Clearing regulation, mission file, and distancing regulation | 145 |
| Failure to question Palestinian witnesses to the incident | 151 |
| • | |
| Failure to consider the problematic background of the battalion | 151 |

| Failure to consult with experts on accidents and safety | 152 |
|---|-----|
| Interim summary and conclusions | 153 |
| Disregarding the safety procedures of the Mechanical | 154 |
| Engineering Equipment Division | |
| Photos from the scene of the incident | 155 |
| Application of the law to the facts pertaining to the evidentiary | 155 |
| damage | |
| Investigative failures and the resulting damage suffered by the | 156 |
| plaintiffs | |
| ♣ An Act of War: the Legal Discussion | 162 |
| General background | 162 |
| The normative framework | 162 |
| Characteristics of the route and the work executed by the | 176 |
| bulldozers | |
| Comparative law: The right to legal remedy and compensation | 180 |
| for the violation of basic rights and damages torts anchored in | |
| international law | |
| Obligation of compensation based on humanitarian law | 180 |
| Obligation of compensation based on international human rights | 181 |
| law | |
| Interim summary and conclusions | 184 |
| ♣ Voluntary assumption of risk | 188 |
| From the general rule to the specific case | 194 |
| ♣ In Brief | 196 |

The Plaintiffs' Summaries

Preliminary Note:

These updated summaries are submitted in place of the summaries submitted by the plaintiffs on November 30, 2011, and this is in accordance with the court's ruling on December 1, 2011 and December 8, 2011 (Request 103) that the summaries be updated according to the page numbers appearing in the court protocol after it² was filed. Since the court protocol contains numbering that is not chronologically consecutive and contains duplicate page numbers for the various sessions, we have noted in the body of the summaries the dates of the sessions in which the testimony was given by each and every witness.

Introduction to Summaries:

- 1. The plaintiffs are the estate of the deceased Rachel Corrie of blessed memory, her two parents, her sister and her brother. The deceased [was] an American citizen, a resident of Olympia in the state of Washington in the United States (hereinafter: "the deceased"). The deceased was a graduate of the Art Department at Evergreen State College, a writer, an artist and an activist in the field of human rights.
- 2. The deceased was crushed to death on the Philadelphi Route on March 16, 2003 at approximately 5 PM.
- 3. The defendant is the State of Israel, and it is a defendant by virtue of its direct and/or delegated responsibility for actions and omissions of IDF soldiers and commanders, including members of the engineering force, the operational force, the Military Police Investigation Unit team, and the Institute for Forensic Medicine.
- 4. The lawsuit is a suit for bodily injury for the damages caused to the plaintiffs as a result of the incident in which the deceased was killed on March 16, 2003, and the plaintiffs' summaries address at this stage and in accordance with the deliberation agreement reached between the sides only the question of responsibility.

6

²In context, "it" refers to the plaintiffs' summaries originally filed on Nov. 30, 2011.

- 5. The plaintiffs submitted their original lawsuit on March 15, 2005 and their revised lawsuit in September 2008, and in their lawsuit they argued that on March 16, 2003, at approximately 5 PM, when the deceased was standing near the home of Dr. Samir Nasrallah on the outskirts of Rafah, at the side of the Philadelphi Route an IDF bulldozer approached the deceased who stood in its path, pulled dirt from under her feet, the deceased fell and the bulldozer's blade ran over her leg, and then climbed onto her body. When the bulldozer backed up, the deceased's body was uncovered and she was critically injured, bleeding from numerous parts of her body, and was transferred to the Al-Najar hospital in Rafah, where she was pronounced dead 20 minutes later.
- 6. The body of the deceased was later transferred to the Institute for Forensic Medicine at Abu Kabir on March 17, 2003, and an autopsy was conducted on March 20, 2003. Prof. Y. Hiss, the director of the institute, conducted the autopsy, prepared an expert opinion, and in the summary of his findings noted that the principal anatomical findings are as follows:
 - "1. Fractures in the ribs, in the bone from the left, in the bones of the upper back and the posterior spinous processes.
 - A. Tear injuries in the right lung.
 - B. Accumulation of blood fluid in the pleural cavity (a total of about 700 ml.)
 - C. Local hemorrhages in the corneal and pleural membranes.
 - D. Hemorrhages in the back muscle.
 - 2. Tear injury in the upper lip of the mouth from the left.
 - 3. Abrasion and chafing injuries in the face from the left.
 - 4. Bleeding from the tongue.
 - 5. Indications of medical treatment."3

At the end of the evaluation, the operating physician notes: "Based on the results of the autopsy I conducted on the body of Ms. Rachel Aliene Corrie, 24 years old, my assessment is that her death was caused by pressure on the thorax ("mechanical asphyxia") with fractures in the ribs and posterior vertebra and in the bones of the upper back and tear injuries in the right lung with hemorrhages in the pleural cavity.

,

³ The mixed alphabetical/numeric numbering reflects the Hebrew original.

In addition, a tear injury was found in the upper lip of the mouth and an abrasion-chafing injury on her left cheek." The opinion was submitted to the court as an exhibit on behalf of the plaintiffs and was marked as P/1.

- 7. The plaintiffs based their lawsuit on tort law and argued that the defendant violated the deceased's right to life and right to bodily integrity, which are anchored in international humanitarian law, in international human rights law and in the Basic Law: Human Dignity and Freedom a major, disproportional and completely unreasonable violation. This violation is a constitutional breach of a fundamental right, as well as a violation of a statutory constitutional obligation; it is a supporting condition and adds weight to the existing basis for the lawsuit, which is established in any event on tort law.
- 8. The plaintiffs also argued that the young life of the deceased was cut off as a result of the intentional use of force by the bulldozer operator, in a completely unreasonable way, without her consent, and that the damage caused to the deceased was extreme and completely unreasonable when weighed against the damage the bulldozer operator sought to prevent.
- 9. The plaintiffs went on to argue that it is only correct and just to apply the directives of articles 23, 35, 36 and 41 of the Torts Ordinance (New Version) in the circumstances of this case. The plaintiffs argued that it would be also just, fair and reasonable for the court to exercise its judgment and apply the directives of Article 41 of the Torts Ordinance in light of the special circumstances of the incident.
- 10. The plaintiffs none of whom were present at the scene of the incident also argued that they lack the knowledge or ability to know what the circumstances were that caused the incident, and that the incident was caused by a vehicle over which the defendant and its soldiers and commanders had complete control, and that the incident is more consistent with the conclusion that the defendant failed to take reasonable measures of precaution than with the conclusion that it took the requisite measures of precaution regarding the incident.
- 11. In addition, the plaintiffs based their lawsuit on a claim of negligence because the defendant and/or its soldiers and/or its commanders, who serve as its agents, acted inappropriately and not in accordance with the circumstances when the defendant's soldiers and/or agents ordered the bulldozer to continue to operate when the deceased and her friends were standing in close proximity

to it and considering the conditions of the place and the terrain, and they⁴ should have expected, normatively and concretely, that the continuation of the bulldozer's activity was liable to endanger their⁵ lives, and which ultimately led to the tragic result.

- 12. The plaintiffs also argued that the conduct of the bulldozer operator and the rest of the defendant's soldiers and commanders who operated at the site of the incident deviated from the standard of normative conduct expected of a reasonable and skilled professional, also when considering the nature of the activity and the circumstances of the case of the specific incident, and that it is rightful to assess the activity of the bulldozer operator and the soldiers and their skills according to a standard of a skilled and reasonable bulldozer operator, all the more so a skilled and reasonable soldier and/or commander, in the same way that the skillfulness of any other professional is assessed.
- 13. The plaintiffs argued also that the autopsy at the Institute for Forensic Medicine was conducted in violation of the legal order requiring the family's consent to the autopsy and conditioning it upon the presence of a civilian physician and representative of the American Embassy. The plaintiffs also argued that the institute destroyed the tape that documented the autopsy process.
- 14. In regard to the investigation by the Military Police Investigation Unit, the plaintiffs argued that it conducted the investigation negligently, and not in a matter-of-fact, serious or objective way, and that it is rightful to apply the doctrine of evidentiary damage with all of its ramifications.
- 15. On the other side, the state presented its factual version of the incident and argued that on the day of the incident: "At 2:00 PM, the bulldozers started to work in the area of the Philadelphi Route. About an hour later, ISM activists arrived with signs and cameras and started to disturb the army's work. The army started to try to disperse the demonstration via calls on a loudspeaker and means of crowd dispersal such as: stun grenades, the use of tear gas, and even deterrent gunfire near the demonstrators. The army's attempts to disperse the demonstration did not succeed and did not lead to the dispersal of the demonstrators, and the work continued amidst repeated disturbances." (Quoted from paragraph 38(A) of the revised writ of defense.)

⁵ That is, the lives of the deceased and her friends

9

⁴ The defendant's soldiers and/or agents

The defendant also argued there that the decision to continue the work, despite the presence of the foreigners at the site, was given "in light of the essentiality of the mission and the immediate and future danger to the lives of the soldiers in the area due to sniper fire had the clearing work been prevented."

- 16. The defendant went on to argue that "the bulldozer operator and his commander immediately stopped when they saw the deceased's friends, raised the bulldozer's blade and pulled back" (quoted from paragraph 39 of the revised writ of defense).
- 17. In regard to the legal arguments, the defendant argued that the incident that is the subject of the lawsuit occurred "during the course of Operation Defensive Shield, during difficult events of fighting" in the Gaza Strip (!!) (paragraph 10 of the revised writ of defense), and that the incident occurred during an action that was "an act of state," and that the lawsuit should be summarily dismissed (paragraph 11 of the revised writ of defense). The defendant went on to argue that the incident falls within the category of "a war action" that exempts the state from responsibility (paragraph 12 of the revised writ of defense).
- 18. In the revised writ of defense, the defendant referred to the words of the (retired) president A. Barak in HCJ 7015/03 Kifah Muhammad Ahmad Ajouri v. Commander of IDF Forces, Takdin-Supreme Court Rulings 1021 (3)2002 (from September 3, 2002, in paragraph 1 of the ruling) where he said: "Since the end of September 2000, tough fighting is being waged in the areas of Judea and Samaria and the Gaza Strip. This is not police action. It is an armed conflict..."
- 19. It may be assumed that the defendant's representative will argue for an exemption from responsibility based on the argument of war action under paragraph 5 of the Civilian Torts Law (The State's Responsibility in Damages), 1952.

Discussion of Evidence:

20. The plaintiffs called as witnesses on their behalf five people who submitted affidavits (four of them eyewitnesses); the deceased's father Craig Corrie, the Military Police Investigation Unit investigator Elad, Prof. Hiss and an expert witness, Asher Asban.

6

⁶ President of the Supreme Court

The defendant presented fifteen witnesses on its behalf: Y. P.⁷ (the bulldozer operator involved), his commander E. V., members of the team from the second bulldozer (S. L. and A. S.), the commander of the operations force Rabia⁸ and his commander Sh. R. (the deputy battalion commander), Rabia's platoon commander (A. D.), S. L. (the head of the Mechanical Engineering Equipment Unit and responsible for training the bulldozer operators), the head of the IDF Combat Doctrine Department (Y. A.), two investigators from the Military Police Investigation Unit (Shalom, the team leader, and Oded), a soldier (Gad) who accompanied the plaintiffs' expert Asban when he examined the vehicle on behalf of the plaintiffs, the commander of the Southern Brigade at the time of the incident (Colonel (Res.) Pinky Zoaretz), and two experts: Major Yoram Manshuri, who presented an engineering opinion regarding the bulldozer, and Brigadier General Ruth Yaron, who presented an expert opinion regarding the ISM organization.

- 21. Now, we seek to discuss the evidence of the sides pertaining to the incident, and already at this point we would like to note that, in fact, there is no profound factual dispute between the two versions of the plaintiffs and the defendant regarding the circumstances of the deceased's death, because it seems that the facts reviewed below are agreed upon in light of the written arguments of the sides:
 - A. The incident occurred at the side of the Philadelphi Route on March 16, 2003. During the afternoon hours, routine work of clearing the ground was performed and the death of the deceased was caused at approximately 5:00 PM.
 - B. The death of the deceased was caused as a result of pressure on the chest ("mechanical" asphyxia) with fractures in the ribs and posterior vertebra.
 - C. The "mechanical" asphyxia was caused as a result of the piling of earth on the body of the deceased, which was pushed by the bulldozer of Y. P. and E. V.
 - D. The body of the deceased was uncovered after the incident when the bulldozer pulled back, proximate to the time and place of the work of the bulldozer, which was operated by Y. P; Y. P. also concurred that his bulldozer was involved in the circumstances of the deceased's death (pp. 1586-1587, session of October 21, 2010).

⁸ Rabia is also referenced in case material using the initials "S.R" His name and image were made public in an interview he granted to Israel Channel 2 TV's program "UVDA" (FACT), which aired nationwide in Israel on April 5, 2003. Thus, he was compelled to testify in plain view of the court.

⁷ Y.P. is also translated as Y.F. in some case material. Both are a reference to the bulldozer operator (driver).

- 22. There is a disagreement between the sides regarding whether the bulldozer operator and his commander saw the deceased or could see the deceased prior to the occurrence of the incident, and there is also a serious disagreement between them regarding the legal implications that should be attributed to the conduct of the soldiers and commanders at the scene in light of the presence of the foreigners for a number of hours prior to the occurrence of the incident.
- 23. In the first stage, we wish to conduct a discussion of the evidence of the sides first the plaintiffs' evidence and then the defendant's evidence as presented in regard to the circumstances in which the death of the deceased Rachel Corrie was caused.

Evidence Presented by the Plaintiffs:

Analysis of the plaintiffs' evidence pertaining to the incident:

- 24. On behalf of the plaintiffs, four witnesses testified from the group of friends who were with the deceased at the time of the incident: Richard Purssel, Alice Coy, Gregory Schnabel and Tom Dale.

 The four witnesses all of whom reside overseas presented affidavits of primary testimony that were written in the English language and a Hebrew translation of them was submitted to the court. The four witnesses also gave testimony at the Military Police Investigation Unit in the English language and a translation of their testimony was done by an IDF soldier soon after it was collected.
- 25. The four witnesses testified that they arrived in Rafah in the framework of their activity in the ISM organization the International Solidarity Movement, an international organization of volunteers who go out to the occupied Palestinian territories in order to protest against the occupation⁹ and its harsh impact on the civilian Palestinian population. They also testified that as observers they document the effects of the occupation on the lives of the Palestinians and participate in non-violent activity (see: paragraph 2 of the affidavit of Alice Coy and Gregory Schnabel). Richard Purssel testified that the organization was founded by Neta Golan and Adam Shapiro, but that he did not meet them (p. 42, line 19 / session of March 10, 2010) and that no training is necessary to be accepted into the organization but that he knew the organization was based on non-violence and solidarity (p. 43, lines 21-22 / session of March 10, 2010). Tom Dale testified that the ISM organization is not an organization with members (p. 129, lines 1-2 / March 10, 2010).

^

⁹ Misspelled in Hebrew text

- 26. The defendant devoted considerable time in the cross examination to the subject of the witnesses' entry into Israel and the territories, and sought to present a version suggesting that the witnesses were briefed prior to their arrive to conceal the truth at Ben-Gurion Airport in regard to the purpose of their visit. The witnesses were questioned in the court about the training they received prior to their arrival in Israel and about the information given to them related to the Israeli-Palestinian conflict. The witness Richard testified that he received training in Nablus, where they explained to him that it is a non-violent organization and is particularly aimed at assisting the Palestinians (p. 48, lines 2-9 / session of March 10, 2010). The witness was asked whether he knew that the organization allows terrorists to hide in the organization's offices and he replied that he had never hidden or concealed any terrorist (p. 55, lines 21-22 / March 3, 2010). The witness was asked about the questioning he underwent at Ben-Gurion Airport and he replied that he personally did not lie when he arrived at Ben-Gurion Airport and was not asked (p. 58 / session of March 3, 2010), and that he entered the Gaza Strip via the Erez checkpoint (p. 59, lines 5-6 / session of March 3, 2010); from there, he came to Rafah with Alice Coy and Nick Durie on March 10, 2003. He also said that at night he would stay with a Palestinian family in Rafah and during the day he would stay in the ISM offices (p. 60, lines 4-5 / session of March 3, 2010). The witness was asked what equipment he received from the organization and he replied that the organization did not equip them with any means and that the only thing they gave him was a fluorescent jacket and that only Rachel had a megaphone (p. 64, lines 8-21 / session of March 3, 2010).
- 27. The witness Alice Coy said she had no contact with ISM before she arrived in Beit Sahour (p. 363, lines 5-9 / session of March 15, 2010), and did not join this organization and started to work with the organization independently from mid-January 2003 as an independent activist (p. 365, lines 5-16 / session of March 15, 2010), and met most of the activists in Rafah (p. 365, line 18 to p. 366, line 2 / session of March 15, 2010). Tom Dale testified that he came to the West Bank for the first time in October or November 2002, and visited Rafah in December 2002. During his stay in the West Bank, he visited Beit Sahour and small towns in Nablus (p. 129, lines 20 to p. 130, line 7 / session of March 10, 2010), and that there was no preparation work before he arrived (p. 130, lines 8-14 / session of March 10, 2010). At the time of the incident, he was only 18 years old (p. 13, line 7 / session of March 15, 2010). Tom Dale testified that no one instructed him and that he found information on the Internet (p. 130, lines 22-23 / session of March 10, 2010). He denied receiving a travel advisory from the British Embassy warning him not come to Gaza or Rafah (p. 238, lines 10-16 / session of March 14, 2010). Gregory Schnabel was questioned in this context and replied that

he did not say that he was coming to obstruct the bulldozers from performing their work, and that he did not have such plans before his arrival and that he was not asked whether he was coming to help the Palestinians (p. 505, lines 7-12 / session of March 17, 2010). When he arrived, he did not intend to obstruct the bulldozers, but merely to visit his friend (p. 505, lines 13 to p. 506, line 2 / session of March 17, 2010), and only when he met his friend Alice and her friends, he decided to volunteer with them (p. 506, lines 3-6 / session of March 17, 2010).

- 28. Gregory Schnabel testified that Alice Coy told him via email about what was happening here and he went to Rafah in order to see what the organization was doing and arrived there in February 2003 and participated in ISM activity against demolishing homes and farm lands of Palestinians in the Gaza Strip (paragraph 2 of the affidavit). Gregory also was questioned about the travel advisory issued by the U.S. State Department, and he testified that in 2003 he was not aware of any such warnings and did not look for them when he was heading to Israel and was unaware of where it was possible to find them (p. 532, lines 16 to p. 533, line 2 / session of March 17, 2010).
- 29. The witness **Alice Coy** was questioned about what she said in paragraph 2 of her affidavit in regard to promoting peace and justice, and she replied that her intention was "to enable the expression of non-violent demonstrations." She told about her activity in Tulkarem, where she accompanied children who were afraid of the tanks that passed there on their way to school (p. 369, session of March 15, 2010). She also said that they stood at checkpoints in Nablus in order to mitigate the tension and that she traveled in ambulances in order to facilitate the passage of the local residents at the checkpoints (p. 371, line 12 / session of March 15, 2010). In addition, she testified that she protested against home demolitions (same, line 14). In regard to Rafah, Alice testified that she came in order to protest the demolition of homes along the Philadelphi Router (p. 378, line 16 / session of March 15, 2010). Tom also testified that the ISM organization does not support any violent activity and added that he thinks that ISM people share his view that suicide bombings are terrible things and also disgusting (p. 267, lines 1-2 / session of March 14 2010). Gregory also testified that he participated three times in activity against demolishing homes during the months of February and March 2003 (p. 507, lines 14-18 / session of March 17, 2010).
- 30. The witness **Tom Dale** testified that he participated in non-violent demonstrations of Palestinian residents against the army, but not in demonstrations during which Molotov cocktails were thrown (pp. 147-148 / session of March 10, 2010). He also stayed in Nablus in homes that were under threat of demolition (p. 15, lines 1-4 / session of March 10, 2010).

31. In regard to the day of the incident, **Alice Coy** testified (affidavit, paragraphs 3 and 4) that on the day of March 16, 2003 she saw two bulldozers and a tank driving along the border and turning toward a home on the edge of the Al-Salam/Brazil neighborhoods in Rafah, and that she set off with two other friends – Nicholas and William – to check what was happening there. She added that she stood on the balcony of the house that appears in photo no. 22 (p. 384, lines 9-16 / session of March 15, 2010) and a few minutes after Nicholas and William arrived there, the bulldozer demolished the corner of the balcony at about 1:30-2:00 PM. In court, she added that the bulldozers damaged the entrance to the house and the gate (pp. 396-397, lines 1-17 / session of March 15, 2010). Later, they climbed onto the roof of the house, went to the corner of the roof and informed the drivers of the tank and bulldozer that they were present there in order to prevent the demolition of the home (p. 429, lines 1-13 / session of March 15, 2010). In court, the witness added that she called on a cell phone to her other friends, but not everyone came right away (p. 394-395 / session of March 15, 2010), and then the bulldozers left the house and started to work at a distance of 100-200 meters from there, in the direction of Dr. Samir's home (p. 412, line 17 to p. 413, lines 1-7/ session of March 15, 2010). Then they climbed down from the roof because the bulldozers no longer endangered the house. **Richard** confirmed in his testimony that on the day of the incident, he was at Tel al-Sultan in Rafah and between 2:20 to 2:30 PM received a message to come to the Al-Salam neighborhood at the outskirts of the city of Rafah, and he traveled there in a taxi together with Gregory and the deceased, and they arrived there about 10-15 minutes later (paragraph 3 of the affidavit, end of pp. 65-66 / session of March 10, 2010). And when they arrived there, there were five other activists: Will Hewitt, Tom Dale, Nick Durie, Alice Coy and John Smith (p. 69, lines 1-5 / session of March 10, 2010). Tom Dale confirmed that he received a message that day from Alice that there was a house in the process of being demolished (p. 211, lines 8-11 / session of March 14, 2010), but that he was 20 minutes away and not personally present at the demolition (p. 216, lines 11-14 / session of March 14, 2010). **Tom** confirmed that they were all there at least from the time that he received the text message from Alice (p. 225, lines 17-19 / session of March 14, 2010). **Gregory** also confirmed that on the day of the incident he arrived at 2:45 PM after receiving a telephone call from other friends in the ISM group who informed him that two bulldozers and a tank were operating in the Al-Salam neighborhood and threatening the integrity of the homes of the Palestinians (paragraph 3 of the affidavit), and that for two hours afterwards they attacked unfinished structures and garden walls of homes (p. 511, lines 9-13 / session of March 17, 2010)

- 32. Richard testified that he defended the homes of two people he knew: Dr. Samir and Abu Ahmad (p. 76, lines 19-23, session of March 10, 2010) and during the course of his testimony told about his personal experience in preventing the demolitions of homes by army bulldozers (end of p. 71 to the beginning of p. 72 / session of March 10, 2010). Alice added, in paragraph 7 of her affidavit, that between the hours of 1:30 to 4:30 PM they obstructed the path of the bulldozers because they thought that the bulldozers were about to demolish homes and that during these hours a smoke grenade was tossed at them. Later, the witness tells about the situation in which she was together with Rachel, who called with the megaphone to those sitting in the tank "We are international observers monitoring respect for human rights. Our embassies and the media know we are here. Why are you firing?" Gregory also testified that they wanted that day to ensure that the homes of Abu Ahmad and Dr. Samir would not be demolished a home where he lived together with the family for two weeks (p. 514-515 / session of March 17, 2010) and that the deceased, before being run over, was standing near Dr. Samir's home (p. 515, lines 15-16 / session of March 17, 2010).
- 33. In regard to the incident in which the deceased was injured, all of the eyewitnesses on behalf of the plaintiffs testified about the incident, citing the main circumstances, each in his own style and language and from the vantage point where he stood. Richard testified in his affidavit, and also in court, that at 4:30 PM the two bulldozers drove to the edge of the area where they operated. One of the bulldozers, which had the number 94 in large white numbers in the back and the number 949623 in smaller numbers, started some type of activity on the left side of the partially demolished structure. Then, most of the group took up positions behind the destroyed structure at a distance of about 70 meters apart from each other. The witness added that at this stage he stood with Rachel between the half-destroyed structure and Dr. Samir's home, and at this point Rachel handed the megaphone to another activist. Then, bulldozer 94 pulled back 50 meters and Rachel walked forward until she was at a distance of 15-20 meters in front of Richard. Then the bulldozer turned around, so that its front end was now facing the home of Dr. Samir as the bulldozer drove forward (p. 90, lines 4-9 / session of March 10, 2010). When Rachel was 20-30 meters from the bulldozer, she knelt down in front of the bulldozer and the bulldozer advanced toward her with the bladebucket in the dirt at a height of 1.5-2 feet, about half a meter. (Please note the statement that the sides agreed upon for correcting the protocol in this context) (end of p. 91 to 92 / session of March 10, 2010). And the dirt piled up in front of it, but the terrain was flat ground and Richard had an open view on a clear day, and the incident occurred at a distance of 20 meters from him (see paragraph 18 of the affidavit). When the bulldozer approached Rachel, she climbed onto a pile of

dirt, not a large one, and the witness referred to photo no. 6 that was submitted by the plaintiffs and noted that the pile was smaller than this pile, whose height was 5-6 feet (p. 102, lines 9-10 / session of March 10, 2010). From the place where she stood, Rachel looked into the driver's cabin. Then the bulldozer continued to move forward. Rachel turned around and started to move in order to get down from the pile, but the dirt was moving as she climbed down and the bulldozer continued to move forward, and then Rachel disappeared under the pile of dirt that was moving. The bulldozer moved forward to a distance of at least 4 meters, then all of her friends ran toward the bulldozer, and then the bulldozer stopped, and in Richard's words: "I heard lots of screams, a great many screams, people signaling to the bulldozer driver to stop, signaling him to stop. At that time, the bulldozer was still moving another 4 meters. It passed the spot where Rachel fell, stopped and backed up in reverse along the path it had traveled in a straight line. Along the path where it [...] Rachel lay on the ground" (p. 94, lines 16-20 / session of March 10, 2010).

- 34. **Richard** added that after the discovery of the deceased's body the bulldozer pulled back (p. 121, lines 7-12 / session of March 10, 2010) to a distance of 20 meters (see also the Military Police Investigation Unit testimony, p. 2., lines 22-23). Richard was asked why the deceased decided to climb onto the pile of dirt the bulldozer had created, and he replied that he thinks she climbed up in order to signal to the driver not to come closer and not to come to the home of Dr. Samir (p. 98, line 17 to p. 99¹⁰, line 6 / session of March 10, 2010). Richard also noted that the deceased stood close to the top of the pile, with her head definitely higher than the top of the pile, and in his assessment, Rachel was at a height of 6 feet (p. 115, lines 9-14 / session of March 10, 2010).
- 35. The witness **Alice Coy** said in her affidavit (paragraphs 10-12) that at approximately 5:00 PM she was sitting with William on a wall by the home of Dr. Samir at point No. 1 on the sketch she drew which was submitted to the court as an attachment to the affidavit of primary testimony in English and which was translated into Hebrew. There she saw Rachel by herself at point No. 2 in the sketch and she saw the bulldozer was approaching her. She and William started to go toward Rachel, from point No. 1 to point No. 2. William started to shout, and then she saw Rachel covered in dirt up to her chest. And the bulldozer pushed sand onto her. They ran toward point No. 2, while waving their arms and shouting to the driver to stop moving forward because their friend was underneath. They signaled with their hands "underneath." In court, the witness was questioned in regard to these moments, and she said that when she sat on the wall next to William at a distance of more than 10 meters (p. 499, line 18 / session of March 15, 2010) she saw that Rachel was standing next to Dr.

1,

¹⁰ Apparent typo - Hebrew text says "98"

Samir's home (p. 450, line 2 / session of March 15, 2010). This testimony is also supported by Tom (p. 230, lines 5-23 / session of March 14, 2010). According to Alice, they climbed down the wall and headed toward the place where Rachel was located and at that moment William shouted and then she looked and saw that the sand had completely covered Rachel (p. 450, line 9 to p. 451, line 4 / session of March 15, 2010) and this was for a half a second, and she was covered perhaps a meter (p. 451, line 2 to p. 452, line 9 / session of March 15, 2010).

36. Tom Dale testified that at the time the incident occurred in which the deceased was injured, he was standing at the southeastern corner on a pile of building debris of what was once a house, and Gregory was alongside him. When he came near Rachel after receiving the message from Alice, he saw everyone there and saw a megaphone in Rachel's hand, and she handed it to him about 5 minutes before she was killed, after she had become tired from shouting (pp. 229-230 / session of March 14, 2010). Tom, Rachel and Richard had fluorescent jackets (pp. 228-229 / session of March 14, 2010). In regard to the incident in which the deceased was injured, the witness Tom Dale testified that after he received the megaphone from Rachel, he continued to shout and warn against the danger Rachel faced. At that time, Rachel stood at a distance of 40 meters from Dr. Samir's home, as the bulldozer advanced toward the house and was about 15 meters from it. Rachel moved several meters from the place where she had been standing and went down to a kneeling position on the ground, when the bulldozer was at a distance of 15 meters from her (see also p. 254, lines 9-12 / session of March 14, 2010). The bulldozer slowly moved closer to her, creating a pile of dirt in front of it as it advanced toward her and the terrain was completely flat (paragraphs 8-9 in the affidavit). The witness also confirmed in court that the bulldozer pushed a pile that it created and that was not there previously between it and Rachel (p. 249, lines 1-10 / session of March 14, 2010). According to Tom, when the bulldozer approached her, she stood up, climbed onto the pile of dirt as the bulldozer drew closer, and when she did this, most of her head was above the edge of the bulldozer blade. But the bulldozer operator continued to advance, and then Rachel started to fall into the pile of dirt and the lower part of her legs could not be seen. The bulldozer driver did not heed the hysterical shouts of Tom and his friends, and continued to advance along its path. Rachel turned around, and was face down as the dirt covered her. At that moment, the deceased had a look of fear and horror (p. 261, line 17 / session of March 14, 2010). The bulldozer continued and Rachel disappeared under the pile of dirt. Tom went on to testify that the bulldozer stopped at the point where his driver's cabin was above the place where Rachel had disappeared under the dirt. The bulldozer waited a few seconds and then pulled back and Rachel's body was then revealed. And Tom went to Dr. Samir's home in order to call for help, but discovered that Dr. Samir had already

called for help. Tom ran back to the place where Rachel was lying and noticed that she had a cut on her face and was pale (paragraphs 12-14 of the affidavit). In his cross examination, the witness Tom added that during the moments in which the incident occurred, he was standing facing Rachel, while Greg stood to the right but further from her and Richard was there to the left of him (p. 255, lines 9-11 / session of March 14, 2010). And from the moment she fell until the moment she disappeared, it was about three seconds (p. 256, lines 1-2 / session of March 14, 2010).

The account of the incident in which the deceased was injured was also heard from **Gregory**, who 37. testified that at approximately 5:00 PM the deceased was standing in front of Dr. Samir's home. He stood together with Alice and William on the demolished wall at a distance of 14-20 meters from her, and the rest of the friends were spread out in the area. Three minutes later, the bulldozer advanced toward Rachel in a wide, open area where there were no rocks, walls or other objects that could obstruct the field of vision. She was 5-10 meters from Dr. Samir's home, behind her, and she wore an orange fluorescent jacket. As the bulldozer advanced toward her, she waved her arms. According to Gregory, the bulldozer was over 20 meters away from her and created the pile when it was 25 meters from her (p. 536, lines 7-9 / session of March 17, 2010), so he was able to see her clearly. The deceased half-knelt and then Gregory had to go around a demolished home, and when he got past the home he saw Rachel standing and starting to climb the pile while it was being pushed toward her; the height of the pile was about half of the bulldozer blade, between 1 to 1.5 meters (p. 534, lines 9-10 / session of March 17, 2010). The witness notes that the deceased's height was 1.80 meters and from the point where he stood, he saw that Rachel was at the height of the window of the bulldozer driver's cabin until she fell. Gregory goes on to describe that when the bulldozer came very close to Rachel, it started to push the dirt under her feet and around her ankles and she stood straight and struggled to remain on top of the pile. She climbed up so the driver could see her, and then she lost her balance and was pushed back. The deceased fell on her side and tried to get way but she was trapped and the bulldozer continued to advance and her legs were covered with dirt. The bulldozer continued to advance with the blade until it reached a distance of 3 meters beyond the spot where the deceased stood, so that the cabin of the bulldozer driver was located exactly above Rachel's body before he had started to advance. In Gregory's assessment, the deceased was not trampled by the tracks of the bulldozer. Rather, she was buried under the body of the bulldozer and pile of dirt. The bulldozer stopped for a moment and then turned back, and when the blade was raised a bit, her body was then revealed, and most of her body was covered with dirt (paragraphs 13-21 in the affidavit). Gregory also repeated the content of the affidavit during the

- course of his cross examination, which, in fact, did not focus mainly on the incident, but rather on issues of marginal import.
- 38. The witness Alice also referred in her affidavit to the moments when the deceased's body was uncovered. She thought that Rachel was under the bulldozer since the bulldozer was exactly above the spot where she had last seen her, and thus she wanted to dig and extract the deceased from under the pile. However, when the bulldozer pulled back, after a few seconds from where it was standing and emptied the bulldozer's blade, then Rachel's body could be seen. She was not covered with sand. She was lying on her back. Her upper lip was seriously injured. Blood flowed from her nose. She said in her presence "my back is broken." At first, she took out the phone in order to call an ambulance, but then held her head in order to stabilize her spinal column (paragraph 11 in the affidavit). The witness later added that Gregory stood to her right and Will to her left, and she held her head. They shouted to the people to call an ambulance, and they continued to speak with Rachel.
- 39. Thomas Dale confirmed that the bulldozers not only flattened land that day, but also partially demolished buildings that day (p. 242, line 1 / session of March 14, 2010). And on that day, he witnessed the demolition of columns of a partially built home (p. 243, lines 1-7 / session of March 14, 2010). Photo no. 11 corroborates the witness' claim.
- 40. **The photographs**: In a preliminary ruling, the court disqualified the submission of photographs taken by a person who is not a witness in the trial and allowed only the submission of the pictures taken by the witness Richard all of the photographs that do not have the date they were taken marked at the bottom of the photos. The witness Richard Purssel attached to his affidavit an appendix in which he described the photographs that were submitted to the court. In his testimony in the court, he explained that he took the pictures on March 16, 2003 with a disposable camera, and they were taken from the negatives of the original rolls of film (p. 77, lines 14-22 / session of March 10, 2010). Greg Schnabel appears in photo no. 5, and in photo no. 10 Greg Schnabel is on the left, Nick Durie is in the middle and Tom Dale is on the right. In regard to photo no. 11, that is a house under construction (p. 80, lines 19-21 / session of March 10, 2010). In photo no. 4, the woman who appears is Alice Coy (p. 82, lines 15-17 / session of March 10, 2010), and she was photographed earlier in the day. The witness testified that he took photographs the moment after the deceased's body was uncovered after the bulldozer backed up photos 25 and 26, as well as photos 3 and 27 (P/34). The witness testified that the young man with the hat on the left side of photo No.

27 is Will Hewitt. The witness described the moment when picture no. 27 was taken: "Answer: The bulldozer pulled back. You could see that the blade was moving upward, you could see the traces of the tracks on the ground, and you could see this on both sides of Rachel. And on the right side, at the bottom, you can see the marks on the ground made by the blade" (p. 121, lines 9-12 / session of March 10, 2010).

> Interim summary and conclusions:

- 41. All of the eyewitnesses of the plaintiffs were at the scene of the incident, some right after the bulldozers arrived at the route (Alice and Tom) and some (Richard, Gregory and the deceased) starting from 2:30 PM. There is no dispute about the fact that all of the witnesses were members of the ISM organization, which they said is an organization that advocates for justice and is opposed to violence of any sort.
- 42. The goal of the members of the organization on that day was to prevent the demolition of Palestinian homes adjacent to the route, and they believed that the bulldozers were indeed operating with the intent of demolishing homes. Photo no. 1 and photo no. 11 clearly show that the bulldozers also engaged in demolishing the foundations of unfinished homes that day, and this only reinforces the contention of the plaintiffs' witnesses that the bulldozers engaged in demolishing parts of structures that day, and approached within several meters of the homes of Dr. Samir and Abu Ahmad.
- 43. When it became known to Alice that the bulldozers were present, she alerted the other activists via her cell phone, and then the deceased arrived in a taxi together with Richard and Gregory at approximately 2:30 PM. Starting from time, and until the deceased's death at 5:00 PM, the ISM activists tried to prevent the bulldozers from advancing towards the homes of Palestinians on the outskirts of the city of Rafah.
- 44. During the course of the incident, the army deployed means of crowd dispersal, but the deceased and the rest of her friends remained in place, without endangering one hair on the head of any of the bulldozer operators or soldiers or commanders sitting in the *nagmachon* [armored personnel carrier]. During these hours, there were situations in which the bulldozers came close to the demonstrators, and the demonstrators were in danger of injury or bodily harm, but this was prevented by stopping at the last moment.

- 45. The incident involving the deceased occurred as the deceased stood at a distance of over 20 meters from the bulldozer in an open area, wearing a fluorescent jacket, and the bulldozer started to move toward her, creating a pile of dirt in front of it. The deceased knelt down in order to prevent the bulldozer from advancing, but the operator of the bulldozer continued to advance, creating a pile in front of it and approaching her. Then the deceased stood up and climbed to the top of the pile, looking at the cabin of the bulldozer. She signaled to the operator to stop, her friends also shouted and signaled to him but to no avail, and he continued to drive. Then the deceased turned in the opposite direction in an effort to flee from the bitter fate, but the bulldozer pushed the pile and buried her inside it and continued to drive for another 4 meters, while she was apparently between the tracks and under the pile.
- 46. The bulldozer stopped above the place where the deceased was located and only after endless calls and shouts and signals by her friends it pulled back to a distance of about 20 meters and then the body of the deceased was uncovered, apparently after the bulldozer's blade had dragged back dirt from above the spot where she had been buried.
- 47. At that time, the body came into view and the photo that documents her condition during the moments after she was run over photo no. 27 is a photo in real time and it speaks for itself: The deceased is lying down, with two of her friends to her left trying to offer assistance. Photos 25, 26, 28, 29 and 30 also shed light on these critical moments. All of these photos show that there is no pile of dirt either in front of the deceased or behind her.
- 48. The plaintiffs' witnesses submitted affidavits of primary testimony, testified before the court in frontal testimony, and also gave testimony at the Military Police Investigation Unit soon after the incident. They also gave testimony before Attorney Raji Sourani from the Palestinian Center for Human Rights in Gaza, and the key points, worded in one way or another, appear in all of the testimonies they gave. The plaintiffs' witnesses believed, and justifiably, that the bulldozer operator and his commander, who sat together in the cabin, could surely see the deceased, including from a distance of 20 meters, and certainly when she climbed onto the pile and her head was above the top of the pile.
- 49. There is one and only one conclusion that can be drawn from the testimonies of the plaintiff's witnesses that the bulldozer operator and his commander were aware of their presence already

from the start of the activity at approximately 12 o'clock noon, and knew with absolute certainty when means of crowd dispersal were deployed at about 3:30 PM. Moreover, the deceased and two of her friends wore fluorescent jackets that day that made them prominently visible to all. In addition, considering that it is noted in the operations log that the military force decided that day not to halt the ongoing activity – in the words of the deputy battalion commander in his summary – in order not to create a precedent due to the presence of the foreigners, a situation was created in which the continued activity of the force endangered the lives of the foreigners and ultimately led to the deceased being buried under a pile of dirt pushed by Y. P. As noted, the plaintiffs' witnesses testified that the deceased knelt down when the bulldozer was about 15-20 meters from her, so the operator surely could have seen her from this distance and could have stopped, but he, because of the unequivocal directive not to stop the work, continued toward her, and when he came close to her, she climbed to the top of the pile and she, along with her friends, signaled to him to stop. But at this point too, he continued to drive and piled the mound onto her and inflicted her critical injuries that ultimately led to her death from asphyxiation. Her body was uncovered only after the bulldozer pulled back and she was lying on the ground without any dirt covering her, apparently after the bulldozer's blade had pulled the dirt from on top of her.

Evidence Presented by the Defendant:

Introduction:

50. As noted, in paragraph 38(B) of its revised writ of defense, the defendant described its version of the circumstances of the incident: "A review of the incident indicates that at approximately 5:00 PM the deceased, Rachel Aliene Corrie, began to move toward one of the two bulldozers that operated in the area. The bulldozer, which was operating in accordance with procedures, moved forward and piled up building debris with its blade. When the bulldozer was at a distance of about 20 meters from the deceased, the deceased sat or knelt on the ground, believing or assuming that the bulldozer would stop when it came close to her. The bulldozer continued to move forward, with the pile in front of it. When the pile of dirt reached the spot where the deceased was sitting, the deceased started to climb onto the pile of dirt and found it difficult to keep her balance. While climbing up and before reaching the top of the pile, the deceased decided to get down from the pile of dirt. She turned in the opposite direction and started to go down from the mound when suddenly her foot apparently got stuck in something and she fell and lay on the slope of the mound. At the same time, the bulldozer continued to move very slowly toward the mound, guided by an internal navigator, and the pile of dirt

started to cover the deceased until she was completely covered. Her fellow activists approached the bulldozer and started to signal and shout to the bulldozer operators to stop. The bulldozer operator and his commander immediately stopped when they saw these young people and raised the bulldozer's blade and pulled back. After the bulldozer pulled back, the deceased was uncovered, lying on the ground and still alive. The deceased spoke to her friends and a few minutes later was evacuated to a hospital."

Discussion of the defendant's evidence:

- 51. As noted, the defendant called 15 witnesses to testify. However, it seems that there were only six of them who were potential eyewitnesses to the incident: **Y. P** the driver of the first bulldozer, which was involved in the incident; **E. V.** the commander of Y. P.; **S. L.** the driver of the second bulldozer; **A. S.** the commander of the second bulldozer; **S. R.** the commander of the operations force; **A. D.** the platoon commander and deputy of S. R., both of whom were in the *nagmachon*. In regard to **Sh. R.** and **Pinky Zoaretz**, there is no dispute about the fact that they were not at the scene and that they received reports via the two-way radio system from S. R. from the field. And their testimony does not have great importance since it is hearsay evidence or conjecture. However, perhaps this testimony is important in the context of the credibility of the other witnesses according to what was reported to these two commanders after the incident, whether in the framework of the operational debriefing or in another framework of ongoing work. The testimony of these two witnesses is also important in the context of command responsibility and command negligence on their part.
- 52. In a nutshell, we note that after the questioning of the defendant's witnesses in court it turns out that the only eyewitnesses who testified about the occurrence of the incident are two: Y. P. and E. V. There is no dispute about the fact that during the incident the *nagmachon* stood at a distance of 100 meters behind the bulldozers that were engaged in clearing activity at the time of the incident, and the two witnesses S. R. and A. D. sat in the *nagmachon* and did not see the incident (p. 958 / session of April 3, 2011). The operator of the second bulldozer and his commander could not provide coherent facts about the occurrence of the incident, and they were busy with the work of their vehicle, to the southeast of the bulldozer of Y. P. and E. V., and there is a substantial contradiction between the operator and the commander in regard to whether their vehicle advanced beyond the spot where the body was discovered, as will be explained below.

53. We will now discuss the defendant's evidence in various contexts of the scenario of the incident, while noting the substantial contradictions in the versions of each witness, which were given at various opportunities – at the Military Police Investigation Unit and in court – as well as substantial and irreconcilable contradictions between the witnesses. We will already note here that certain arguments might be repeated in regard to the issue under discussion.

Command hierarchy:

- 54. **Sh. R** testified that he served on the day of the incident as deputy commander of the battalion that was responsible for carrying out the mission assigned to the force to clear and flatten the ground (paragraph 2 of the affidavit). In fact, since the battalion commander was not present at the scene of the incident that day, Sh. R. was the one who commanded the battalion (p. 1036, lines 17-22 / session of April 6, 2011). **Sh. R.** was not actually at the incident, and so he was not called upon to command a specific local incident, but rather the entire sector (p. 1037, lines 1-6 / session of April 6, 2011).
 - **S. R.** was the commander in the field at the incident and he sat in the *nagmachon*, which is an APC with an armored underbelly (p. 882, line 11 / session of April 3, 2011). The two bulldozer teams were subordinate to him on the professional level, and performed the clearing work according to his instructions. **Sh. R.** was the deputy battalion commander and he sat in the war room, at the command center, which was at the Liaison Unit, 1 to 1.5 kilometers away (p. 1038, lines 2-17 / session of April 6, 2011) and monitored what was happening via a video camera (pp. 884-885 / session of April 3, 2011).
- 55. The mission of **S. R.** was command and control of the area and therefore he took up a rear position in order to observe the two bulldozers and provide security for them. After deploying in the field, the bulldozers continued to work without a break until the deceased was killed. They occasionally stopped and moved away from the foreigners, and then the foreigners chased after them again (pp. 912-913 / session of April 3, 2011). According to his version, disembarking from the vehicles was out of the question in light of the threats, but it was possible in very specific cases of rescue or of injuries, without distinguishing between the rescue of an injured soldier or an injured civilian. To such an extent that the soldiers urinated into bottles (p. 917, lines 16-22 / session of April 3, 2011).

Sh. R. specifically learned of the presence of the foreigners on the ground that day via a report stating that "a group of foreigners is congregating around the bulldozers and hindering the clearing mission" (beginning of paragraph 11 of the affidavit).

Pinky Zoaretz was the senior commander and he commanded the Southern Brigade at the time. He said that he received reports on the incident during the course of the day, but he only came to the site of the incident after it occurred, when he needed to conduct an operational debriefing (pp. 1228-1229 / session of July 10, 2011).

Nature of the clearing work as a routine task:

- 56. The defendant's witnesses testified at length about the clearing work conducted on the route during that period of time. On the one hand it was regular, ongoing, routine work and on the other hand the forces were instructed that the route was a war route and that it was forbidden to disembark from the vehicles. The routine clearing work also included, among other things, the demolition and flattening of structures, or structures under construction, in the Rafah area. In his testimony on March 3, 2003 (P/36), Y. P. said: "In this work during reserve duty most of the time I was flattening the ground on the route and clearing the top layer of this terrain so that if there was a bomb hidden in the upper part of the ground the bomb would be detonated. The bulldozer's blade is heavy and it is preferable to harming the lives of the soldiers. The flattening of the ground in effect builds a route for the movement of both vehicles and infantry forces... Every day I was sent together with the commander of the vehicle or a bulldozer leader (another name) who guided me and served as another set of eyes since the visibility in the vehicles is limited..." (in P/36, line 21 to p. 2, line 6. See also the witness' affidavit, beginning of paragraph 1).
 - S. R. testified that the clearing activity was conducted frequently in order to pre-empt dangers and was performed several times a week (p. 896, lines 15-20 / session of April 3, 2011).

The briefing and the presence of the foreigners:

57. **Sh. R**. noted in an affidavit of primary testimony that on the day of the incident, and before setting out on the mission, he instructed the company commander to brief the mission force regarding the

dangers facing them at the site of the work, as well as the matter of the foreigners present in the sector, who were obstructing the work of the bulldozers (see paragraphs 8 and 9 of the affidavit).

58. **Y. P.** testified in his testimony at the Military Police Investigation Unit on March 17, 2003 (**P/36**) on page 2, after line 10, that the company commander S. R. briefed them that day: "He told us that the mission was to flatten the terrain, to clear on the Philadelphi route. He explained to us that we needed to be careful and not to get out of the D9. He explained to us the radio codes and vis-à-vis whom we were working and that we needed to beware of the Palestinians who launch anti-tank and RPG fire against our vehicles. And he also told us **about the foreign people in the area** (there is a group of tourists in the area, active in various groups, who are unarmed. ____ in the area. He also briefed about armed (terrorists) armed or unarmed. He said that we should update him via the two-way radio. He did not speak specifically about anyone, only about **a group of peace activists** or something like that" (**P/36 lines 14-24**).

In his testimony in court, Y. P. said that he encountered the group of foreigners for the first time that day and that at first he thought they were tourists (p. 1574, lines 1-11 and also p. 1582, line 19 to p. 1583, line 3 / session of October 21, 2010).

The witness testified that the procedure for the Philadelphi Route was that it was a war zone, and they told them¹¹ "it was forbidden for civilians to be present there" (p. 1648, lines 5-10 / session of October 21, 2010).

The witness **Y. P.** told the court that 12 R. briefed them about people roaming around there, all sorts of foreigners and they could be armed or unarmed. The witness was unable to explain the lack of consistency and the meaning of the deletion in his testimony in P/36 (p. 1571, lines 5-9 / session of October 21, 2010).

59. E. V. testified that they received a briefing and mission in the morning. The mission was to clear the area and they warned them about bombs and that it was an open territory in a dangerous area.
They also told them that there might be foreign citizens and that they needed be careful of them, to keep a distance from them in order to avoid harming them. Present at the briefing were the two

27

¹¹ The opening quotation mark is missing from Hebrew text; translator assumes it goes here.

¹² Presumably S. R.

bulldozer teams and the *nagmachon* team (p. 1689, line 12 to p. 1690, line 11 / session of November 4, 2010).

The witness did not know to say how many foreigners there were and did not know on the day of the incident that they were European and American citizens, and learned their identity for the first time from the investigation and from the news (p. 1691, lines 12-17 / session of November 4, 2010).

60. The witness **S. L.** (the operator of the second bulldozer), when questioned at the Military Police Investigation Unit on March 19. 2003 (P/40), said **that on the day of the incident**, they received a briefing before the clearing mission, but that contrary to the testimony of Y. P. and of R. they "**did not speak to us about the movement of civilians because no one comes near there – neither a Palestinian nor anyone else" (P/40 – p. 1, lines 21-22). He repeated most of this in the affidavit of primary testimony (paragraph 5 of the affidavit). Also during his cross examination, when he was asked whether they said something to them about the foreigners, he said that they did not say a word to them about the foreigners (p. 1773, lines 7-13 / session of November 4, 2010) and only instructed them that it was completely forbidden to disembark from the vehicles.**

Under cross examination, the witness said that he had received **training at the training base** in Beersheva, and not on the day of the incident, and there he was told that work in a situation where people are nearby is forbidden (p. 1772 to the bottom of p. 1773 / session of November 4, 2010) and added that in the specific briefing given on the day of the incident, they did not speak to them about foreigners, and in regard to a situation in which people are around the vehicles: "They did not tell us there would be such things there. We did not think for a moment that there would be civilians there, that they come there." (p. 1773, lines 12-13 / session of November 4, 2010).

The witness further added that he had not encountered the phenomenon of foreigners around the vehicles while working in the framework of his reserve duty, and that this was the first time for him (p. 1797, lines 8-10 / session of November 4, 2010).

In his testimony at the Military Police Investigation Unit on March 19, 2003, A. S., the commander of the second bulldozer, testified explicitly that "**they did not speak about the movement of civilians**" and that there was usually no need to do so because no one came near there (P/30, p.1, line 13).

However, when he was questioned in court, the witness **A. S.** (S. A.) did not remember details about the briefing, and the content of his testimony in this context is from the routine; he did not remember who was present at the briefing, nor did he remember who gave the briefing (pp. 1484-1485 / session of October 7, 2010), and he did not know to say whether the issue of the foreigners came up in the briefing (p.1485, lines 1-3 / session of October 7, 2010).

- 61. According to the witness **A. S.**, the foreigners were about 12 people at most, the foreigners were young people of ages 16 to 25, male and female, and he did not know to say whether there were Arabs among them and it was not clear to him where they came from (pp. 1482-1483 / session of October 7, 2010). And after the deceased was injured, a large number of people arrived a wave of people (p. 1482, lines 16-17 / session of October 7, 2010). On the other hand, in his testimony at the Military Police Investigation Unit, the witness testified explicitly that "they did not talk about the movement of civilians" (p. 1, lines 1-3).
- 62. The witness **A. D**. (S. R.'s platoon commander) did not make any reference to the briefing of that day in either his affidavit or in his testimony at the Military Police Investigation Unit (**P/51**); and in his cross examination, he did not remember anything from the briefing that took place that day or what was said in it (p. 1199, lines 2-8 / session of April 6, 2011).
- 63. The witness **Zoaretz** knew about the presence of the foreigners and had encountered them in numerous incidents (p. 1204, lines 18-21 / session of July 10, 2011) a few months prior to the incident, when they obstructed the work of his forces (p. 1203, lines 8-16 / session of July 10, 2011). The witness confirmed that the possibility of arresting them and bringing them to trial had been considered, but according to him for some reason this was not a practical option (pp. 1204-1205 / session of July 10, 2011). On that day, the foreigners were a few dozen and some of them were Palestinians, and from an operational perspective the desire to arrest them and remove them from the area was not practical (pp. 1226-1227 / session of July 10, 2011).
- 64. According to the words of the witness **S. R.**, he gave a briefing that day to all of the teams battle procedure, and spoke to them about the mission they needed to perform that day, and about the threats that could materialize. In this context, he spoke to them about anti-tank fire and also **spoke to them about the issue of the organization and of the foreign people**, who had come two weeks earlier and would stand around the bulldozer.

According to **S. R.**, the foreigners made a practice of coming during these two weeks to every activity of the force and sometimes hung onto the bulldozer's blade. The group numbered between 15 and 20, and they never had weapons and did not throw rocks at the force (pp. 906-907 / session of April 3, 2011).

According to the words of the witness **S. R.**, the foreigners hindered the work of clearing for several weeks prior to the incident (p. 886, lines 1-3 / session of April 3, 2011). The witness added that the foreigners, the members of the organization, arrived at the route, ordinary people did not come there, only terrorists. And after the foreigners came for the first time, reports were sent to the commanders, a situation assessment was made, and the force was equipped with means of crowd dispersal: tear gas and stun grenades solely for them (p. 901, line 16 to p. 902, line 2 / session of April 3, 2011).

- **S. R.** had no problem with the foreigners. His problem was with terrorists who plant bombs, contrary to the stance of Pinky (p. 922, lines 18-20 / session of April 3, 2011).
- 65. On the day of the incident, there were 10 to 20 foreigners, and some residents of Rafah were with them. And when he was asked how he knew that some of them were from Rafah, he replied that he identified them by their appearance, but did not remember why he did not mention them in his testimony at the Military Police Investigation Unit. He testified that he called to them in Arabic to move further away, while his medic, Jamal, called to them in English via the megaphone (p. 937 / session of April 3, 2011).

The witness confirmed that they were protesting against the demolition of homes and that this was their goal, and that he knew about them from the battalion commander and the brigade commander. (p. 940, lines 7-16 / session of April 3, 2011).

66. **Sh. R.** noted in the affidavit of primary testimony (paragraph 9) that he knew that the foreigners were present there for three months already and that they were obstructing them. **Sh. R.** testified that they spoke about the foreigners in the weekly and monthly situation assessments. They analyzed the methods and clarified the subject pertaining to their presence and the need to avoid harming them (p. 1063, line 20 to p. 1064, line 2 / session of April 6, 2011).

Sh. R. asked the company commander to brief the mission force about all of the foreseeable dangers in the area, including sniper fire, the throwing of grenades, small arms fire, antitank and RPG fire (see paragraph 8 of the affidavit).

In addition, he asked [the company commander] to conduct a briefing on the subject of the foreigners. When questioned by the Military Police Investigation Unit, he said that he emphasized to company commander S. R. "the dangers in the area, including the movement of that civilian group that is known and familiar to us and has been operating for about 3 months (**P/50**, lines 36-40).

In his cross examination in court, he did not exactly remember whether he briefed the entire force or whether he briefed **S. R.**, who delivered the briefing to everyone:

"Question: You don't remember what occurred.

Answer: I don't remember. Either I briefed the entire force, and R. gave his inputs,

or I briefed R. and R. conducted the briefing.

Question: You really don't remember.

Answer: No."

(p. 1071 lines 13-17 / session of April 6, 2011).

In the testimony of **Sh. R**. at the Military Police Investigation Unit on March 17, 2003 (**P/50**), he contended that there was a group of activists from various countries and that they had been obstructing the work of the force for three months. He noted that on the day of the incident a group of activists arrived – about 15 to 17 people, in their twenties – and started to hinder them there. "They stood in front of the bulldozers and in front of them while moving, in an effort to sabotage their work" (**P/50**).

In the affidavit of **Sh. R**, he added that he received a report on the two-way radio regarding the presence of a group of foreigners who had gathered around the bulldozers and were interfering with the clearing mission (paragraph 11).

Later, he testified that he did not know that they would come. He said that they verified that they were not terrorists, and therefore they did not want to harm them (p. 1111, lines 1-9 / session of April 6, 2011).

Interim summary and conclusions:

The commanders knew about the foreigners already three months earlier, that they did not pose a life-threatening danger, a situation assessment was conducted, the possibility of arresting them was not considered to be a practical option, and the force was equipped with means of crowd dispersal. Some of the witnesses remembered that they had spoken to them about foreigners, and some of them testified that they had not spoken to them about foreigners, and some of them did not remember whether the subject came up.

The start of work and the arrival of the foreigners:

- 67. According to the operations log attached to S. R.'s affidavit, the departure for clearing work was at 12:00 o'clock noon, and the D9 started working at 2:13 PM and the arrival of the foreigners was reported at 15:06 as follows: "arrival of foreigners with signs and cameras, east of the Dubi¹³, warning [shots] fired."
- 68. We learn from the testimony of **Y. P.** from March 17. 2003 at the Military Investigation Police Unit (**P/36**) that he performed flattening and clearing of the ground on the route during his reserve duty that included this period. His mission that day was also to flatten the terrain. The witness said there that a group of civilians, which initially numbered three or four, appeared at 12:00 noon and later about eight people came and they started to approach and obstruct the work and jump in front of the bulldozer's blade. He received a directive from the company commander not to harm them and continued southward, and again they came and started to jump and disrupt.
- 69. **Y. P.** testified in court that the procedure regarding the Philadelphi Route was **that it was a war zone**, and they told us that civilians were forbidden to be there, and that we should keep a distance from the civilians (pp 1648-1649 / session of October 21, 2010), "but under no circumstances to stop the work because it was war" (p. 1648, lines 14-15 / October 21, 2010).

1.

¹³ Nickname (Teddy bear) for the D-9

- 70. The words of the witnesses, including the plaintiffs' witnesses, indicate that the deceased and her friends indeed sought to protest against the work of the bulldozers, under the assumption that they were going to conduct demolition work near the route, and in practice they stood in the path of the bulldozers' work.
- 71. It seems that there is also no factual dispute that some of the foreign demonstrators were at the site of the incident soon after the bulldozers arrived and that their number reached eight from 2:30 PM and until the deceased was injured at 5:00 PM. The presence of the foreigners was known to the commanders in the field and also to the soldiers who operated the bulldozers.

Use of crowd dispersal measures and the reporting of the incident in the operations log:

- 72. According to the operations log, as noted, warning shots were fired toward them at 3:06 PM, and at 3:22 PM "a stun grenade was tossed in their direction" and at 3:23 PM "using tear gas" and at 3:27 PM "used crowd dispersal measures did not help."
- 73. **S. R.** was shown his testimony at the Military Police Investigation Unit where he said that after they had used crowd dispersal measures, it took three minutes, they moved to another place and then he received a report on the two-way radio that someone was hurt and he confirmed that this is what happened (pp. 946-947 / April 3, 2011).

As noted, according to the operations log, the report on the use of crowd dispersal measures was at approximately 3:00 PM, while the deceased was injured at approximately 5:00 PM.

The testimony of **S. R.** in this context does not seem credible and is inconsistent with the operations log, since he himself testified that at 5:00 PM he received a report from Y. P. that he apparently hit someone, and this is also indicated in the operations log. Therefore, the last time crowd dispersal measures were used was an hour and a half before the deceased was hurt.

> Interim Summary and conclusions:

74. If so, it seems that the report in the operations log regarding the time when crowd dispersal measures were used is more credible than the testimony of S. R. at the Military Police Investigation

Unit, and it seems that the force made use of crowd dispersal measures for the last time only at 3:30 PM. Indeed, S. R. himself testified that the report in the operations log reflects what happened on the ground and the log entries were made in real time (p. 889 / session of April 3, 2011).

The story of the incident according to the operations log:

- 75. In regard to the incident in which the deceased was hurt, there are three reports in the log one short and two detailed. The short one: at 5:00 PM "apparently a rock fell from the Dubi onto one of the foreigners they are evacuating him, apparently in serious condition, and at 5:12 PM an ambulance arrived they are evacuating him."
- 76. The first detailed report in the log includes the following details:

"To Karen:

5:20 PM – During the clearing work between coordinates 23 and 24 on Philadelphi, there was a gathering of foreigners who arrived near the route. Tried to distance them via warning shots that did not help, use of crowd dispersal measures at all levels – did not help. The forces stopped further to the west and after the people were further away from the route the D9 continued to work. At a certain stage the people came closer without the D9 noticing. The D9 continued to flatten the ground and the person was hurt. The moment he was hurt, the work was stopped.

18 C ready to move, but the injured person was evacuated by the Palestinians."

77. The operations log adds in the second detailed report at 6:20 PM: "Deputy battalion commander's summary: As a result of the situation that developed and the repeated and unsuccessful efforts to distance the people, the injury to the foreigner was unavoidable. The D9's field of vision is a narrow field of vision and the D9 saw the injured person only after the fact. We must not, as an army, allow such incidents to disrupt the ongoing mission. The problem of the foreigners is known in this area and as a policy we do not stop activity due to the presence of foreigners in this area in order to avoid creating a dangerous precedent. There were similar incidents in the past. For example, during the demolition of the yellow house the foreign citizens climbed onto the house itself – the people were removed and the work was completed. The severity of the incident from a media perspective is clear, as well as the damage the incident causes to us as an army. But again, this incident was unavoidable and these foreigners must be addressed and prohibited from entering the Strip. In addition, the

clearing work in this area must continue. It should be noted that the rules of engagement visà-vis any adult on the route is to shoot to kill."

> Interim Summary and conclusions:

78. If so, according to the operations log at 5:20 PM – that is, 20 minutes after the incident occurred, there is a report about the injury, but there is no factual detail about how the injury occurred.

In the second report, at 6:20 PM – that is, about an hour and a half after the incident occurred – the deputy battalion commander summarized the incident, and here too there is no reference to how the injury transpired, but there are a number of points the deputy battalion commander deemed [appropriate] to note:

- A. The problem of the foreigners' presence on the route **was known** to the force prior to conducting the work, and it was necessary to address these foreigners and prohibit their entry to the Strip. That is, their entry was not prohibited at that point.
- B. The work and the missions performed at the site were **ongoing** missions.
- C. Unsuccessful attempts were made to distance the foreigners.
- D. The commanders believed they should not **create a precedent** of stopping work due to the presence of foreigners.
- E. The rules of engagement on the route were clear and unequivocal: to shoot to kill any adult present on the route.

Characteristics of the terrain and execution of the work:

79. **Demolition of homes in Rafah**: The plaintiffs argued that the deceased and her friends arrived that day to defend the homes that were in danger of demolition, and they sought, in a non-violent way, to prevent the execution of such demolitions. In reality, the terms "clearing" and "flattening" in military lingo referred to the demolition of homes on the outskirts of the city of Rafah, which led to the widening of the route to a width of hundreds of meters as a result of these demolitions. The witness Zoaretz was asked at length about the policy of home demolitions the army carried out in the city of Rafah adjacent to the Philadelphi Route during the years 2000-2004, when 1,700 homes were demolished, which left about 17,000 people homeless, according to B'Tselem's figures. The witness was also presented with data on the killing of civilians: 101 people were killed between

August 2002 and March 2003, including 42 children of ages 10 to 18 (p. 1264 / session of July 10, 2011). The witness acknowledged that there was widespread demolition of homes, but disparaged B'Tselem's figures. But this senior-ranking witness did not deny statements attributed to him in an interview with the *Yedioth Ahronoth* newspaper. He said there, inter alia, that he was entirely focused on the lives of his soldiers and that he gave this higher priority than the lives of innocent civilians (pp. 1299-1300 / session of July 10, 2011).

- 80. [There is] a disagreement that the width of the Philadelphi Route and its area grew over time due to the demolition of many homes adjacent to the route in the city of Rafah. **Sh. R.** testified that the width of the route was 80-150 meters (p. 1039, lines 2-78 / session of April 6, 2011), and that the work was executed between coordinates 21 and 23, whose length is about 700 to 800 meters (same, lines 2-3). On the other hand, **Zoaretz** gave an exaggerated assessment, saying the Philadelphi Route spans 150 kilometers from the Mediterranean Sea to Eilat (p. 1172, lines 1-8 / session of July 10, 2011) and that the width of the route ranges from 300 to 400 meters (p. 1173, lines 19-22 / session of July 10, 2011).
- 81. In regard to the characteristics of the area where the bulldozers worked, **Y. P.** testified (**P/36**) that the terrain had mounds that were half a meter to one meter high, with weeds, while in his [later] testimony¹⁴ (**P/38**) he said that the area he worked on at the time of the incident was straight and flat.

Did any of the soldiers see the deceased prior to the incident?

82. In an affidavit of primary testimony, at the beginning of paragraph 15, the witness Y. P. declares that he did not see anyone and "certainly did not see anybody on the pile I pushed. I didn't see where the deceased was standing and couldn't know where she was standing. One thing is clear – she wasn't in my field of vision." The witness later states: "The pile that was between the bulldozer and the deceased, and onto which the deceased climbed, is a wide, wavy pile that was created from dirt and garbage" [the bold emphasis is not in the original A. H.]. If so, there seems to be a contradiction between what is stated at the beginning of the paragraph and what is stated in the middle of the paragraph: At the beginning, he states that he did not see, and later he states that the deceased climbed onto a wide pile. In court, the witness testified that he did not see the deceased prior to the incident, and that he saw her for the first time after the incident (p. 1608,

¹⁴ P/36 and P/38 are both testimony he gave at the Military Police Investigation Unit (see paragraph 86 below)

lines 9-12 / session of October 21, 2010). He was confronted with the affidavit in the court and testified that he did not see her at all, and did not tell the State Prosecutor's Office that she climbed onto the pile. His explanation in court that he thought in retrospect that she had climbed is not acceptable (pp. 1631-1632 / session of October 21, 2010).

- E. V., who was together with Y. P., testified that during the course of the day foreign citizens 83. arrived carrying signs in English and tried to prevent them from carrying out the mission assigned to them. But he did not testify anywhere 15 that he specifically saw the deceased prior to the incident. However, in court he testified that he saw her walking around among her friends prior to the incident, but did not remember when he saw her for the last time prior to the incident (pp. 1770-1772 and 1775, lines 2-7 / session of November 4, 2010).
- S. L. testified in court that he did not see the deceased prior to the incident, and saw her for the first 84. time after the people started to come toward her to offer first aid after the incident (end of p. 1787 to p. 1788 / November 4, 2010). S. R. also testified in court that he did not see the deceased prior to the incident (p. 959, line 21 to p. 960¹⁶, line 14 / April 3, 2011).

Interim summary and conclusions:

85. According to Y. P.'s version, the force did not see the deceased that day at all, while E. V. testified that he did see her. It is difficult to accept the contention of the defendant's witnesses that they did not see the deceased prior to the incident, particularly in light of the simple fact that all of the defendant's witnesses testified – at the Military Police Investigation Unit, in their affidavits and in their testimony in court – that the demonstrators were present that day since the work [began] and until it was halted, and that means of crowd dispersal were tossed at them. Moreover, the deceased and two of her friends wore shiny fluorescent jackets, so it was difficult not to see them. And it can be assumed that Y. P. sought to distance himself as much as possible from the argument that the deceased "was seen by" him prior to the incident. In addition, the deceased carried a megaphone in her hands for several hours and handed it [to someone else] a quarter of an hour prior to being run over.

¹⁵ Anywhere in his affidavit, apparently

¹⁶ Hebrew text says 696, apparently a typo

The occurrence of the incident:

Y. P. testified three times at the Military Police Investigation Unit: on March 17, 2003, March 19, 86. 003 and April 3, 2003. In his first testimony (P/36), Y. P. described the incident as follows: "While working and flattening the ground, when clearing you create a mound of dirt there since you're actually pushing dirt and soil, and then a hill is created in front of the bulldozer. The height of the bulldozer's blade is about 2 meters and the width of the blade is 4.40 meters. The bulldozer itself is 4.70 meters high. When the blade is engaged in work, its height is half a meter. And so, in short, I work and there's a pile of dirt of about 2 meters high. I backed up in reverse and I saw that a number of people were approaching, young men and women in their twenties" (same, p. 3, line 23 to p. 4, line 6). Later, he was asked by a Military Police Investigation Unit investigator: "Did you see civilians or people in front of the bulldozer while you made the mound? [The clearing work]¹⁷ And what was your speed? His answer: I didn't see anyone in front..." (same, pp. 3 and 4). On the other hand, when he was questioned for the third time by a Military Police Investigation Unit investigator, the investigator showed him the content of the ISM testimonies and noted that they claimed that the deceased stood on the top of a hill of dirt that he was pushing. Y. P. replied: "When I came close to the pile of dirt, I didn't notice anybody or anything standing in the path. When I arrived at the pile, I didn't see anyone standing at the top of it. Therefore, I started to push the pile" (P/38, p. 1). A simple comparison between the two testimonies indicates that they are completely different in regard to the pile of dirt that injured the deceased: According to Y. P.'s first testimony, she was hurt by a pile of dirt that Y. P. created and drove together with it, while according to testimony P/38, there were two piles – one that he had created previously and another that he created and drove together with it to the first pile.

In his affidavit of primary testimony, **Y. P.** adopted his version from the first testimony [at the Military Police Investigation Unit] – that is, that he created a pile of dirt and did not drive to a pile of dirt that already existed (see paragraphs 11-12 of the affidavit of primary testimony).

87. On the other hand, **E. V.**, who sat with Y. P. in the bulldozer, spoke about two mounds – one that existed and another that the bulldozer created and drove with to the first pile, because he said that the bulldozer raised a pile, moved back 20-40 meters and then drove forward again in order to knock down the pile that was 2-2.5 meters high (pp. 1695-1696 / session of November 4, 2011), and then drove forward to the pile again from a distance of 30-40 meters with the blade raised 50

1.5

¹⁷ Unclear – seems to be extraneous, or other words are missing

centimeters, drove onto the pile and then saw people to his right signaling (same, p. 1696). This contradiction is a substantial contradiction between the driver of the bulldozer and his commander that cannot be explained, and it seems that the defendant chose to adopt the version of Y. P. when it adopted this version in paragraph 38(B) of the revised writ of defense, and it seems that this is what actually happened.

- 88. **S. L.**, in paragraphs 10 and 11 of the affidavit of primary testimony, testifies that Y. P.'s bulldozer pushed a pile of dirt and building refuse 2 meters high by 4.5 meters wide that was created during the work, but that he did not see the deceased when she was standing opposite the pile of dirt. However, when this witness was questioned in cross examination in court, he completely retracted this version and testified that **he did not see the pile** that Y. P.'s bulldozer was working on (p. 1796, lines 4-7 / session of November 4, 2010), **and did not see what was in front of Y. P.'s bulldozer before the deceased was injured and did not see anything pertaining to the incident of the injury** (p. 1785, lines 19-20 / session of November 4, 2010).
- 89. **A. S.**, who was S. L.'s commander, testified in paragraph 10 of his affidavit that at 4:00 PM he saw the other bulldozer, which was to the southeast of him, he saw a gathering, he saw that the other bulldozer was moving backward and a mound of dirt about 2 meters high was in front of it and behind the mound was a person lying on the ground.

In court, he also retracted the version he gave in the affidavit and testified that he did not remember the date of the incident (p. 1471, line 11 / session of October 7, 2010), did not see the deceased prior to the incident (p. 1488, lines 1-6 / same), and also did not remember the bulldozer when it hit her and did not know whether there was a mound of dirt before the bulldozer started to move in her direction, and **did not see the height of the pile or its width or anything about the position of the deceased before or after the injury vis-à-vis the mound** (p. 1491, line 23; p. 1501, lines 15-17; p. 1522, line 19 to p. 1523, line 1 / same). Moreover, the witness' version in the affidavit is completely illogical because he says that he noticed the gathering of people, and then saw the pile of dirt in front of the bulldozer that was already driving backward and the deceased lying on the ground and that the height of the mound was about 2 meters. How could it be that the pile was still 2 meters high after the bulldozer flattened it and drove backward?! In addition, this version completely contradicts what is apparent in the photographs.

90. **Y. P.** noted during questioning at the Military Police Investigation Unit that after he pulled back 20 meters and stopped the bulldozer, he saw the body of the deceased in front of him and the group of activists and the mound of dirt behind them. That is, the group of activists and the deceased were between the bulldozer and the mound of dirt (P/38 – p. 2, line 23 to p. 3, line 2).

In his testimony in court, he noted that he did not see how many people lifted her, and that he saw people carrying her in their arms (p. 1588, line 18 to p. 1589, line 7 / session of October 21, 2010). But, apparently he was referring in these words to the removal of the deceased from the dirt that covered her and not to her being moved to a different place, and this is because later he said that he saw that they removed the deceased **from under the bulldozer** (p. 1595, line 23 / same), and he later said that he saw a body from afar and that they were removing it **from under the ground** (p. 1586, line 21 to p. 1587, line 4 / same) and, a third time, he said "**that's what I saw, that they were lifting her from under some body, from under the ground, that's it**" (p. 1603, line 5 / same).

Interim summary and conclusions:

91. Therefore, we are left with only two contradictory versions – one of Y. P. and the other of his commander E. V. because, as noted, in their cross examination, the two other witnesses from the second bulldozer retracted their versions from the affidavits of primary testimony and testified that they did not see the incident or the pile of dirt that Y. P.'s bulldozer worked on. As stated, the defendant adopted, apparently, Y. P.'s version in regard to a single pile of dirt that he created and that this was the pile that buried the deceased, and that nothing remained of it after the bulldozer pulled back and the blade flattened the pile, uncovering the body of the deceased. And therefore, all of the versions of the defendant's witnesses in the affidavits of primary testimony about the existence of a pile of dirt next to the deceased's body after it was uncovered are incorrect. In regard to how the deceased was injured and the discovery of the body, a discussion of these subjects will be conducted below.

Did Y.P. or E.V. see people approaching?

92. **Y. P.** testified at the Military Police Investigation Unit (**P/36**) that he saw people approaching and then spoke with E. V., while in E. V.'s testimony (**P/38**) he was the one who saw the people signaling to him and he signaled to Y. P. to stop. In court, Y. P. returned to the version in **P/36** and said that he began to move and drive backward: "I saw signs, I saw people jumping there, I saw

all sorts of motions" (p. 1601, lines 6-8 / session of October 21, 2010). On the other hand, **E. V.** testified that he saw people who started to wave their arms and signal to him to stop (p. 1696, lines 15-18 / session of November 4, 2010). And according to E. V., Y. P. did not see the deceased's friends after the incident and he was the one who instructed him to stop at the pile (p. 1696, lines 15-23 / same).

Did Y.P. and E.V. see people near the bulldozer?

93. **Y.P.** testified that he did not see anyone in front (P/36, p. 4, lines 24-26). In his testimony **P/38**, he gave a contradictory version: "Perhaps she stood below the height of the peak... I also didn't see **any sign from her friends who stood at the sides**, and therefore I continued to drive forward and push the pile" [bold emphasis mine, A. H.]. On the other hand, E. V. testified that he saw the deceased's friends when he rode toward the pile for the second time at a distance of 50 to 60 meters **behind the pile, and not from the sides** (p. 1702 / session of November 4, 2010). **E.V.**, in his testimony on March 17, 2003, testified that when he moved toward the pile, he saw "behind the pile, several meters away from it, a few people" and he later testified that he did not see people on the side or behind it, "**only a number of meters in front of the pile**." In his cross examination, he was asked what "a number of meters" meant and he replied that he meant 50 to 60 meters (p. 1703, lines 6-12 / same)

The blind spot in front of the bulldozer:

94. In Y. P.'s testimony on March 19, 2003, he added that "the blind spot in front of the bulldozer is about 3 meters, plus or minus (**P/37**, line 11). Later in the testimony, he testifies about the nature of the terrain as uneven terrain with building debris and mounds.

On the other hand, when the witness was cross examined in court, he said that the blind spot in front of the bulldozer is very far, and that he started to see things from a distance of about 30 meters and before that he ¹⁸ "could not see anything" (p.1560, line 10 to p. 1561 / session of October 21, 2010).

Later, he revised his answer and said that the blind spot is definitely more than 20 meters (p. 1561, lines 12-15 / same) When the witness was confronted with his testimony at the Military Police Investigation Unit from March 19, 2003 (P/37), where he stated that the blind spot was plus or

41

¹⁸ Opening quotation mark missing in Hebrew text, translator presumes it belongs here.

minus 3 meters, the witness offered a new response – that this is true in regard to flat terrain, though he did not say this to the investigator when questioned at the Military Police Investigation Unit (p. 1565, lines 18-23 / same 3). And despite the fact that he testified, as noted, in his testimony on March 19, 2003 about the characteristics of the terrain as uneven terrain, his explanation for the change in his response is totally unacceptable.

Amazingly, E. V. – who was Y. P.'s commander – does not know what the blind spot in front of the bulldozer is (p. 1718, lines 17-23 to p. 1719 / session of November 4, 2010).

The tossing of a grenade:

- 95. The defendant argued that on the day of the incident, "a deadly fragmentation grenade" was tossed at the force (paragraph 38A of the last section of the revised writ of defense), and some of its witnesses repeated this version in their affidavits of primary testimony. Already here, we wish to note that the only confirmation that a grenade was tossed that day without noting the type of grenade appears, ostensibly, in the operations log attached to R.'s affidavit: "At 4:18 PM: A grenade was tossed to their east at sector 22A" while at 4:13 PM there was a report about: "a gathering at 22A of about 20 kids, about 150 meters from the route."
- 96. It should be noted that none of the defendant's witnesses who testified at the Military Police Investigation Unit during the days following the incident mentioned the tossing of any grenade a serious incident in itself and, therefore, the plaintiffs contend that this was a later fabrication, and that the grenade referred to in the operations log was apparently a smoke grenade the force tossed at the demonstrators. The wording in the operations log supports the plaintiff's contention because the grenade that was tossed was a smoke grenade tossed toward the demonstrators or toward the people who gathered at 4:13 PM and not a live grenade tossed at the force, as the log says: "a grenade was tossed to the east of them at sector 22A."

Support for this contention of ours can be found in the testimony of **Y. P**. in **P/36**, where he testifies that during the disturbance by a group of civilians at the site they used tear gas and stun grenades against them, but to no avail. "And then I suddenly heard a noise grenade detonate near me. The bulldozer makes a very loud noise, but I heard the grenade explode. Nonetheless, they continued to walk around and hinder" (same p. 3, lines 13-16).

Despite the fact that **Y. P.** gave three testimonies at the Military Police Investigation Unit, in none of them did he mention that any live grenade was tossed at the force that day. He did note this in his affidavit of primary testimony (the end of paragraph 6). This was apparently in order to indicate that the situation escalated during the course of the incident. In his cross examination, the witness argued that grenades were tossed at the vehicles and that he saw an explosion with smoke, and could not know who tossed the grenades. Later, he said: "**It's only smoke, it's not a grenade... it's a type of bomb that doesn't explode. It only emits smoke**" (p. 1652, lines 1-5). And he also confirmed that he is a simple person who cannot distinguish between a tear gas grenade and a stun grenade (p. 1655, lines 3-5).

97. The witness **A. S.** confirmed that on that specific day there was nothing out of the ordinary except for the incident of the deceased's death. But according to his readings of the affidavits – apparently affidavits of primary testimony – he understood that there was anti-tank fire that day. And, as noted, there is not a single word about anti-tank fire in the affidavits (p. 1505, line 8 to p. 1506 / session of October 7, 2010). The witness later noted that he remembered that he wrote in his affidavit submitted to the court: "On that day, a live grenade was also tossed at us from the Palestinian side" (p. 1506, line 15 / same), and when the witness was asked when this occurred, he gave an even stranger answer:

"Answer: No, look, I don't know. You weren't at a sector like this. To come and say from here whether it was a grenade or an improvised rocket or that it was another weapon, whose name I don't know to say. I also have to say, I said, based on reading my affidavits since then. I can't come and tell you something that I remember. That I remember a fire mushroom or smoke mushroom related to this situation, on that day"

(p. 1506, lines 17-21).

In his testimony at the Military Police Investigation Unit, the witness noted "what I saw is what I said till now." That is, the witness mentioned in his testimony everything he wanted to say, and there he did not say a word about a grenade being tossed at the force – which everyone would agree constitutes a grave scenario.

98. The witness **Rabia** testified that he remembers that a grenade was tossed that day into the group of civilians, but added that he did not see the place from which the grenade was tossed. And he confirmed that he did not testify about this at the Military Police Investigation Unit, despite the

importance of the matter, and he had no explanation why he did not testify about this at the Military Police Investigation Unit (p. 910, lines 6-7; p. 910 line 19 to p. 911, line 5 / session of April 4, 2011).

- 99. Moreover, the witness **S. R.** testified that when there is an incident, it is recorded 24 hours. And if there is an incident of anti-tank fire or the tossing of a grenade, it is recorded and can be reconstructed (p. 885, lines 16-20/same). If so, the question arises: Why wasn't the recorded evidence presented that documented the tossing of the grenade?!! It is reasonable to assume that no grenade was tossed at all, and in any case the recording did not include an incident of a grenade being tossed.
- 100. It is reasonable to assume that if indeed a grenade had been tossed at the demonstrators during the course of the day, the plaintiffs' witnesses and the army would have been questioned about this at the Military Police Investigation Unit. Moreover, such an incident would have deterred the foreign demonstrators, especially in light of the fact that they were peace activists who advocated non-violent activity.

The time of the incident:

101. There are substantial contradictions in the versions of the defendant's witnesses pertaining to the time of the incident in which the deceased was hurt. According to the operations log, the incident in which the deceased was injured was reported at 5:00 PM, where, as noted, it was reported that the deceased was hurt by a rock that fell from the bulldozer. The witness **S. R.** testified in his affidavit that at 5:00 PM he received a report from one of the bulldozers that someone had been hurt (paragraph 11 of the affidavit). It seems that this version is the correct version, because it is consistent with the *Paskal* and with the operations log, while the version of **Y. P.**, according to which the incident occurred between the 1 PM to 2 PM (p. 1582, lines 14-18) is completely incorrect and contradicts the witness' own version (p. 1645) and testifies only to the witness' faulty memory and judgment. In any case, it also contradicts his testimony at the Military Police Investigation Unit.

The location of the body after it was hit:

102. In the revised writ of defense, the defendant argued in paragraph 38(B) that the deceased's friends approached the bulldozer and started signaling and shouting to the bulldozer operator to stop **after**

the body of the deceased was completely covered: "The bulldozer operator and his commander stopped immediately when they saw these young people and raised the bulldozer's blade and pulled back. After the bulldozer pulled back, the deceased was uncovered, lying on the ground and still alive. The deceased spoke to her friends and a few minutes later was evacuated to a hospital" [the bold emphasis is not in the original, A. H.].

A person who exercises his senses and logic when reading the defendant's wording of this paragraph can easily come to the conclusion that the paragraph lacks a factual basis in regard to the way in which the deceased's body was uncovered: The defendant speaks about the fact that the deceased was "completely covered" and then, when her friends and arrived and the bulldozer stopped and pulled back, "the deceased was uncovered, lying on the ground and still alive." If so, the question arises of how the deceased's body was uncovered, lying on the ground? The only logical answer is that the bulldozer dragged the dirt that was on top of her with the blade and then the deceased's body came into view.

The defendant's witnesses who testified in this context support this conclusion, because most of them who were asked about the photos **P/33** and **P/34** confirmed that **P/34** reflects the situation when the deceased's body was found after the incident, with no mound of dirt visible in front of or behind the deceased and her friends.

103. However, the version of the defendant's witnesses vis-à-vis the location where the body was found after the incident was not consistent and was described with substantial and irreconcilable contradiction. Y. P. was directly asked by an investigator at the Military Police Investigation Unit:

"Where were the deceased, the bulldozer and the pile of dirt located after you stopped the bulldozer?"

Answer: "I saw from inside the bulldozer that the deceased's body and the group of activists were in front of me and the pile of dirt was behind them. That is, the group of activists and the deceased's body were between the bulldozer and the pile of dirt. That's the situation I saw after I pulled back 20 meters"

(p. 2, line 23 to p. 3, line 2).

104. In court, the witness repeated his version that the deceased's body was between him and the pile and did not retract this version even when he was shown the version of Edward, who sat with him

in the vehicle. E. V. stated in paragraph 14 of his affidavit: "When we saw the place where the deceased was lying, we saw that she was lying beyond the pile of dirt, in a place where the bulldozer's blade hadn't reached at all. I think the deceased lay or sat in front of the pile, on the opposite side from us, and therefore the driver and I could not see her."

The witness Y. P. was asked: "Now, my focus is on the location of the body following the incident. Forget about what you saw and what you didn't see before the incident. I, my focus is on the location of the body. You told me in clear and unequivocal language that her body was in front of the pile of dirt. E., your commander, now comes and says – after what happened, that she was on the other side of the pile.

Answer: He thought. He didn't say, he didn't think. He also didn't tell me" (p. 1616, lines 17-21).

Y. P. did not retract his version and he had no explanation for the diametric contradiction between his testimony and that of Edward regarding the location of the body, despite the fact that he confirmed that they spoke to each other about someone being removed from under the dirt (p. 1618, lines 12-19). Y. P. had no explanation for the location of the body between the bulldozer and the pile of dirt (p. 1659).

The discovery of the body according to E. V.:

105. According to the witness **E. V.**, he saw the body for the first time after they instructed him to stop and they pulled back and it was **behind the pile of dirt** (p. 1697, lines 8-14 / session of November 4, 2010). The witness was presented with the version of **Y. P**., who saw the deceased's body between the pile and the bulldozer, and not behind the pile. And this was his answer:

"Answer: He can say what he saw. I'm saying what I saw"

(p. 1709, line 16 / same).

106. Contrary to Y. P.'s version, **E. V**. testified that he did not see them removing a body because they were far away (p. 1716, lines 13-20 / same), but retracted this reply and later in his questioning said, for some reason, that he did see them removing the body (pp. 1730-1732 / same).

The witness tried to give an explanation for the location of the deceased's body as it appears in photo **P/34**, where there is no mound or hole visible, neither in front of or behind the deceased. As noted, in his affidavit in paragraph 19, the witness referred to photos 25-27 and declared: "**I would like to note that the photos submitted present a distorted picture. The deceased as she was photographed in the pictures, was photographed after her friends had moved her. Between the bulldozer and the deceased was a pile of dirt that doesn't appear at in the photos.**" Under cross examination, the witness retracted this version – that he saw her friends moving her – and explained that this was his conclusion, but "they apparently moved" her (pp. 1735-1736 / same).

107. The witness **E. V**. was asked to explain to the court how he was able to see the body of the deceased behind the mound of dirt that remained 2 meters high, from a distance of 40 meters, and his response was: "When we were on the pile, tilted upward, we didn't see. When we backed up and the bulldozer became level, the terrain there was also not very flat. There might have been a slight upward tilt, so we saw her behind the pile" (p. 1730, lines 1-3 / same).

This response from the witness is completely illogical, despite his effort to persuade the court that he was at a higher vantage point than that of the pile, because he admitted that the place where he stood after backing up was not a mound and was flat terrain. And he did not use binoculars or any other instrument (p. 1731 to the bottom of p. 1732, line 8 / same).

- 108. As noted, the witness **Y. P.** retracted his [previous] version in which he [claimed that he] saw the deceased climbing, and he rejected the version according to which she stood in his path and tried to flee from him, [and then] curled up in the dirt and was buried. The witness said that he did not see anyone in his path, either in front or at the sides, and did not know whether there was someone behind the pile, and he had no explanation for the type of injury the deceased sustained, or for the location where she was found, between the bulldozer and the pile of dirt, as he claimed (p. 1658, lines 10 to p. 1659, line 3 / session of October 21, 2010).
- 109. In paragraph 12 of the affidavit of primary testimony, the witness **S. L**. testified that at a later stage he saw people approaching Y. P.'s bulldozer and saw the **deceased lying on the ground**. In court, the witness **S. L**. also testified that he personally did not see the circumstances of the deceased's injury, but was sure that his bulldozer was not involved in the incident (p. 1785, line 22 to p. 1786, line 3 / session of November 11, 2010), and did not see what the other bulldozer was doing during the moments prior to the incident, and **did not see the deceased's body or the foreigners**. And he

was concentrating on his vehicle and his work, and **his commander also saw whatever he saw**, **more or less.** When the incident in which the deceased was killed occurred, they instructed him to stop and pull back, and he first heard on the two-way radio that the deceased was hurt. **He pulled back to a distance of 60 to 70 meters and stood there**. According to his testimony, the other bulldozer and the *nagmachon* also pulled back with him to the same distance. They waited there until a Palestinian ambulance arrived and evacuated her (pp. 1785-1789 / same). Under reexamination, the witness confirmed that the other bulldozer was next to [his bulldozer] after it pulled back and was at a distance of 1.5 to 2 meters from it (p. 1812, lines 11-17 / same). On the other hand, he confirmed that he remembered seeing the situation that is visible in **P/34**, where three foreigners are taking care of the deceased (p. 1795, lines 7-10, same).

110. The witness **A. S**. did not say in his testimony at the Military Police Investigation Unit that he approached the place where the deceased's body was located and he said that the deceased **was lying on the ground on the eastern slope of the pile of dirt** without noting the height of the pile. According to him, after a group of people gathered, the second bulldozer did a reverse and he advanced in that direction. The first bulldozer pulled back 15 or 20 meters and he advanced the same distance and then he saw the "**critically injured person**" who "was **really buried inside the pile of sand**" (p. 1490, lines 4-20 / session of October 7, 2010).

The witness went on to explain:

Question: "Buried inside a pile of sand. When you tell me 'buried,' that means that dirt is covering her.

Answer: Not all of her, part of her. The upper part of her body still reacted. That is, her arms in an involuntary way. She had an injury to her nervous system.

That's what I understand"

(p. 1490, line 20 to p. 1491, line 2 / same).

The witness **A. S.** changes his version regarding the burial of the deceased in the sand and offers a different version later:

"Answer: No, I'll clarify. She wasn't buried. I saw the upper part of her body. And, of course, and she was inside a pileup of sand, and it's definitely possible that she was also paralyzed. I can't say what situation she was in when she was in the pile of sand. I can say

that I saw the upper part of her body, from the area of the lower belly and above" [the emphasis is not in the original, A. H.] (p.1491, lines 13-17 / same).

111. The witness **A. S**. was shown photos number 25 (**P/33**) and 27 (**P/34**), and he replied that these photos are coherent and correctly reflect the situation when the body was uncovered and her friends took care of her after the injury (p. 1492, lines 6-10 / same). The witness changed his version again after he saw the photos, noting that she was not lying on the ground and that her body was upright vis-à-vis the ground (p. 1498, lines 17-22 / same), and that he saw the upper part of her body. "**I** can say that I saw the upper part of the body. In regard to the lower part of the body, whether it was buried or not, I don't remember" (p. 1497, lines 16-18 / same).

Later, the witness provided a new answer, saying that the deceased **sat on the ground with her legs stretched out in front of her and her back straight, perpendicular to the ground** (p. 1499, lines 7-8 / same). Later, he again contradicted himself and claimed that he could not say anything about the position of her legs (p. 1507, lines 9-11 / same).

The witness added that this was the place where her friends ran to in order to offer her help, and the signs of blood from her mouth reminded him of the circumstances (p. 1492, lines 18-22 / same).

112. The witness **A. D**. gave various versions regarding the way they acted after the incident. One time he said that they advanced forward (p. 1167, lines 16-17 / session of April 6, 2011), and in another place he noted that "they backed up a little in order to allow assistance" (p. 1172, lines 4-5 / same), but he did not remember that they approached the place where the deceased's body was located (p. 1172, lines 6-10 /same). Later in the testimony, the witness did not remember what distance they advanced toward the place where the body was located, but estimated that it was in the range of 20, 30 or 50 meters, and they were in the path of the bulldozer that injured [her]. And in any case, from this place they could not see the deceased or know what her condition was (p. 1183 / same). The witness tried to explain the lack of memory by noting the difficult traumas he has experienced since that time. He said that he lost five soldiers at once in 2004 and, therefore, was unable to say anything about the group of foreigners there – not their identity, their age or number. He did not even remember what he ate for breakfast the previous day or what he did two minutes before his testimony (p, 1158, lines 13-21 / same).

113. This testimony of **A. D**. stands in complete and significant contradiction to what the witness said in his affidavit in paragraph 6, where he declared: "**At a certain stage, I noticed the foreigners congregating, and when we drew closer I saw the deceased lying on the opposite side of the mound the bulldozer had created in its work. This was already, of course, after she was hurt." His testimony in court also contradicts his testimony at the Military Police Investigation Unit, where he said: "We rode up to them with the** *nagmachon* **and saw that a young woman had been injured and she was lying on the ground behind the hill the bulldozer had created when it pushed the ground." (P/52, end of p. 1).**

114. The witness **S. R**. testified in paragraph 14 of the affidavit of primary testimony: "After receiving the report and after the D9 had pulled back, we could see the deceased lying **behind the pile of dirt** the bulldozer had created." On the other hand, he testified in court that the deceased was **lying at a place where you could not see a mound**, because according to his account **the bulldozer had flattened it** (p. 962, lines 1-2 / session of April 3, 2011).

The witness was shown photo no. 27 (**P/34**) and he confirmed that this picture reflects the absolute truth about the location of the deceased's body after she was hurt. The witness identified the deceased in a lying position, with her friends trying to help her, and the bulldozer after it had pulled back after hurting her (p. 962 / same). The witness added that he moved forward toward the spot where the deceased was injured. The witness was asked to point to the pile of dirt that the bulldozer flattened and he explained that the eastern part is not visible (p. 963, lines 5-10 / same). As we see in his cross examination, S. R. retracted what he said in paragraph 14 of the affidavit.

The witness was asked to mark on P/47 – which is actually the same picture as in P/34 – the pile of dirt that the bulldozer flattened. The witness marked a No. 1 on P/47 that he identified as the pile where the deceased was injured, the pile the bulldozer had flattened before pulling back.

"Question: It was also not as high. Great. And the pile where the deceased was injured, it's where you marked No. 1, but it depicts a situation after the bulldozer already flattened it, right?

Answer: Yes, after it pulled back.

Question: After it pulled back?

Answer: After it hit her and pulled back, and reported to me (talking together).

Question: And the body of the deceased was uncovered.

Answer: Yes.

Question: Then, when you arrived, you did not see a pile. The pile had already been

flattened.

Answer: It was here, part of it. He didn't clear. He didn't have time. He moved forward

and then saw her and pulled back, and he left the pile here. He flattened. In

order to flatten, you need space"

(p. 964, lines 4-13 / session of April 3, 2011).

He identified the tracks on the ground on the two sides of the bulldozer's path as they appear in **P/34** and **P/49** (p. 1019-1020 / same).

The position of the deceased's body:

- 115. Each of the defendant's witnesses told a different story in regard to the position of the deceased's body after the incident, and the versions were incompatible with one another. Clearly, the most reliable picture of the position of the deceased's body is the one documented in P/34. Here, we will review the testimonies of the witnesses in this context and seek to point out the contradictions between them.
- 116. Y. P. testified in court that he saw that they were removing from the ground "some sort of body, but I didn't see it" (p. 1587, line 4). And he added that he did not see the position of the body, whether it was buried in the earth, because he was at a distance of 30 meters and this was a blind spot (p. 1588, lines 8-13). He said later that they removed the deceased from under the bulldozer (p. 1595, lines 19-23) and afterwards he saw them lifting her "from under some body, from under the ground" (p. 1596, lines 1-2).

Later in the investigation, he provided another answer: that he saw a person with part of his body covered in dirt, and later he said that he thought the she was covered in dirt (p. 1614).

But he again changed his mind and said: "I saw a person, not covered in dirt. I saw that they were removing him from the dirt" (p. 1614. line 15). Later, he again did not see the position in which the deceased was lying on the ground.

117. The witness **E. V**. said that the deceased's body was visible and that she wore an orange jacket and jeans (p. 1700, lines 2-4; p. 1706. lines 16-21 / session of November 4, 2010). Later, he retracted this version and said that he did not see them removing the body because they stood far away (p. 1716, lines 13-20 / same). Later, he said that he saw them removing the body (pp. 1730-1732 / same) and that he saw her intact (p. 1733, lines 3-6 / same).

It seems that the version of E. V., who saw the deceased's body intact and that she wore an orange jacket jeans is reasonable and logical, and is consistent with P/34 because this photo, which was taken in real time just after the incident, shows the deceased intact and indeed wearing an orange jacket and jeans.

- 118. The witness **S. L**. testified in paragraph 12 of the affidavit that at a later stage he saw people approaching Y. P.'s bulldozer and saw the deceased **lying on the ground**. On the other hand, he retracted in court and said that he did not see the deceased either before or after the incident (p. 1787, line 23 to p. 1788, line 3 / session of November 4, 2010).
- 119. S. L.'s commander, the witness **A. S.**, provided various and strange answers to the question of the deceased's position after the incident: "The deceased was critically injured," "She was **really buried** inside a pile of sand" (p. 1490, line 20 / session of October 7, 2010). Soon afterwards, he suddenly said that she was not completely buried, just partly, and that "the upper part of her body still responded" (p. 1491, lines 1-2 / same).

The witness added: "she wasn't buried... she was inside a pileup of sand... I can't say in which situations she was in the pile of sand. I can say that I saw the upper part of her body, from the lower belly and above" (p, 1491, lines 13-17 / same). Indeed, when he was shown the photos P/33 and P/34, he noted that they accurately reflect the situation when the body was uncovered (p. 1492, lines 6-10 / same) and that she was not lying on the ground (p. 1498, lines 17-20 / same).

He noted that he saw the upper part of the body, and did not remember whether or not the lower part was buried (p. 1498, lines 14-18). And finally, the witness added another version: "The deceased sat on the ground with her legs stretched out in front of her and her back straight, perpendicular to the ground" (p. 1499, lines 7-8 / same).

We see that this witness provided every answer possible to the question of the deceased's position after the incident, and it seems that these responses from the witness can testify to his personality and willingness to provide answers to everyone without attributing any importance to whether they were logical or consistent with his previous versions. We can assume that this witness did not see the deceased at all from up close, and it is logical that he indeed pulled back and was not in a vantage point from which he could see the deceased.

- 120. In his affidavit, the witness **A. D**. testified that he saw the foreigners gathering and when he approached he saw the deceased **lying on the opposite side of the mound** the bulldozer had created (paragraph 6). In court, the witness retracted this testimony and said that he did not see the deceased prior to the incident and did not know the circumstances of the injury (p. 1166 / session of April 6, 2011), and that he did not know her condition after the incident (p. 1172 / same). The witness said he had undergone severe traumas and does not remember what he ate the previous morning and not even what he said two minutes ago (p. 1159, lines 13-21 / same).
- 121. From the wording of paragraph 14 of **S. R**.'s affidavit, we can understand that he saw from afar the deceased **lying** after the bulldozer pulled back. In court, the witness said that he looked through binoculars at a distance of 80 meters and could see the deceased **lying and there was no mound** because the bulldozer had flattened it (p. 960, lines 5-7 / session of April 3, 2011).

When he was shown the photo (P/34), he said that the picture reflects the position of the deceased's body after she was hurt and her friends helping her and the bulldozer pulling back (p. 962 / same).

It is reasonable to assume that this version by S. R. – that he saw the deceased through the binoculars in a lying position after the incident from a distance of 80 meters, without a mound of dirt at the site – is indeed the correct and reasonable one and is consistent with the reality.

Interim Summary and conclusions:

122. An analysis of the versions of the defendant's witnesses reveals substantial and diametrically opposed contradictions between them in regard to the position of the deceased's body after the incident. In light of these multiple versions of the witnesses involved in the incident – E. V. and Y. P. – it is difficult to determine what Y. P. saw and when, and each version he gave did not stand up and was contradicted by a new version that the witness himself gave in court.

- 123. It is reasonable to assume that the deceased was indeed lying on the ground after her body was uncovered, as S. R. saw her from afar through binoculars, wearing jeans and an orange jacket, without any pile near her, and also that Y. P. saw her near the original pile, which he flattened when he raised the blade in the pile.
- 124. The photos P/33 and P/34 reflect the reality of the body's location after the incident of being run over and this state of affairs is supported by some of the defendant's witnesses.

Reference to the photos (P/33) and (P/34):

- 125. The plaintiffs submitted as part of their evidence various photographs that were taken during that day, and the court only approved the submission of photos taken by Richard Purssel, and rejected other photos taken by a witness whom the plaintiffs did not summon to testify in court. There are two photos that document the moment after the injury to the deceased: In (P/33) she appears surrounded on three sides by three of her friends who were with her that day, including the witness Alice Coy, who appears in the middle, by the deceased's head, and two other friends on either side of her, trying to offer her assistance. In (P/34), the deceased appears lying on the ground, her friend Alice at her side to the left and another friend next to her, and a few meters in front of the bulldozer, with the blade raised about 50 centimeters above the ground. In (P/34), we can see signs of folds in the ground, tracks that remained in the path the bulldozer traveled. It would not be superfluous to note that (P/34) unequivocally shows that there is no pile of dirt by the place where the deceased was lying. During the hearing of evidence, these photos were presented to the defendant's witnesses and they were asked to address them.
- 126. The witness **Y. P.** was shown photo no. 25 (**P/33**) and he confirmed that the pile of dirt he spoke about might be the one in photo no. 25 (p. 1596, line 22 to p. 1597, line 4). Photo no. 27 (**P/34**) was also shown to the witness. In this picture, we see the deceased's friends offering her first aid, and a few meters away from her we see the bulldozer. The witness confirmed that he sees the folds of dirt in the photo on both the left and right side (p. 1597, line 21 to p. 1598, line 3).
- 127. The witness **S. L**. testified that when the bulldozer moves it leaves tracks on both sides. The witness was shown photo **P/34** and he confirmed that the traces of folds in the ground on the sides are from the bulldozer's tracks and that there are no folds in the middle because the caterpillar track did not

pass there. There are signs of the blade that dragged the earth as it backed up (pp. 1791-1792 / session of November 4, 2010). In court, he marked on **P/34** the area the witness was referring to in his testimony (p. 1793, lines 9-10 / same). The witness was asked to point to the pile of dirt that was between the bulldozer and the three foreigners who appear in P/34 as they offered assistance to the decease, and he confirmed that there is no pile of dirt whatsoever. He also remembered that he saw from afar the situation that appears in P/34, in which three foreigners are taking care of the deceased (pp. 1787-1788 / same).

The withdrawal to the rear after the incident:

In order to point out the contradictions of the defendant's witnesses, we also wish to discuss the testimonies of the witnesses in regard to the pullback after the incident.

128. Y. P. testified at the Military Police Investigation Unit that he pulled back one to one and a half meters, and then E. V. signaled to him to stop and later he pulled back to a distance of 20 meters. The witness testified in court that he pulled back 25 meters, perhaps more, and then saw signs 19 (p. 1301, lines 3-4 / session of October 21, 2010). On the other hand, in **P/36** he testified that he pulled back, saw that a number of people were approaching and asked E. V. to check what was happening, and that E. V. said no²⁰, and then pulled back about 15 meters and then saw people standing on the mound. We will note here that S. R. testified that he received the report about the injury from Y. P. when the latter was on the mound (p. 960 to p. 961, line 11 / session of April 3, 2011).

On the other hand, E. V. testified that the bulldozer stopped on the mound and later pulled back to a distance of 20-40 meters (pp. 1695-1697 / session of November 4, 2011). The witness rejected the possibility that the stopped a number of meters from the mound when they pulled back. According to E. V., they drove straight to a distance of 30-40 meters (p. 1697, lines 5-7 / session April 3, 2011).

The witness S. L. testified that after the incident, they told him to stop the work and pull back and he pulled back together with Y. P.'s bulldozer and the nagmachon and stood together at a distance of 60-70 meters (p. 1787 to the bottom of 1789 / session of November 4, 2010).

¹⁹ *Unclear – signals, tracks?*

²⁰ Unclear, might be missing word(s)

A. S. testified that after the incident a group of people gathered, Y. P.'s bulldozer pulled back 15 or 20 meters from the pile. He, S. A. 21, drove closer to the site of the incident and saw the deceased critically injured (p. 1490 / session of October 7, 2010). A. S. was, as noted, the commander of S. L., and the two of them were sitting in the same bulldozer and their versions on this matter are inconsistent and completely contradictory.

The version of S. L. – that his bulldozer did not approach the deceased's body – is supported by the testimony of S. R., who testified that the second bulldozer (of S. L. and A. S.) remained in the rear and did not move toward the body. S. R. added that he, as noted, received a report from Y. P. when they were on the pile and later Y. P.'s bulldozer pulled back 6-7 meters, while he (S. R.) advanced toward him and instructed him to pull back, and he indeed pulled back 40 meters.

We see that the witnesses' versions contradict each other, because the second bulldozer did not move closer to the site of the incident according to most of the witnesses, and there is a very significant disparity in regard to the activity of Y. P.'s bulldozer when the incident occurred and to what distant it withdrew.

Did they move the deceased?

129. The witness **E. V**. testified in an affidavit of primary testimony, in reference to photos 25 and 27: "The exhibited photos portray a misleading picture. The deceased, as she was photographed in the pictures, was photographed after her friends had moved her..." (paragraph 19). In his testimony in court, he again argued in reference to P/34: "Her friends had moved her from the site" (p. 1718, lines 13-14 / session of November 4, 2011). Later, he contradicted himself and argued that he did not see that her friends had moved her: "I'm not saying that they did or did not move her, I didn't see ... I said?" (p. 1736, lines 11-12 / session of November 11, 2010).

The witness A. S. testified in his affidavit that the deceased was behind the mound of dirt that was created from crushing the material the bulldozer had crushed (paragraph 12). Indeed, when asked in court about P/33 and P/34, he noted that this was the place toward which the deceased's friends ran in order to offer her assistance and the blood stains reminded him of this (p. 1492, lines 18-22 / session of October 7, 2010).

²¹ Apparent typo – should be A. S.

What killed the deceased?

130. As noted, the defendant argued in paragraph 38(B) of the revised writ of defense that the deceased was killed from "mechanical asphyxia" due to the accumulation of dirt piled upon her, and this conclusion is consistent with the testimonies of most of the defendant's witnesses, including Y. P. and E. V., who are the defendant's principal eyewitnesses in regard to the incident.

As noted above, S. R., A. D., Sh. R. and Pinky Zoaretz were not eyewitnesses to the injury to the deceased. As noted, S. R. and A. D. sat in the *nagmachon* at a distant position, 100 meters behind the bulldozer, and did not witness the incident. Sh. R. and Pinky Zoaretz received reports from the field, with Sh. R. sitting in the war room at the Liaison Unit and Pinky somewhere at the command headquarters. Therefore, the testimony of these witnesses is hearsay upon which no factual finding can be established. Still, what they were told about the incident by their subordinates is important in demonstrating that the version of the eyewitnesses who were part of the group that injured the deceased is a version that takes on various and strange forms that are incompatible and certainly inconsistent.

- 131. The operations log indicates that the deceased was killed by a rock that fell: "Apparently a rock fell from the Dubi." S. R. testified that he stood at a distance of 100 meters from the two bulldozers that day, behind them (p. 958, lines 1-2 / session of April 3, 2011). S. R. had an explanation for the circumstances of the incident. In his opinion, the deceased thought that the bulldozer saw her, but it turns out that it did not see her, and she did not have time to flee before it injured her. However, he personally did not see her being run over and did not see that the deceased hid behind a mound of dirt. However, he drew conclusions (p. 945, line 15 to p. 946, line 6 / same). He later testified that he advanced and found the deceased lying behind a mound (p. 946, line 14 / same). S. R. later added a different version based on his experience in tracking. The witness testified that he identified the signs of the tracks on the ground that appear on both sides of the bulldozer's path of travel, as seen in P/34 and P/49 (pp. 1019-1020). And based on these tracks, S. R., who is an expert in tracking, assumed that the deceased was injured by the blade of the bulldozer (p. 977, line 22 to p. 978, line 2 / same).
- 132. Sh. R. testified that he heard the story of the incident from the driver in the debriefings that were conducted after the incident. In the summary of the incident, their assessment was: that he that is, Y. P. "lifted a concrete block in the pile of sand, which fell on her" (p. 1103, lines 14-15 /

session of April 6, 2011), and later he also said: "<u>a concrete beam</u>, which fell on her" (p. 1104, lines 1-2 / same).

He confirmed that when the deputy brigade commander conducts a debriefing, he also goes into the field and sees the people who are involved (p. 1110, lines 6-10 / same).

133. Y. A. said in the beginning of his testimony that he was a member of a committee the army appointed, chaired by Major General Eiland (p. 1334, lines 7-9 / session of September 6, 2010) to investigate the circumstances of the incident in which the deceased was killed, and they reached the conclusion that the bulldozer "flattened and lifted a mound in order to enable what is called – a lookout" (p. 1328, line 11 / same).

The defendant's most senior commander in this case, **Pinky Zoaretz**, testified that after the incident he conducted an operational debriefing, during which he met with everyone who was involved in the incident, including the operators of the bulldozers, S. R. and Sh. R., and the soldiers of the operational force, and that the findings of his debriefing were that the deceased was killed **by the pile of dirt and debris that was there, and one of the concrete columns hit her, the bulldozer's blade pushed sand and a concrete column, and the column fell on her. That's what the witness heard from the operators of the vehicle (p. 1192 / session of July 10, 2011)**. The investigation was conducted prior to the investigation by the Military Police Investigation Unit and continued simultaneous to and overlapped with the Military Police Investigation Unit investigation.

Interim summary and conclusions:

134. The defendant presented its factual version of the incident in paragraph 38(B) of the revised writ of defense, but after hearing the evidence, other factual versions were presented that contradict the aforementioned version, such as: mechanical asphyxia from a pile of dirt, a rock fell, a concrete column fell and injured the deceased, a concrete block, a concrete beam, a mound and even the bulldozer's blade hit her. These were some of many testimonies of what transpired in this case, and the grave thing is that the conclusions drawn by S. R., Sh. R. and Pinky were based on things they heard from their subordinates, including Y. P. and E. V.

<u>Safety instructions for operating mechanical engineering equipment in a</u> limited confrontation and civilian safety instructions:

- 135. The plaintiffs based their original lawsuit, inter alia, on the argument of negligence, and they argued in the revised statement of claim that "the conduct of the bulldozer operator, and of the rest of the defendant's soldiers and commanders operating at the site of the incident, deviated from the standard of conduct measured by the test of a reasonable and skilled professional, also when taking into consideration the nature of the activity and the circumstances of the specific incident..." (See paragraph 25.)
- 136. The plaintiffs went on to present and explain in paragraph 27 of the revised statement of claim their arguments regarding the negligence attributed to the bulldozer operator and his commanders. They explicitly argued, inter alia, that "they violated the instructions of the procedure for operating the bulldozer (mechanical engineering equipment) in that they allowed the presence of people within the range of the bulldozer's activity" (paragraph 27.14). The plaintiffs also argued that they the soldiers and commanders did not distance the deceased and her friends from the site and/or stop the operation of the bulldozer until they were distanced from the site (paragraph 27.17).
- 137. In the framework of this case, the defendant submitted a certificate of privilege signed by the minister of defense as authorized under paragraph 44 of the Evidence Ordinance. In response to the submission of the certificate of privilege, the plaintiffs submitted a petition to the Supreme Court on March 17, 2008 to disclose privileged evidence (Misc. Criminal Petition 2468/08). Inter alia, the plaintiffs argued that there is great importance in disclosing the civilian procedure for operating the D9 and for disclosing the military procedure, particularly when the plaintiffs' principal argument is negligence under the Torts Ordinance and it is clear that a deviation from the standard of caution must be judged in the light of these procedures. On the other hand, the defendant agreed to disclose the civilian procedure for the D9, but in regard to the military procedure for operating the bulldozer it argued that "this is an internal and classified IDF work procedure that cannot be disseminated and part of which cannot be examined at all, and for this reason the certificate of privilege was issued and remains in effect."
- 138. The wording of the certificate of privilege is very general, and incidentally, **the number of another civilian case is mistakenly cited (Civil Lawsuit 1409/02 in Tel Aviv District Court)** (see paragraph 2 of the certificate attached to the petition).

- 139. After submitting the petition, the sides held discussions and the following documents were subsequently provided to the plaintiffs:
 - A. The civilian procedure for the D9.
 - B. The operations log from the day of the incident, from 2:21 PM to 12:48 AM.
- 140. In regard to the military procedure for operating the bulldozer, the defendant's representative, attorney Noemi Zameret from the State Prosecutor's Office, informed the plaintiffs' representative on April 1, 2008 that among the privileged documents under the certificate of privilege is "the internal work procedure of the IDF" professional instruction for mechanical engineering equipment in the Engineering branch 12.1. "This is an internal and classified IDF work procedure that cannot be disseminated and in part cannot be examined, and for this reason the certificate of privilege was issued and remains in effect..." (Appendix C of the update notification of April 15, 2008.)
- 141. In the defendant's response to the petition for disclosing evidence and the update notification, it argued that the IDF work procedure according to which the bulldozers operate during operational activity is privileged and cannot be examined, but it agreed that chapter 8, concerning "safety instruction for operating mechanical engineering equipment," could be examined.
- 142. In a discussion held in the Supreme Court on April 27, 2008, the defendant's representative, attorney Noemi Zameret, declared to the court that in the military procedure there are chapters that are not relevant and are not privileged under the certificate of privilege, "however, there are chapters that are privileged, that are privileged under the certificate of privilege." Later that day, the court issued its ruling on the rest of the questions that remained in dispute, and ordered that certain sections in chapter 5 of the military procedure be disclosed, and instructed the defendant to allow the plaintiffs' representative to examine chapter 8, authorizing the plaintiffs' representative to write notes for himself from it. The procedure in dispute was indeed submitted to the court and marked P/31. The submission of the revised statement of claim came, as stated, inter alia, following the petition to disclose evidence, which the plaintiffs submitted against the certificate of privilege issued by the minister of defense.

- 143. The petition to disclose evidence, the update notification the plaintiffs submitted on April 15, 2008, the protocol from the discussion of April 24, 2008, the response on behalf of the respondent, and the ruling of the court on the petition were submitted as an exhibit and marked <u>P/41</u>.
- 144. The witness Shalom, an investigator at the Military Police Investigation Unit, asked on March 27, 2003 at 10:00 AM to examine manuals from the training base on operating mechanical engineering equipment in limited conflicts. On March 31, 2003, as part of his handling of the case, he examined four manuals from the training base on operating mechanical engineering equipment, and after studying them he wrote a memo that same day entitled Study of Mechanical Engineering Equipment Booklet:
 - "1. On the aforementioned date, I studied four mechanical engineering equipment booklets on operating a bulldozer in a limited conflict.
 - 2. In all four of the booklets, there is no mention of the safety range of people around the bulldozer. There is also no guidance about steering the bulldozer away from hazards or people during its operation.
 - 3. The booklets were not attached to the investigation file..."

Shalom's memo was attached as an update notification to the Supreme Court, submitted on behalf of the petitioners in P/41. It turns out that on that day – that is, March 31, 2003 – **Shalom** questioned Y. A. at 2:35 PM at the Chief Combat Engineering Corps (South) and the latter, who served as the head of the training station for about two years and was responsible for all of the combat doctrine, told him explicitly that the safety instructions of the vehicle are in a file of IDF safety instructions [and] "that no one should be standing within about 10 meters of the vehicle when it is operating (P/24, lines 5-8). Nonetheless, Shalom did not change his mind, did not go back to the manuals and definitely did not re-investigation any of the witnesses – including Y. P. and E. V. – who already gave testimony, about the content of the safety manual.

- 145. As noted, arguing that it was irrelevant, the senior investigator from the Military Police Investigation Unit, **Shalom**, did not deem it appropriate to obtain the relevant manuals or make use of them in any way for the purpose of the investigation, neither he nor his two assistances Oded and Elad.
- 146. According to the plaintiffs, after receiving the procedure **P/31** following the petition for disclosing evidence, it turned out that there are many instructions, in both the civilian and military procedures,

emphasizing the importance of safety and prohibiting the endangering of human life. The civilian procedure is the procedure provided by the bulldozer's manufacturer (p. 849, lines 3-5 / session of April 3, 2011) and which was adopted by the army via the Technology Unit (pp. 1299-1300, session of September 6, 2010).

- 147. The plaintiffs argue that the main theme we see both from the Technology Unit and from the military procedure (Mechanical Engineering Equipment in a Limited Conflict), which comprises an integral part of the manuals, and which the witness Shalom regarded as irrelevant documents is that the operators of heavy vehicles must beware of harming people who are in the vicinity of the vehicle, and that it is absolutely prohibited to come near the vehicle at various distances during the hours of the day and the night. At a later stage, we will address the meaning of the concept "Mechanical Engineering Equipment in a Limited Conflict" and the extent to which this procedure applied to the circumstances of the incident that is the subject of the lawsuit. However, for the purpose of continuing the discussion, we assume that this procedure applied to the circumstances of the incident, and we ask to draw the court's attention to the following directives:
 - A. Directive no. 5.4.6.3.4, which instructs: Make sure "that no people are within a range of 10 meters around the objective and the raised element."
 - B. Directive no. 5.5.3.3 states: "The commander of the team will guide the operator when driving and when working with the blade."
 - C. Directive no. 5.6.5.3, which instructs: "Shaving the ground is done while driving slowly (in first gear), with an overlap between the crushing by the caterpillar tracks (between the tracks) and the blade in the ground."

D. Paragraph 8.2: Guiding the operator:

a. Before starting the vehicle, the operator will make sure there are <u>no people or</u> <u>equipment</u> under it that might be hurt. The operator will also conduct an external check for cracks and leaks...

E. Operating mechanical engineering equipment:

- a. . . .
- b. Near the work site, there should be an evacuation vehicle with a radio device or telephone that enables calls for assistance.
- c. At the work site, there must be at least one first-aid kit.
- d. ...

- e. While working with the mechanical engineering equipment, there should be no one near it except for someone who is there for the purpose of his job. This person must inform the operators of his presence at the site and will be within the range of safety:
 - 1. <u>During daytime, no person should be present within a range of less than 20</u> meters in front of / behind the vehicle or in back of it or within a range of less than 5 meters at the sides of the vehicle.

[The emphasis is not in the original, A. H.]

- 148. The defendant's witnesses, including investigators from the Military Police Investigation Unit, were questioned at length about this procedure, and they provided contradictory and varying responses regarding the application of this procedure to the work of the bulldozer on the Philadelphi Route. We will review these testimonies below and point out the peculiarities and contradictions in the witnesses' testimony contradictions in their own testimony and contradictions vis-à-vis the versions of the other witnesses.
- 149. As noted, the person who examined the manuals that include the aforementioned procedure from the training base was the senior investigator **Shalom**. However, the procedure was not taken and none of the members of the investigation team used it for the purpose of investigating the incident. The investigator **Elad** did not receive any instruction regarding these booklets, did not read them and did not question any of the witnesses in light of them, despite the fact that he was the investigator who collected the largest amount [of testimony] from the witnesses, including the foreign witnesses (p. 581, lines 10-17; pp. 590-591, lines 1-7 / session March 17, 2010). The witness added and confirmed that he did not know that among the directives there was a directive pertaining to the presence of people around the vehicle (pp. 720-721 / session March 22, 2010; see also D/2, D/4 and D/5, which include 12 statements collected by the investigator Elad). In cross examination, the witness Elad admitted that it was important for him to know these procedures in order to question the operators and the other soldiers in the field about whether they knew the procedures and whether they acted in accordance with them (p. 728, line 17 to p. 729, line 11 / session of March 22, 2010).
- 150. The witness **Shalom** was asked in cross examination why he did not question the bulldozer operators and the commander of the operations force about the procedure, and why the bulldozers

were operated when there were demonstrators around them. Shalom's answers took on various and sundry forms:

- "Q: So, what you're telling me is that the state of war overrides this booklet.
- A: No. I didn't say [this].
- Q: Then what [did you say]?
- A: I said that there are situations that make what is written superfluous.
- Q: Make superfluous what is written. And it is permissible to operate this, despite the fact that there are people in close proximity.
- A: Correct.
- Q: And in your view, there is no criminal negligence when, according to the manufacturer's instructions, it is forbidden to operate this when people are present.
- A: Yes, in my view there is none.
- Q: In your view there is none.
- A: None."
- (p. 1412, line 13 to p. 1413, line 1)

The witness **Shalom** was asked about the definition of the concept of "limited conflicts" and he responded that there is a definition but that he does not know its meaning, and in his view these directives were advisory and not compulsory:

"A: The difference is that you give instructions about everything. You can give an instruction that nothing should be within 10 meters of a tank because when you turn the gun turret someone would be hurt. But during warfare, when someone runs at you with a Kalashnikov, you can't say – just a minute, I won't operate the gun turret because it's not written in the instructions"

[the bold emphasis is not in the original, A.H.] (p. 1415, lines 18-21).

The witness later made other and contradictory arguments:

"Q: There was no reason to question them in light of this procedure. Why?

A: Because you can't in a situation, <u>in a war zone or area defined as an area of warfare or conflict</u>, you can't say that no one should be near the vehicle, when people are roaming around the vehicle. There's a situation of war and there's a situation of peace. There's Norway and there's Israel and there's the Gaza sector, and there is a date and there is a specific hour, and what happens at one moment does not happen at another moment. That's the nature of the world.

Q: And on that day, in your view, there was war there.

A: There was an area of limited conflict there. I don't determine war.

Q: There was a limited conflict?

A: There was a conflict.

O: Not a limited one?

A: I don't know to tell you. You're getting into fine points of law with me.

Q: What conflict was it? Limited or not limited?

A: I don't know to tell you.

O: You don't know.

A: You're cornering me; I don't know to tell you.

O: Okav."

(p. 1417, lines 6-22 / session of October 7, 2010) [the bold emphasis is not in the original, A.H.]

151. Therefore, we see that the head of the investigation team did not know the definition of "limited conflict" and did not know to say whether or not it was an area of limited conflict. His answers regarding the procedure and the extent to which it applied to the circumstances of the incident were confused at best, taking on various and sundry forms. However, in any event, the procedure that requires keeping a distance from people near the vehicle was not relevant in his view. He refused to answer whether there was a war there and regarded the posing of this question as constituting a political viewpoint! (p. 1418, lines 8-14 / session of October 7, 2010).

Later, the witness abandoned his interpretation of the nature of the conflict that took place there and argued that this procedure contains things that are inconsistent with pure logic, and that he did not

act as a robot and that "... I utilize all of my senses - sight, hearing, touch and I exercise **common sense**²²..." (p. 1419, lines 8-10 / session of October 7, 2010).

Shalom, adding more and more confusion, also argued that, to the best of his knowledge, there is no procedure that defines the operation of the bulldozers in the situations in which they were actually operated. But he quickly retracted and argued that some of it is not relevant, such as directives 5.4.6.3.4 and 8.3e because they were in a war zone. However, directive 8.2a is indeed relevant (p. 1421, line 16 to p. 1422, line 12 / session of October 7, 2010).

- 152. The witness Y. P., the driver involved, was asked in court whether he knows the minimal distance at which a person is permitted to be near the vehicle while it is working, and he responded that according to the safety directives it is forbidden to come within 20 meters of a vehicle from any side. (p. 1642, lines 5-15). This indicates that this witness believed that the procedure did indeed apply in the circumstances of the case.
- 153. The witness **A. D.**, surprisingly, testified that he knows there are safety directives for the bulldozers, but that he was never apprised of them. In his view, this does not pertain to the area of his profession. The witness added that working with the bulldozer when there are people within 5 meters is not being cautious. However, at a distance of 15 meters, it is okay. (pp. 1192-1193 / session of April 6, 2011).
- 154. It became clear from **S. R.**'s testimony in court that despite the fact that he was the senior commander of the force operating at the site, he was unfamiliar with the safety procedures for operating the bulldozer, and did not know to say at which distance a civilian is permitted to be within the range of the bulldozer's work. In his view, it is at least 8 meters or 5 meters. In any event, it is forbidden to endanger the lives of civilians who are present within close proximity to the vehicle. When the witness was asked why, therefore, he permitted the bulldozers to continue the work when the foreigners were present in a range of less than 5 meters, he responded that he employed means of crowd dispersal and instructed the vehicles to keep away from them (pp. 1009-1012 / session of April 3, 2011).
- 155. Sh. R. was asked in cross examination about the safety instructions of the Engineering Corps that prohibit being present near the vehicles when in operation and he confirmed that it is

66

²² "Common sense" appears in English in the Hebrew text.

prohibited to be near the vehicles while they are working and he did not remember what the instructions are (pp. 1111-1113 / session of April 6, 2011). However, he did not give directives to the bulldozer operators on this subject: "We did not give directives because people were not supposed to be there (p. 1112, line 21 / session of April 6, 2011). Later, the witness admitted that he did not know there are instructions for mechanical engineering equipment vis-à-vis civilians (pp. 1114-1117 / session of April 6, 2011).

A section of an Engineering Corps procedure was read to the witness **Sh. R.** that states: "During the operation of mechanical engineering equipment, no one should be near it, except for someone who is there for the purpose of his job." In his response, he said that this pertains to soldiers and added that "this does not pertain to operational activity; in a place where there is shooting all day, it is not relevant" (p. 1115, lines 8-9 / session of April 6, 2011).

- 156. The defendant called two witnesses on its behalf **Colonel S. L.** and **Y. A.** who were supposed to shed light on these safety procedures and the extent to which they applied in the circumstances of the case. However, it is very difficult after hearing their testimony which was characterized by inconsistencies and contradictions to determine a clear finding in regard to the application of the safety instructions to the circumstances of the case at hand, because they spoke in a number of voices and did not present a clear and consistent line of testimony and thought on this issue.
- 157. The witness **Colonel S. L.** testified in court that at the time of the incident, in 2003, he served as the head of the training base for training operators of heavy vehicles the IDF deploys in operational activity, including operators of bulldozers like the one involved in the incident that is the subject of the lawsuit. During the course of his cross examination, he was presented with the testimony he gave at the Military Police Investigation Unit at March 26, 2003, when he testified that "during the course, we do not teach them to contend with situations of this type, where there are demonstrators near the **D9**. These are subjects that are learned, perhaps, at the sector, threats and problems. I assume that this was not the first incident of this type" (p. 838, lines 9-12 / session of April 3, 2011).

The witness confirmed that he said these things and that he stood behind them (p. 838, lines 13-16 / session April 3, 2011). The witness added that [instructions for] operating the vehicle are collected in four chapters, with the first chapter addressing the **operation of the vehicle in an operational** setting (p. 849, lines 12-19 / session of April 3, 2011). And this chapter is in the general part,

within Mechanical Engineering Equipment in a Limited Conflict. In his view, a limited conflict means fighting in the area of Judea and Samaria and Gaza. (p. 854, lines 11-17 / session of April 3, 2011). This witness believed that this procedure pertains primarily to military entities (p. 855, line 7 / session April 3, 2011). But when section 8.3, subsection E(1) was presented to the witness, where it states "During daytime, no person should be present within a range of less than 20 meters in front of or behind the vehicle, in back of it, or within a range of less than 5 meters at the sides of the vehicle" (p. 885, lines 20-22 / session of April 3, 2011), he was asked to address the meaning of the words "no person should be present" and he replied that he did not write the directive and did not know whether this pertains to a civilian or a soldier. However, he speaks during training about military forces. Later, the witness agreed: "Does this apply to civilians or to military personnel? I assume it speaks about a person, any person. I assume. (p. 857, lines 1-2 / session of April 3, 2011)

The witness was asked what the operator should have done when the deceased was present within a range of 20 meters, and despite the fact that she was forbidden to be there, and he responded in a clear way: "Assuming that this entailed a hostile element, I assume that he would also strike a blow with the intention of causing injury. Since it did not entail a hostile element, I assume that his duty was to stop" (p. 857, lines 16-17 / session of April 3, 2011).

158. The second witness summoned by the defendant in this context was Colonel **Y. A.**, who served as the head of the Combat Doctrine Department of the Engineering Corps and was responsible for writing the combat doctrine and the means of warfare and the preparedness of the Engineering Corps. (His testimony at the Military Police Investigation Unit - P/24). **Y.A.** confirmed that part of the directives refers to excavators and another part to bulldozers (p. 1314, lines 17-18 / session September 6, 2010). The testimony of this witness at the Military Police Investigation Unit on March 31, 2003 was submitted and marked as **P/24**. In this testimony, the witness explicitly notes that "**the safety directives of this vehicle, like all of the armored combat vehicles in the IDF, can be found in the collection of IDF safety directives, where it is written, to the best of my recollection, that no one should stand within 10 meters of the vehicle while it is working**" (P/24, page 1, opposite line 5). When this testimony was presented to the witness in court, the witness tried to retract the content of the words, and initially claimed that he did not give testimony at the Military Police Investigation Unit, but retracted when shown his signature on the testimony (p. 1296 to p. 1297, line 1 / session of September 6, 2010). And he later tried to explain that in addressing these directives he was only referring to the operational aspect – that is, to soldiers and

not to civilians (p. 1300, lines 1-11 / session of September 6, 2010) and that safety directives written in the army are intended mainly for routine [operation] and training, and that things are conducted differently in wartime (p, 1301, lines 15-20 / session of September 6, 2010).

159. In his testimony at the Military Police Investigation Unit (P/24), the witness testified explicitly about the application of the procedure to limited conflicts:

> "At the beginning of the conflict, in October 2000, we received a directive from the previous IDF chief of staff to write a combat doctrine for operating mechanical engineering equipment in a limited conflict. The first booklet, in its initial version, was submitted to us in December 2000 and has since undergone many revisions and adaptations in accordance with the changing situations on the ground. These directives were combined with the IDF safety directives and are called professional directives in chapter 4, the armored bulldozer in volumes A and B, as well as the operation of mechanical engineering equipment in a limited conflict. It is important to note that in all of the combat doctrine that was written, there was no _____23 of the fact that the commander's hatch - the place for the bulldozer driver's commander - was open and the bulldozer commander would stand with his head outside to look out at the territory. In the current conflict"

(P/24, p. 1, opposite lines 9-19).

The witness was asked to explain the meaning of the words "limited conflict" and he responded: "A limited conflict, unlike the previous doctrine that dealt with a previous war, a limited conflict is a limited conflict in the military language. It is to fight in areas that are areas in which there are buildings, bombs, snipers, other threats that are a bit different" (p. 1304, lines 4-6/ session of September 6, 2010).

The witness added that these directives were combined with the IDF safety directives – the armored bulldozer, volumes A and B, and these volumes are in the Military Police Investigation Unit file, and this is the doctrine (p. 1304, line 15 / session of September 6, 2010).

The witness explained that "in war, there are no civilians around" – that is, not around the vehicles (p. 1306, lines 7-8 / session of September 6, 2010).

²³ The blank line is in the original.

In court, the witness was shown his testimony at the Military Police Investigation Unit (**P/24**) on page 2, where he addresses "**those around it**" and responded that he indeed confirms what is written and what he signed (p. 1305, line 17 to p. 1306, line 15 / session of September 6, 2010), where it states:

"Under the supervision of the operational forces in the area, and when it is necessary to conduct engineering activity, such as clearing, for example, the engineering team conducts the clearing activity, and the navigation of the vehicles and protection of those around it, including soldiers²⁴ or civilians, is under their authority" [the emphasis is not in the original, A. H.].

160. The witness was asked to explain why in his testimony at the Military Police Investigation Unit he spoke about civilians and soldiers present around the vehicles, while in court he only referred to soldiers, saying that civilians do not need to be near the vehicles. The witness confirmed saying these things, on the one hand, but again explained that "in the army, we don't write combat doctrine that looks at civilians; in a war zone, there are no civilians. There are no civilians. If someone is present there, this indicates that he is hostile. There are no civilians by definition. It is also impossible to write a doctrine that addresses animals or birds or something else.

When you write the doctrine, you're writing doctrine for war" (p. 1308, lines 14-17 / session of September 6, 2010).

The testimony of this witness was characterized by inconsistency regarding the application of the doctrine he wrote. On the one hand, he was the person who wrote the procedure, and the things written in the procedure speak for themselves and do not require interpretation. That is, the procedure refers to keeping a distance from people in a limited conflict. On the other hand, the witness attempted to qualify the things stipulated in the procedure, as if they were intended for routine, training and preparing for war (p. 1313, lines 15-18 / session September 6, 2010) one time, and another time he tried to place the responsibility for implementing the directives on the operational force that was present at the site (p. 1322 / session September 6, 2010).

161. The witness was asked to read the definition of a limited conflict in the manual, where it states: "In the framework of a limited conflict, the Engineering Corps conducts many missions that demand a wide range of professional specializations that are unique to here. Companies,

70

²⁴ The Hebrew word used here usually means "cells" – as in terrorist cells, but apparently here it refers to small groups of soldiers. In the next paragraph (160), the usual word for "soldiers" is used.

platoons... comprise a central element for executing missions in the framework of various actions, dealing with bombs, building... clearing land, demolishing structures and other missions. The correct activation of frameworks of mechanical engineering equipment by the commanders in the various sectors is a condition for the success of the missions and for this depends on knowing the frameworks of mechanical engineering equipment... for the way to perform the missions. The work of the mechanical engineering equipment is primarily based on unwritten doctrine, and it is impossible to write about the way to operate a mechanical engineering equipment vehicle by commanders in the field. The professional instructions include... are part of the professionalism required on this subject" (p. 1318, lines 8-17 /session of September 6, 2010).

- 162. The witness was asked whether this combat doctrine is irrelevant to the conflict that occurred on the route, and he responded:
 - "A: Under all these things, after all everything that is written here, we also do in training. Then, in training, the safety instructions are sacred, period. There are margins of safety for the vehicle, there is someone guiding you from the ground, the commander is situated above. This is training. In war, things change. Why? Because the commander is inside, they're shooting at you, there are bombs, you act in accordance with the situation that is developing opposite you.
 - Q: And you, in your view, on March 16, war was being waged on the Philadelphi Route.
 - A: On the Philadelphi Route, there has been war since it began.
 - O: Excuse me?
 - A: On the Philadelphi Route, there is war all the time.
 - Q: There is war all the time.
 - A: All the time, there is war. I was there dozens of times, and each time I entered with an armored vehicle, with protection. They shot at me and they shot all the time at that post where I was located.
 - O: Since when is there war?
 - A: Since the intifada started.
 - Q: Since the route exists.

- A: All the time, yes.
- Q: And there is no situation in which ...

Attorney A. Brom: He didn't say 'since the route exists.' He said – 'Since the intifada started.'

- Q: And till today, the situation hasn't changed.
- A: No, today there is no army there.
- Q: There's no army there. But in March 2003, there was a war.
- A: If I remember well, yes."
- (p. 1319, line 5 to p. 1320, line 3 / session of September 6, 2010).
- 163. After giving this answer, the witness was asked, therefore, to say what the relevant directives were in a state of war, and he responded:

"All of the professional directives [were] in accordance with the conduct on the ground, in accordance with the movement of the situation on the ground (p. 1320, lines 6-7 / session of September 6, 2010) and "when you go to war, you adapt the directives to the state of war, [to] what is happening on the ground"

(p. 1320, lines 13-14 / session of September 6, 2010).

The witness also added that there is no written doctrine:

- "A: There is no doctrine for anything in the army, except for this doctrine, which is the relevant doctrine.
- Q: Which is the relevant doctrine."
- (p. 1320, lines 16-17 / session of September 6, 2010)

According to the witness:

"In the briefing given to people when they come to a war zone, they are told – guys, keep your eyes open, there are terrorists there, there are bombs, and be ready to fire at anyone in the area there. That's the definition, okay? The operator and the commander don't think at all about innocent civilians who are there. It's not their role at all. Okay?"

- (p. 1321, lines 2-5 / session of September 6, 2010).
- 164. And in the end, the witness gave a completely different answer, according to which this procedure is indeed relevant to the area in which the incident occurred:
 - "A: A limited conflict is a conflict that is not vis-à-vis an army, an army similar to our army. Instead, it is against various types of cells that act differently than we act. It's not an army versus an army in a regular way.
 - Q: I understand. And in the form of Gaza, in Rafah, it's not an army. They are cells and there are also civilians.
 - A: There are cells that are not organized in a structure, like another army is organized.
 - Q: And therefore it matches the definition of a limited conflict.
 - A: That's part of the definition. A limited conflict, in its other aspect, is to exercise a small part of the means you possess, and not all of it, because you cannot"
 - (p. 1331, line 20 to p. 1332, line 4 / session of September 6, 2010).

The halting of the work:

165. The witness **Y. P.** agreed that the presence of the foreigners that day was dangerous, since they were approaching the bulldozers and trying to prevent them from carrying out their assigned mission by jumping in front of the bulldozer's blade or standing in back of it (p. 1642, line 16 to p. 1644, line 5 / session of October 21, 2010). The witness confirmed that they continued to work despite the close proximity of the foreigners to the vehicles and did not halt the work, continuing non-stop until the deceased was killed. The witness was asked to explain the fact that the work was not halted and he responded that he was only a soldier and could not stop the work because he received instructions. The witness also said that he complained to his commander that there was a problem in continuing to carry out the work and that they were liable to hurt the foreigners, but "in the army, you have to continue the work" (p. 1646, line 20 / session of October 21, 2010). You have to keep away from them, but under no circumstances stop the work, because this was war (p. 1648, lines 14-17 / session of October 21, 2010). We also refer the court to the summary of the deputy battalion commander on that day regarding the fear of creating a precedent if the work were to be stopped.

166. In the deputy battalion commander's summary, which is in the operations log, entered at 18:20 – that is, after the incident – it is noted that the injury to the deceased was "unavoidable" and that "We must not, as an army, allow such incidents to disrupt the ongoing mission. The problem of the foreigners is known in this area and as a policy we do not stop activity due to the presence of foreigners in this area in order to avoid creating a dangerous precedent" [the emphasis is not in the original, A. H.].

In his court testimony, **Sh. R**. testified that they must "**continue the work, no stopping, it is operational activity**" (p. 1077, line 14 / session of April 6, 2011), and that stopping the work was not an option from his perspective, and that a mission must be completed through the end. Later in the testimony, he noted that his thinking was that stopping the work was liable to lead to intensified activity by the organization (pp. 1077-1078 / session of April 6, 2011).

Therefore, **Sh. R**.'s statements indicate that his considerations in not stopping the work that day were aimed at not creating a precedent all along the way, rather than considerations of endangering lives [of soldiers] if the activity were to be postponed until the foreigners were removed or prevented from reaching the site. Indeed, today he thinks otherwise, **that this should have been dealt with in advance** – that is, they should have been prevented from entering at the Erez checkpoint or at other places (pp. 1090-1092 / session of April 6, 2011).

The witness Colonel **Y. A**. testified that in regard to stopping the work, this decision should have been a decision made by the commander on the ground, the operations commander, who makes the decision and is authorized to order a halt to the work (p. 1322 / session of September 6, 2010).

167. The witness **S. R.** testified that he did not stop the work because of the presence of the foreigners, and not because he feared creating a precedent. And when he was shown the words recorded in the operations log, he responded that he does not know what the person who said this intended (p. 922, line 7 to p. 923, line 12 / session of April 3, 2011).

The witness **S. R.** was asked whether he turned to his commander and complained about the tangible danger in continuing the work and he confirmed that he had indeed wanted to stop the work, had turned to his commander (Sh. R.) and had received a directive to employ means of crowd dispersal. And he indeed employed means of crowd dispersal and because of the necessity of the mission, they continued with it (p. 930 / session of April 3, 2010).

- 168. The witness **A. S**. confirmed that the foreign activists hindered them in their work and they had to move to another place, However, they did not discuss the possibility of stopping the work because of the foreigners' presence because "**there is no such thing in the military parlance**" (p. 1515, line 8 / session of October 7, 2010), because stopping the work does not exist as an option (p. 1516, lines 1-4 / session of October 7, 2010).
- 169. **E. V.** confirmed that they spoke with S. R. about the difficulty of continuing to carry out the work, but did not ask to stop it because there was a mission and it was necessary to execute it.
 - "A: We didn't ask to stop. That is, I don't know how to say it. It was an important mission. It wasn't like we were just playing because we wanted to, that we felt like working or didn't feel like working. We came to carry out an important mission. All of the questions, what we had, we asked the commander in the *nagmachon*, we said that there are people, it's dangerous, I think several times. He said work very slowly, with the utmost caution so you won't hurt people, and so we continued to work.
 - Q: So from your perspective, it was a directive that you had to obey, and you absolutely could not stop the work.
 - A: I repeat, the mission was important. Not just playing around. We couldn't just stop when we wanted to. There was a mission and we had to carry it out"
 - (p. 1743. line 21 to p. 1744, line 6 / session of November 4, 2010).

He added that on that day he heard the personnel from the other team complaining on the two-way radio that they were hindering their work, and they also complained (p. 1725, lines 1-7 / session of November 4, 2010).

170. The witness **A. D**. was asked why he, as the officer responsible, did not initiate a call to S. R. asking him to stop the work in light of the danger posed to the foreigners by continuing the work of the bulldozers when they were so close to the vehicles. The witness excused himself by saying "**I don't initiate. Apparently, I don't initiate**" (p. 1172, lines 21-22 / session of April 6, 2011) and did not deem it appropriate to turn to S. R. and he relied on his judgment (pp. 1191-1193 / session of April 6, 2011).

171. It is important to note that the work was eventually stopped at 5 PM, only after the incident of injuring the deceased. This is instructive because if the work were indeed so essential from an operational perspective and could not have been postponed, then it would not have stopped at 5 PM.

> Interim Summary and conclusions:

- 172. This lawsuit is, as noted, a lawsuit of bodily damage, based on the argument of negligence, and the plaintiffs explicitly argued that the bulldozer operator violated the civilian and military operating procedure for the bulldozer during the activity that took place on March 16, 2003 on the Philadelphi Route. Ostensibly, these procedures are supposed to include instructions pertaining to the standard of caution in operating the vehicle.
- 173. The plaintiffs contend that both the civilian procedure ("CAT D9R bulldozer description, operation and maintenance," published by the Technological Unit, Motorized Systems Department / Armored Combat Vehicle Branch) and the military procedure do indeed include safety instructions for operating the vehicle. These instructions are aimed at protecting human life and limb from negligent and haphazard operation of the vehicle. Both of them inherently contain such instructions and it seems that the military procedure is stricter and demands more exacting safety conditions than the civilian procedure. We refer the court to the instructions on page 6 of the civilian procedure, which warns the operator that he should make sure that the area surrounding the bulldozer is clear of people before starting the engine because this could cause severe damage and even death. There is also a warning to "make sure that the path of travel is clear of people and equipment" and that "failure to follow these instructions could lead to bodily harm and even death." The Technological Unit integrated the civilian procedure from the manufacturer into the military procedure (p. 1304 / session of September 6, 2010).
- 174. In regard to the military procedure, as noted, the state submitted a certificate of privilege that covers this procedure, but after the petition was submitted it agreed to disclose the safety procedures. And in the wake of the court's decision, it was required to disclose additional sections of the procedure.
- 175. Both the civilian procedure that was adopted by the Technological Unit and the military procedure (Mechanical Engineering Equipment in a Limited Conflict) comprised an integral part of the manuals that Shalom reviewed and saw at the Chief Engineering Officer's Headquarters, according

to his memo from March 31, 2003 – after most of the defendant's witnesses had already given testimony – and he decided that they were not relevant, despite the fact that he did not know the definition of a "limited conflict" and did not know to say whether a limited conflict was being conducted on the Philadelphi Route.

- Y. A., it can be said despite the contradictions revealed in their testimonies that the procedure (P/31) is indeed relevant. Colonel S. L., who served as the head of the training base for teaching operators of heavy vehicles the IDF deploys in operational activity, including operators of bulldozers like the bulldozer that was involved, testified that the army does not teach the operators at the training base about such situations in which demonstrators are standing around a bulldozer (p. 838, lines 9-16 / session of April 3, 2011). However, he agreed that the instructions are all included in four booklets, with one chapter addressing the operation of the vehicle in an operational setting (p. 849, lines 12-19 / session of April 3, 2011)
- 177. The witness agreed that the instruction in section 8.3, subsection E(1), which prohibits the presence of a person within 20 meters in front of or behind the vehicle, or within a range of 5 meters from the sides of the vehicle, applies to any person and not only to a military person. (p. 857, lines 1-2 / session of April 3, 2011).
- 178. The witness **Y. A.**, who served as the head of combat doctrine for the Engineering Department at the time of the incident, said in his testimony at the Military Police Investigation Unit (**P/24**) that the safety instructions for the vehicle prohibit standing within 10 meters of the vehicle when it is working (P/24, p. 1, line 5). The witness confirmed that a limited conflict is one that takes place in areas where there are buildings, bombs, snipers, etc. (p. 1304, lines 4-6 / session of September 6, 2010). The attempt by this witness to qualify the applicability of the procedure to the Philadelphi Route because it is in a war situation should be rejected, because the witness also agreed himself that a limited conflict was taking place on the route and that this was part of the definition (p. 1332, lines 2-3 / session of September 6, 2010).
- 179. Therefore, we see that both the civilian procedure and the military procedure are aimed at setting a standard of caution for operating the bulldozer, with the authors of the two procedures guided by a concern for human life and limb. A reasonable operator of the vehicle, and especially a reasonable and level-headed commander, should have stopped the activity of the two bulldozers when civilian

demonstrators were present at the site in close proximity to the operation of the vehicles, and when the continuation of the vehicles' operation was liable to cause bodily damage to them, if not death. It seems that the authors of both of the procedures anticipated such situations according to the foreseeability test and sought to prevent the operation of the vehicles in order to avoid injuring or damaging those around the vehicle.

- 180. The military force did not consider stopping work that day due to the fear of creating a precedent in which the foreigners succeed in halting the clearing work on the route. The bulldozer operator and his commander were aware of the danger in continuing to carry out the work and came close to harming the foreigners during the course of the day. They complained to the commander in the field, S. R., who passed along the message to Sh. R. but the latter decided that there was no option of stopping the work from his perspective, due to the fear of creating a precedent. This is arrogant behavior and not the behavior of a level-headed commander who is responsible for human life; a reasonable commander in these circumstances would have calmly given thought to and weighed the protection of civilians in the field in light of the chances and dangers in continuing the execution of the work. In the circumstances of the case, the commanders and soldiers should have at least stopped the work, even if only for a short time, until ensuring that the foreigners were away from the route that day either by moving them off or even by detaining them in order to protect human life. And thus, the life of the deceased would have been saved.
- 181. This behavior is typical of a commander with rigid thinking, a commander who does not exercise reasonable judgment and makes his decisions capriciously rather than weighing all of the circumstances in a practical and reasonable way.
- 182. Most of the senior commanders who testified in this case, including Pinky Zoaretz, Sh. R. and S. R, testified that they had known about the problem of the foreigners for several months. The subject had been discussed and they had formulated instructions for contending with their presence. These instructions were not disclosed during the course of the trial, but according to the criteria that apply in circumstances of activity by armed forces vis-à-vis civilians and demonstrators (and not a situation of armed conflict), the forces operating in the field and their commanders are obligated to act with caution and reasonableness, and to make a maximal effort to protect basic rights, including honoring the right to life and limb, and the right to freedom of expression and demonstration.

 Therefore, it would be only reasonable for the army to define procedures that would allow for an appropriate balance between the army's needs to carry out its missions, on the one hand, and

respect for human rights, on the other hand. In this case, it seems that the army violated this balance and preferred not to stop the work – even for a short time – due to the fear of creating a precedent. It ordered that the clearing activity be continued contrary to the safety procedures, without making a serious attempt to drive the foreigners away and, ultimately, horrible and irreparable damage was caused due to the violation of the directives of the procedure.

Exiting the vehicles is absolutely prohibited according to a situation assessment that is not based on intelligence information:

183. All of the defendant's witnesses testified that they were forbidden, in an unequivocal and immutable directive, to leave the vehicles due to fears that such disembarking would enable soldiers to be ambushed and harmed.

The witness **Sh. R**. addressed the prohibition on leaving the vehicles which was imposed on the soldiers participating in the mission due to fears for their lives. He argued that "our situation assessment was that someone was using them, so that we would exit the vehicles [and] they would open fire at us and hit us." Later, he revised his statement, saying that it was his own assumption of the situation:

- "Q: This was your assumption of the situation.
- A: Mine, not ours. My own.
- Q: This was your assumption of the situation.
- A: Situation assessment.
- Q: There was a situation assessment that in the specific case...
- A: Because in the past they drew us out in this way, and this occurred.
- Q: Allow me. You're telling us this there was a situation assessment [misspelling] that day that the foreigners were serving as instruments for whom? For terrorists?
- A: The assessment was mine. Instrument is not the right word. I'll redefine it, with your permission. [The assessment was] that other elements, whose aim was to harm IDF forces there, would exploit this situation. They would take up positions on the roofs of the homes; that was my situation assessment. Consequently, I didn't allow, and there is no permission to go out of the vehicles, for one of the soldiers to go

down to try to catch someone, to arrest him, in order to deter the others so that they would leave. So this was not done, because we knew that people are waiting in ambush on the roofs to attack that person who leaves the vehicle"

```
(p. 1061, line 21 to p. 1062, line 12 / session of April 6, 2011).
```

When asked when he made this situation assessment, he responded that this was done throughout the entire day and also previously:

"A: This situation assessment, first of all, a situation assessment is carried out all the time. Every day a situation assessment is conducted, and every hour. In this case, personally. Specific to this incident, this is how I assessed it"

```
(p. 1062, lines 18-20 / session of April 6, 2011).
```

Later, he was asked whether this assessment was based on an intelligence report, and he responded:

"A: In terms of an intelligence report during that period, I don't remember whether there was. But sniper fire was always there. This situation assessment did not come out of nowhere, because incidents happened in the past and we had a lot of experience in this matter. Because there are always warnings of sniper fire. Even about snipers who came from particular places as mercenaries there. And one such [mercenary] was caught in the media"

```
(p. 1063, lines 9-13 / session of April 6, 2011).
```

He testified that they spoke about the foreigners in weekly and monthly situation assessments. They analyzed the methods and clarified the subject in regard to their presence and the need to avoid harming them (p. 1064, lines 1-2 / session of April 6, 2011).

184. The operations log also refers to a case in which the foreigners entrenched themselves on top of the yellow house – in the summary of the deputy battalion commander, at 6:20 PM on March 16, 2003: "The foreign people were removed and the work was completed." The plaintiffs' witnesses also described situations in which the bulldozers retreated at the last moment and saved them from bodily harm (paragraph 11 of the Gregory's affidavit; end of p. 71 to the bottom of p. 72 / session of March 10, 2010; pp. 527-529 / session of March 17. 2010).

> Interim summary and conclusions:

- 185. All of the defendant's witnesses repeated again and again the mantra that disembarking from the vehicles on the route was absolutely prohibited, except for the most extreme cases. However, it seems that this situation assessment was not based on specific intelligence information, was not reasonable in the circumstances of the case and, in any event, it is inconceivable that the army could not find a practical solution for the presence of demonstrators on the route on both the legal level and the operational level. As noted, Pinky Zoaretz tried to convince the court that there was an order from the GOC [Southern Command] forbidding entry to the route, but since this order which is tantamount to legislation was not presented, it can be assumed that there was no such order; perhaps this was because there was no justification to issue such an order, or perhaps this was because the army was negligent in failing to issue an order forbidding entry to the route, or for that matter, to the Gaza Strip.
- 186. In regard to the operational level, it is inconceivable that the army could not find a practical solution for contending with civilians on the route that would ensure the continuation of the military activity according to its urgency, on the one hand, while respecting human rights in a way that would be less harmful and destructive, on the other hand. As noted, the senior commanders testified that the issue of the foreigners had already been raised three months prior to the incident. And the inaction in contending with this phenomenon of foreign demonstrators is inconceivable: The demonstrators came to the route without the army being able to prevent their entry to the route during activity or to remove them soon after their entry there. As mentioned, Sh. R. noted in the operations log that lessons should be drawn from the incident in order to prevent their entry to the Gaza Strip. Without agreeing to Sh. R.'s approach, if the army had forbidden the foreigners' entry to the Gaza Strip immediately after encountering them for the first time, it is possible that we would have been spared this incident and the life of the young woman would have been saved without injury.

Discussion of the Opinion of the Experts Asban and Manshuri

187. The plaintiffs argued at length in their summaries about the evidentiary damage they suffered as a result of the failed and negligent work of the investigation team assigned to investigate the circumstances of the incident, and the failure caused by the defendant's agents in moving the vehicles from the site of the incident and returning them to the base after the incident. The plaintiffs contend that the best evidence was a visit to the site of the incident immediately after it occurred,

when the vehicles were still in their places and the location of the body could be determined, and that the defendant should bear the responsibility for the resultant failure in collecting this evidence in real time.

- 188. Without detracting from the arguments the plaintiffs have presented in this context, they will seek below to conduct a discussion of the expert evidence that each of the sides submitted to the court. The plaintiffs submitted on their behalf an opinion by an expert in safety and accident investigation, Mr. Asher Asban, while on the other side, an opinion was submitted by Mr. Yoram Manshuri, an expert on behalf of the defendant. The two opinions are based on theoretical assumptions, and both were conducted in "laboratory" conditions, which are incredibly far from the conditions in the field, where the incident occurred.
- 189. Most of the opinion of Asban, the expert on behalf of the plaintiffs, is based on the training manual "CAT D9R Bulldozer Operation and Maintenance," which incorporates the manufacturers' written instructions and instructions for IDF mechanical engineering equipment operation, including safety instructions and activation. The manual was submitted in the framework of the plaintiffs' evidence.
- 190. The expert Asban cited in his opinion (p. 6) selected quotations from this manual, such as, for example, the need to make sure that the path where the bulldozer is working is clear of people and equipment, and that the area around the bulldozer is clear of people before starting [the vehicle's engine] and the obligation to keep all of the people away from the bulldozer and from the area where the bulldozer is working, as well as the obligation not to operate the bulldozer until after reading and understanding the warnings and instructions noted in the operation manual.
- 191. In addition, the expert relied upon the instruction booklet "Mechanical Engineering Equipment in a Limited Conflict" (P/31), which includes explicit instructions for operating the bulldozer in a limited conflict: [The operator] must make sure that no people are within a range of 5 meters in front or in back of the vehicle, or 20 meters from the sides of the vehicle. And when the vehicle lifts a load, [the operator] must make sure that no people are within a range of 10 meters from the raised bucket. And when the vehicle lifts a load, [the operator] must make sure that no people are within a range of 10 meters from the raised bucket.

. .

²⁵ Numbers should be reverse.

²⁶ Hebrew says "target" – Translator assumes it's a misspelling (one letter different in Hebrew)

- 192. In his opinion, the expert addressed the subject of the field of vision both that of the operator and that of the commander of the vehicle, and in the summary chapter (p. 10 of the opinion), he makes substantive determinations regarding the negligence of the defendant's agents. The key finding is that according to the vehicle's operating instructions it is completely forbidden to work within a distance of 5 meters from people. And in any case, the vehicle's operator is forbidden to push a pile without making sure what is behind it.
- 193. In his testimony, Mr. Asban reinforced the findings in his opinion. Thus, for example, he testified that "in the position where the *nagmachon* and the two D9s, the two bulldozers, were standing, they could not see the deceased if the deceased was behind the pile of dirt" (p. 657, lines 11-12 / session of March 22, 2011). The expert went on to note that the bulldozer driver could have prevented the killing of the deceased (p. 661, lines 9-11 / session of March 22, 2011) if the force had made sure to follow the safety instructions.
- 194. The expert also determined that after the army installed armor on the bulldozer this further impaired the field of vision, which was already limited. But the army did not provide any solution that could have improved the field of vision after installing the armor (p. 671, line 22 to p. 672, line 3 / session of March 22, 2011).
- 195. The expert again emphasized in his testimony that "it is forbidden for this vehicle to work in close proximity to people in any situation" (p. 684, lines 11-12 / session of March 22, 2011).
- 196. On the other hand, the defendant submitted an expert opinion on its behalf by Major Yoram Manshuri, who served from 1999-2010 as the head of mechanical engineering equipment in the Technological Division of the land forces branch. Already here, we wish to note that this opinion is riddled with very substantial flaws, to the extent that its findings should be rejected for the following reasons:
 - A. Manshuri testified that he participated in the project of armoring the vehicle (p. 1080), and that he is **not an expert in the work of mechanical engineering equipment** (p. 1265, lines 4-5 / session of September 6, 2010), and the operation of a vehicle like the bulldozer involved **is not in his field of expertise**, and he is **not an authority on the subject of operating vehicles** (p. 1214, lines 1-2 / session of September 6, 2010)

- B. The expert started from the assumption that the deceased was standing at a distance of 15-20 meters from the vehicle and **could not tell the court what authoritative source he was relying upon in this matter** (p. 1232, lines 1-10 / session of September 6, 2010)
- C. The expert could not provide a response to [the question of] where the deceased came from prior to being run over by the vehicle (p. 1238, lines 15-16 / session of September 6, 2010)
- D. The expert not only did not know where the deceased stood and where she came from; in his understanding, the bulldozer was pushing a mound of dirt and there was no mound previously, and he also **did not know what the distance was between the bulldozer and the mound!!** (p. 1240, lines 18-19 / session of September 6, 2010).
- E. The expert admitted that he did not know where the deceased was standing, also when the bulldozer began to move and push the pile of dirt, as he claims, and he gave an even more peculiar response in regard to the stopping distance:
 - "Q:Do you know whether the pile of dirt was at a distance from the bulldozer before it came?"
 - A: No. I understood that the bulldozer pushed a mound of dirt. That's what I understood.
 - Q: Pushed a mound of dirt.
 - A: Yes.
 - Q: And then, when it started to push a mound of dirt, what distance did it travel?
 - A: I don't know. It could be tens of meters, I don't know.
 - Q: Don't know. You also don't know where she was standing when the bulldozer started to push the pile of dirt.
 - A: Don't know."
 - (p. 1240, lines 14-22 / session of September 6, 2010)
- F. The expert noted in his testimony that "we didn't ask where she was standing, because if they had seen her, they would have said. They apparently did not see her" (p. 1241, lines 5-6 / session of September 6, 2010). These words of the expert clearly testify to the flawed

- factual basis on which his opinion relied and reflects a basic error in understanding the incident in which the deceased lost her life.
- G. Little importance should be attributed to the findings of the defendant's expert for two additional reasons: First, the findings of the expert Manshuri are based on a simulation conducted at Kerem Shalom, in an area whose characteristics are different than those at the site of the incident (end of p. 1228 to p. 1231 / session of September 6, 2010). Secondly, he defined the simulation of the location of the bulldozers based on the recollections of the eyewitnesses seven years after the incident, and he did not review or crosscheck [these recollections] with the testimonies of the eyewitnesses at the time of the incident and did not watch the Paskal (p. 1285 / session of September 6, 2010). Even more surprisingly, the expert responded that the simulation of the incident of the bulldozer hitting the civilian, which appears in Appendix A of the opinion on p. 17, included distances between the vehicles, both lengthwise and widthwise, that were based on the words of the witnesses who participated in the simulation, and they told him the distances "approximately" and all this nearly seven years after the incident. And he did not compare this data with their testimonies at the Military Police Investigation Unit. (pp. 1249-50 / session of September 6, 2010).
- H. In section 16 of his opinion, the expert gave his view regarding the field of vision results at various heights, starting at ground level (zero) and going up to 1.8 meters above the ground, and in alternative F, lowering the members of the team by 10 centimeters and testing at ground level. The basic assumption in the six alternatives that remained constant is that the deceased's position for the purpose of the testing was one of lying completely on the ground that is, where the deceased is not at any stage in a standing, kneeling or bending position. The witness Manshuri confirmed this under cross examination and added that he had no evidence indicating that she was lying on the ground (pp. 1256, lines 15-21 / session of September 6, 2010).
- I. This basis, which the expert used to write his opinion, has no support in the evidentiary material: None of the defendant's witnesses testified that the deceased was lying on the ground, and no one testified that he saw her in the few moments prior to the injury. In regard to the plaintiffs' witnesses, some of them testified that the deceased knelt and sat on her knees when the bulldozer started to push the pile, and when the bulldozer reached her she climbed onto the pile and her head was above the top of the pile, and she even looked toward the bulldozer's cabin. Both the plaintiffs' witnesses and the defendant's witnesses testified about the deceased's lying position after the incident, when the bulldozer pulled back. And the exhibits (P/33 and P/34) support this with absolute certainty.

- In light of these things, the findings of the expert in section 16, with all its alternatives, are theoretical and detached from the circumstances of the actual incident.
- J. The expert Manshuri, despite serving as the head of mechanical engineering equipment in the Technological Division of the land forces, which is the army's Technological Unit- did not devote even a single word in his opinion to a substantial point pertaining to the operating instructions of the bulldozer, and particularly the training manual published by the Technological Unit. He also did not address the booklet of directives written in the army on "Mechanical Engineering Equipment in a Limited Conflict." An examination of the booklet, which was submitted by the plaintiffs, clearly indicates that it was composed by the Technological Unit, where the witness worked as the head of the mechanical engineering equipment department for 11 years. How is it that this witness does not know these instructions? Does Mr. Manshuri have the answers?!
- K. Manshuri testified in court that he is not familiar with the safety conditions for operating the vehicle – neither the civilian nor the military ones: "I'm not familiar with this. What I do know is that it is forbidden to start working when there are people. What I know is that the bulldozer started to work several kilometers previously" (p. 1281, lines 15-16 / session of September 6, 2010). And later, when asked how far away people must be, he responded: "I don't know. As far as I remember, [in] the instructions from Caterpillar, which provides safety instructions, it doesn't appear. If there are, they are instructions from the Engineering Corps" (p. 1281, lines 9-18 /session of September 6, 2010).
- L. Moreover, Manshuri testified that the instructions pertaining to contact with a civilian population are not familiar to him, despite the fact that they are at the very heart of the procedure. However, on the other hand, the witness admitted that the army uses this vehicle to demolish homes (p. 1243, lines 13-14 / session of September 6, 2010), and the army knows the danger entailed in operating the vehicle when civilians are near due to the limited field of vision (p. 1217 and also p. 1242 / session of September 6, 2010). The witness' response regarding his unfamiliarity with the instructions about keeping a distance from people did not hold up for very long, and he retracted his testimony and testified that what he remembers is that when the bulldozer starts to work, [the operator] must make sure that there are no people (p. 1281, lines 11-19 / session of September 6, 2010^{27}).

²⁷ Typo in Hebrew

- 197. The expert Manshuri admitted in his testimony that if the *nagmachon* were deployed perpendicularly to the bulldozer during its work, as portrayed in pictures 1 and 2 (pp. 1261-1262 / session of September 6, 2010) **P/26**, then the commander of the *nagmachon* could have provided a better view to the bulldozer operator, warning him of the presence of the deceased and preventing the accident. That is, if the *nagmachon* had changed its position to a place that offered a better view of the bulldozer's blind spots, then he could have seen any obstacle in the bulldozer's path.
- 198. Moreover, the expert confirmed that during the Second Lebanon War, the army operated the D9 via remote control, with three cameras installed on the bulldozer's roof. The cameras were designed for operating the vehicle remotely and also broadcast to a control system located at a particular distance (p. 1224, lines 3-10 / session of September 6, 2010). The expert also admitted in his testimony that, in principle, it is possible to install a camera that could see both sides of the vehicle, and that it is possible to install an additional one that rotates and shows 360 degrees, which could see objects in front of the blade (p. 1267, lines 2-14 / session of September 6, 2010). However, the expert argued that this option is not realistic and imposes a burden on the vehicle's operator (p. 1268, lines 5-6 / session of September 6, 2010). The witness was then asked whether the commander of the vehicle could engage in this task and occasionally look at the screen of the cameras and warn the operator about obstacles and people in the vicinity of the bulldozer. The witness agreed that this could help, but in his view the commander must look "to a distance and look for threats...!" because his job is to command the vehicle and he "would not bother to look next to the blade" (p. 1272 / session of September 6, 2010), and he looks near the blade and could not look at the camera's screen.
- 199. This explanation does not meet the test of logic, because the commander can look at a split screen that has room for more than three pictures. However, he later admitted that the commander could indeed do this, especially since part of the job of the vehicle commander is to guide the operator (p. 1305, lines 8-11; p. 1267, lines 16-19 / session of September 6, 2010).
- 200. The expert went on to note in his testimony in court that following the incident in which the deceased died, the army installed cameras. However, he claimed that this was not effective and later noted that the camera indeed provided a solution that was very limited in his view (pp. 1280-1281 / session of September 6, 2010).

- 201. The witness Manshuri confirmed that he did not hear about the existence of sensors that are installed on such vehicles, which are designed to warn of objects the vehicle is approaching (p. 1274, lines 13-18 / session of September 6, 2010).
- 202. To summarize the testimonies of the experts, we wish to note that the two experts agreed, in fact, that the bulldozer's work in close proximity to people was absolutely forbidden under the army's safety procedures and that the accident could have been prevented if the commander of the *nagmachon* had changed its position on the ground and warned the bulldozer about the dangers that that the bulldozer's commander and operator could not see. Moreover, the army had solutions available for contending with the blind spots that it was aware of. [These solutions] were relatively inexpensive, and even if they were expensive, the cost would be negligible in comparison to the loss of human life.
- 203. We wish to also add that the helplessness exhibited by the army, which three months prior to the incident knew that the foreigners had arrived in the area where the bulldozers were working, and did not adopt any minimal means of precaution to contend with the vehicles' limited field of vision, especially after they were armored, establishes, in fact, broad negligence. The army could have installed cameras; the army could have installed a sensor that warns of objects; the army could have provided more monitoring and warning; the army could have repositioned the vehicles in order to deploy a vehicle whose main job would be to warn against harming civilians. An army that is capable of developing technological systems for operating a bulldozer via remote control, could certainly have installed sensors and cameras to warn of dangers and thus provide the bulldozer with a better picture.

The Normative Basis:

Constitutional Torts:

204. As noted, the plaintiffs argued that the defendant deprived the deceased of her right to life – which is the ultimate right – in violation of the Basic Law: Human Dignity and Liberty. In regard to the basic law's ramifications for residents of the territories who file lawsuits in Israel, see the words of the honorable president (retired) Barak in the Adalah case.²⁸

²⁸ The Adalah case (HCJ 8276/05, 8338/05, 11426/05 Adalah et al. v. Minister of Defense).

205. The plaintiffs argue that they are entitled to receive compensation for the damage they suffered as a result of the state's actions, even under the assumption that there was no negligence in its actions.²⁹ That is, when a constitutional right is violated, it is sufficient to prove that the event occurred – in this case, there is no dispute about it. It only remains for the court to assess the damage. In other words, since this entails a fundamental right that has a higher normative status than the Torts Ordinance or the Civil Damages (State Liability) Law, the defenses that exist at a lower normative level should not be applied to basic legislation.

The right to life in constitutional law in Israel:

206. The right to life is a basic constitutional right, accorded to every person. This right is closely connected to the principle of the sanctity of life, which is an integral part of the Israeli system of justice. The constitutional status of this right is anchored in the paragraph on basic principles in the Basic Law: Human Dignity and Liberty, which states: "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free..."

In addition, the right to life is anchored in article 4 of the Basic Law: Human Dignity and Liberty, which is worded as follows: "All persons are entitled to protection of their life, body and dignity."

International human rights law:

207. The right to life found expression in international human rights law in two conventions that the State of Israel has signed and ratified:

[Article 6 of] the International Covenant on Civil and Political Rights (1966) instructs that:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

²⁹ See and compare: HCJ 2665/98 **Nahum v. State of Israel**, Piskei Din 52(2), 454, pp. 460-461; HCJ 688/81 **Migadeh Ltd. v. Minister of Health**, Piskei Din 36(4), 85, p. 97; Civil Appeal 6296/00 **Kibbutz Malkiya v. State of Israel**, Piskei Din 59(1), 16, p. 23; Civil Appeal 9185/03 **Tenenbaum v. Haaretz Publishing**, Piskei Din *Imisspelled* 58(1), 359, pp. 364-365.

[[]misspelled] 58(1), 359, pp. 364-365.

30 See Request for Civil Appeal 5587/97 Attorney General v. John Doe (a minor), Piskei Din 51(4) 830, 850, where the court discussed the status of a minor's right to life.

- 208. The words that are written in General Comment No. 14 of the UN's Human Rights Commission regarding article 6 above clarify the importance of this right and also emphasize that it may not be violated, even during a situation of public emergency:
 - ".. the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency."
- 209. From this firm assertion it is clear that there can be no foundation for arguing that the security situation the IDF was contending with at the time exempts the defendant from the basic liability for the lives of civilians.

And in a similar spirit, article 6 of the Covenant on the Rights of the Child (1989) also declares:

- "1. States Parties recognize that every child has the inherent right to life.
- 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

And article 38 (4) of the covenant states:

"In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

210. Here too, there is the consistent approach that protecting human life, and the obligation to adopt practical means in order to ensure that this right is not violated, also applies, and even more so, during a time of armed conflict. Even if we accept the defendant's argument that Israel is in the midst of an armed conflict, this does not exempt it from the obligation to strictly maintain the right to life. And this includes taking all measures available to it to protect the civilian population from the repercussions of the armed conflict.

International humanitarian law:

211. As an occupying force and as the effective ruler in the territories, the State of Israel is obligated to ensure the well-being and security of the residents of the territories. This obligation is anchored in

article 42 of the regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land (1907) (hereinafter: "the Hague Regulations"), which states:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

212. Article 46 of the Hague Regulations instructs the signatories of the convention that:

"Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."

213. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) anchors the right of protected civilians to life and emphasizes that this right cannot be denied under any circumstances. Thus, article 27 of the convention states:

"Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights... They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof..."

- 214. It should be emphasized that this article is a clear humanitarian article, and there is no dispute that the State of Israel is obligated to fulfill it.
- 215. According to article 11 of the Basic Law: Human Dignity and Liberty, all of the governmental authorities are obligated to respect the right of every person to protect his life. This means that there is an **obligation to act** to protect the life of all persons. See in this context Aharon Barak's book Interpretation in Law Constitutional Interpretation (Nevo, 1994), p. 365.
- 216. International law also recognized the approach that the right to life imposes a positive obligation on the state, as we will elaborate below.
- 217. According to the Israeli legal system, international law constitutes part of the internal law (and applies subject to contradictory legislation). In addition, according to the "presumption of suitability" the courts are required to interpret internal law, as far as possible, in line with Israel's

international obligations, as expressed in conventions to which Israel is a signatory and customary international law.

- 218. This approach leads to the conclusion that "within the human rights protected under the Israeli legal system (for example, the right to life and bodily integrity), it is also possible to discern a positive component of an obligation to fight against the violation of the protected values by individuals." (Yuval Shani "My Home is Not My Fortress: Violence in the Family as a Type of Forbidden Torture" <u>Hamishpat</u> 7 (5762) 151, 187).
- 219. In addition, the plaintiffs sought to establish their lawsuit on various civil wrongs in the Torts Ordinance, including the torts of negligence and assault, and the violation of a statutory obligation.

Emergency situations and proportionality:

- 220. An emergency situation does not mandate a special measure of reasonability. An emergency situation is one of the circumstances that define the ways of reasonable conduct. The activity of the army forces in the Gaza region is subject to and operates according to the rules of international law, which define principles and guidelines for conducting warfare and protecting the lives of civilians. The plaintiffs argue that the test of proportionality should be applied here, as addressed by the Supreme Court in the case of the Public Committee³¹ and in the Adalah case,³² so that there are no "black holes" and the state's fight against the hostile Palestinian organizations is not conducted in a normative vacuum, but is conducted according to rules and laws.³³
- 221. I think it is appropriate to begin the arguments in this context by citing the instructive words in the ruling by former president Barak in the targeted killing case: "There is a well-known saying that when the cannons fire, the muses fall silent. Cicero expressed a similar view in saying: 'in times of war, laws are silent' (*silent enim leges inter arma*). These sayings are regrettable. They reflect neither the existing law nor the desirable law. (See: Re: Application Under s.83.28 of the Criminal Code [2004] 2 S.C.R. 248, 260.) It is when the cannons fire that we especially need laws (see HCJ 168/91 Murkus v. Minister of Defense, Piskei Din 45(1) 467, 470; hereinafter the Murkus case).

³¹ HCJ 769/02 The Public Committee Against Torture et al. v. Government of Israel et al., published in Nevo, sections 61 and 62.

³² HCJ 7052/03 Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Interior, paragraph 74 of the ruling.

³³ See also HCJ 1730/96 Sabih v. Commander of IDF Forces in the Region, Piskei Din 50(1), 353, 369.

Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law according to which the state must act. There are no 'black holes' (J. Steyn, Democracy Through Law: Selected Speeches and Judgments 195 (2004). In our case, the law was determined by customary international law regarding armed conflicts of an international nature. Indeed, the state's struggle against terrorism is not conducted 'outside' of the law. It is conducted 'inside' the law, and with tools the law provides to the democratic state." (HCJ 769/02 The Public Committee Against Torture et al. v. Government of Israel et al., published on the Nevo website, sections 61 and 62 of the ruling.)

222. In all of the situations in which fighting is conducted against hostile elements, the rule is that injury to innocent civilians must meet, inter alia, the principle of proportionality. Similarly, Justice Haim Cohn said: "The moral weapon is no less important than any other weapon, and perhaps is even more important – and there is no moral weapon more effective than the rule of law." 34 The military court of appeals ruled in another context: War, as a phenomenon, has always been rife, as noted above, with ugly acts that accompany war activity, but are not necessarily an essential part of it. From a legal and moral perspective, a clear distinction must be made between the use of force required to execute the permissible military mission – in a proportional way, derived from the circumstances of the fighting – against combatants and the abuse of force against a civilian population."³⁶ The value of "purity of arms" in the IDF Spirit³⁷ clearly presents, in unequivocal language, the soldier's obligation to act with maximal restraint when exercising the military force at his disposal. "The soldier will use his weapon and force only to execute his mission, only to the necessary extent for this and will maintain humanity even during combat. The soldier will not use his weapon and force to harm human beings who are noncombatants or prisoners of war, and will do his utmost to avoid causing harm to their lives, bodies, dignity or property." This moral mandate always applies. In its implementation, the proportionality of exercising military force derives, of course, from the military context of the soldier's mission and all of the circumstances of the case.

The test of proportionality states that an attack against innocent civilians is prohibited if the collateral damage to them is not commensurate with military benefit (in protecting combatants and civilians). In other words, an attack is proportional if the benefit derived from achieving the suitable

93

³⁴ HCJ 320/80 Kawasme et al. v. Minister of Defense et al., Piskei Din 35(3), pp. 113, 132.

³⁵ Appeal (Gaza Strip Region) 62/03 Military Prosecutor v. Naim Jihad Naim Mudran.

³⁶ Closing quotation mark missing in Hebrew; translator assumes it goes here.

The IDF's code of ethics.

military objective outweighs the damage caused to innocent civilians who are harmed by it. This is the moral test.

"This secondary criterion carries on its shoulders, essentially, the constitutional perspective that the end does not justify the means. It is an expression of the idea that there is a moral barrier that democracy cannot cross, even if the purpose we seek to achieve is worthy" (HCJ 8276/05 Adalah – The Legal Center for Arab Minority Rights v. Minister of Defense (not yet published, paragraph 30 of the ruling); see also R. Alexy, A Theory of Constitutional Rights 66 (2002).

223. Later in the ruling, the former president explains his analysis of the principle of proportionality and gives concrete examples:

"Striking this balance is difficult. It is necessary here to go case by case, narrowing the area of disagreement. Take a regular case of a combatant or terrorist sniper firing at soldiers or civilians from the balcony of his home. Firing at him would be proportional even if this results in the injury of an innocent civilian living next to him or innocently passing by his home. This would not be [proportional] if the home is bombed from the air and dozens of its inhabitants and passersby are injured (cf. Dinstein, p. 123; Gross, p. 621). The difficult cases are those that lie in the space between the extreme examples. Here, a close examination of each particular case is required; the military benefit must be direct and anticipated (see article 57(2)(111) of the First Protocol). Indeed, in international law, as in the internal law, the goal does not sanctify the means. The state's power is not unrestricted. Not all means are permissible. However, when there are hostile activities, losses are inflicted. The state's obligation to protect the lives of its soldiers and civilians must be balanced against the obligation to protect the lives of innocent civilians who are harmed when striking against terrorists. This balance is difficult, as it involves human lives. It raises moral and ethical problems. (See Kasher and Yadlin, "Assassination and Preventive Killing," 25 SAIS Review 41 (2005).) Despite the difficulty, this must be done."

As noted, the military court of appeals also turned to the principal of proportionality in the case of the chief military prosecutor – versus Alexander Ayalon – (02/03) and the words were cited above.

224. Applying these rules in our case leads us to the conclusion that in light of the factual circumstances described above, it is difficult to point to a real danger threatening any of the soldiers who were deployed in the three armored vehicles in the field. The deceased certainly did not threaten Y. P.'s

- life. All these are circumstances that clearly refute the respondents' argument regarding the nature of the action as a belligerent or non-negligent action.
- 225. The death of the deceased was caused in circumstances of faulty exercise of judgment and unbalanced calculation of the dangers that were likely to result from stopping the clearing activity until evacuating the foreigners versus continuing the activity at any price, even at the price of crushing the deceased to death only in order to avoid creating a dangerous precedent of halting the clearing activity. The death of the deceased raises an ultimate moral question because the death of innocent people was caused due to a breach of the appropriate balance between the state's obligation to protect the lives of innocent residents versus its desire to continue the routine activity of clearing land activity that was not proven to be particularly urgent. The tragic result was caused by the stubbornness of commander Sh. R., who did not see fit to come to the site himself and sufficed with receiving reports from the field over the course of about five hours, and did not accede to the request of S. R. to stop the activity of the bulldozers in light of the danger to the demonstrators and ordered him to continue the work. The commander Sh. R. was close-minded in thinking that the activity should not be halted, despite the danger posed to the demonstrators. It can be said with certainty that his conduct was not proportional and definitely cannot serve as the basis for exemption under a belligerent activity defense.
- 226. The proportionality of the action the death of Rachel Corrie, who weighed 65 kilograms, by a bulldozer that weighed 56 tons and crushed her to death during a clearing activity indicates a complete lack of proportionality that borders on criminal negligence. The death of the deceased raises an ultimate moral question because the death of an innocent young woman was caused by a violation of the appropriate balance between the state's obligation to protect the lives of innocent civilians versus its desire to carry out routine military activity. This attitude by the force reflected close-mindedness and rigid thinking by commanders, who were fearful of creating a precedent of foreign demonstrators being able to stop the [IDF's] work, and completely ignored and was blind to the fate of human beings and their bodily integrity.

It can be said with certainty that its conduct was not proportional and it was far from serving as the basis for exemption under a belligerent activity or non-negligence defense. The sense of justice would rebel if the defendant is exempted from responsibility and any sensible attorney would say that this is not what the lawmakers intended.

The Tort of Negligence:

- 227. To establish negligence under articles sections 35 and 36 of the Tort Ordinance [New Version] requires the damager's notional duty of care vis-à-vis the damaged party; the concrete duty of concrete care, which is required of the damager vis-à-vis the damaged party; a negligent act or omission that constitutes a breach of the duty of care; and a causal connection between the breach of the duty of care and the damage that was caused (see Civil Appeal 145/80 Vaknin v. Beit Shemesh Local Council, Piskei Din 37(1) 113, 123 (1982) (hereinafter: the Vaknin case); Civil Appeal 9245/99 Weinberg v. Arian, Piskei Din 58(4) 769, 800 (2004).
- 228. The notional duty of care derives from the foreseeability test and asks whether a reasonable person should have anticipated the occurrence of the damage in the normative sense, where it is possible to anticipate the damage as a technical matter (Civil Appeal 962/80 Municipality of Hadera v. Zohar, Piskei Din 37(3) 757, 768 (1983); Civil Appeal 243/83 Municipality of Jerusalem v. Gordon, Piskei Din 38(10 113, 129-130 (1985).) The decision on this question is made according to considerations of juridical policy: Is it fitting to impose on certain types of damagers a duty vis-à-vis certain types of damages, and in which circumstances is it appropriate to do this (the Municipality of Hadera case, p. 765; Civil Appeal 2061/90 Marcelli v. State of Israel, Ministry of Education and Culture, Piskei Din 47(1) 802, 809 (1993); Civil Appeal 915/91 State of Israel v. Levy, Piskei Din 48(3) 45, 66 and onward (1994)); in general, in cases where it is possible to foresee the damage in a technical or physical way, the notional duty of care applies, unless there are special considerations in social policy that justify diminishing the duty or canceling it, despite the physical ability to anticipate the damage.
- 229. The concrete duty of care is tested against the background of the specific circumstances of the case and entails the question of whether between the specific sides, in the special circumstances of the case, a concrete duty arises to put into practice the notional duty that applies vis-à-vis this type of human activity. In this regard, it must be examined whether a reasonable person, in the concrete circumstances, could and should have anticipated the occurrence of the damage. Breach of the duty of care is measured by an objective criterion based on the dimension of reasonableness, according to a test of whether the damager strayed from the standard of conduct required of him. The duty is to take reasonable measures of care in regard to the danger that exists, and to act as a reasonable person would act. The level of reasonable care is determined by the considerations of juridical

policy, which help to define what the reasonable measures are that should be taken in order to comply with the duty of care, and this depends on the circumstances of the case.

The fact that everyday life in general is naturally full of dangers, does not make it superfluous to take precautionary measures against one concrete danger or another that derives from the specific circumstances that can be anticipated. The person who creates the specific danger will bear liability for the damage when the danger is unreasonable and the damager did not take reasonable precautionary measures, provided that the danger was possible to foresee (Civil Appeal 3124/90 Meir Sabag v. David Amsalem et al., published in Nevo).

- 230. Once it is determined that the damager has a notional and concrete duty of care vis-à-vis the damaged party, it must be examined whether this duty was breached by the damager, and whether he was negligent in his conduct. This question is also examined according to a criterion of reasonableness. The question is whether the damager strayed from the level of conduct reasonably required by suitable norms of behavior in society. This is at the basis of the question if juridical policy (Civil Appeal 5604/94 Osama Hamed v. State of Israel, Piskei Din 58(2) 498, 506.
- 231. The damager is not required to take all possible measures or even the optimal measures to remove the danger; he is required to take reasonable measures that a reasonable person would take in his situation, in the circumstances of the case (Civil Appeal 2906/01 Municipality of Haifa v. Menorah Insurance Co. Ltd., paragraph 47 (published in Nevo), May 25, 2006) (hereinafter: the Municipality of Haifa case). In determining the reasonable measures for this case, the court must balance the interest of the injured individual and the damager's interest in carrying out the activity that caused the damage, against the background of the overall public interest; the court must take into consideration the nature and scope of the danger, the societal importance of the activity that caused the damage, and the means required to prevent it (see Civil Appeal 217/90 The Local Committee for Planning and Construction Krayot v. Yirmiyahu Eini Construction Co. Ltd., Piskei Din 47(2) 111, 128). The reasonableness of the damager's conduct is always tested according to the data that existed at the time of the occurrence, and not in retrospect after the fact (the Hamed case, p. 507).
- 232. Finally, a causal connection is required between the negligent action or omission and the damage that was caused (section 64 of the Torts Ordinance). In this framework, the existence of a factual causal connection is examined: Did the damage occur solely due to the negligence, or would the damage also have occurred without the breach of duty and even if appropriate precautionary

measures had been taken (the Vaknin case, p. 134; Civil Appeal 8199/01 The estate of Miro v. Miro, Piskei Din 57(2) 785, 790 (2003); Izhak Englard, Aharon Barak and Mishael Cheshin, <u>The Law of Civil Wrongs – The General Part</u> 119, 193 (G. Tedeschi, ed., 1976). The existence of a legal causal connection is also examined: Liability will be assigned where the damager's fault is the reason or one of the reasons for the occurrence of the damage. However, his fault will not be seen as the cause of the damage if the fault of another person was the decisive factor in causing the occurrence. The decisive reason for the damage is assessed with the help of the tests of expectations, dangers or common sense (section 64 of the Torts Ordinance; the Gordon case, p. 144; the Vaknin case, p. 134).

The tort of negligence and the responsibility of public servants:

233. When the legislature enacted the Civil Damages (State Liability) Law in 1952, Israeli jurisprudence jettisoned the conception of state immunity, which originates in English law, putting the state's status on a par with that of any other organized entity for the purposes of liability for damages, subject to the exceptions stipulated in the law. The legislation also stipulates that the state is not liable for damages resulting from actions that lie within its range of legal authorization and which are conducted with the reasonable and sincere belief that this legal authorization exists. However, it is liable for negligence in its actions (section 3).

In regard to a public servant, section 7(A) of the Torts Ordinance, as worded during the period relevant to our case and prior to its revision, stipulates the following:

"A public servant is liable for every wrong he commits, and if sued for this, will be sued personally; however, without derogating from the authority of sections 6 and 8, the servant will be protected against any complaint that is not about negligence if the action was within the area of his lawful authority or if he performed the action in good faith, believing that he was acting within the area of his lawful authority" (bold emphasis added).

A public servant is also liable, therefore, for a tort of negligence for an action or omission in the purview of his job.

234. Thus, the tort of negligence applies to both the individual and to the public authority. This is mandated by the principle of equality in applying the law to the authority and the individual (Civil Appeal 209/85 Municipality of Kiryat Ata v. Ilanco Ltd., Piskei Din 42(1) 190, 197); however, the

internal content attached to the components of liability is likely to be influenced by the special status of the public authority and the nature of its authorities, roles and duties, which project onto the content of norms that apply to its conduct.

- 235. In general, the existence of a notional duty of care is influenced by a legal reality that seeks to balance various values and interests that are relevant to the case. The fact that the damager is a public entity is not a reason for exempting it from the duty of care. The fact that a public authority's activity derives from its statutory obligation also does not as such exempt it from the duty of care in negligence for which it might be liable vis-à-vis a person harmed by its conduct. The existence of government authority in the hands of the entity is even likely to constitute a substantial factor in establishing a notional duty of care that applies to it in the civil arena: "The government authority gives it control, oversight and power. A reality of functioning, reliance and expectation is created that is likely to form a notional duty of care." The existence of statutory power accorded to the public authority not only does not grant it immunity or exempt it from its civil liability it is actually likely to serve as a cornerstone for establishing the authority's notional duty of care.
- 236. The powers vested in the authority have implications for the existence and scope of the relations between the government authority and the individuals in the society. They constitute a source from which one can learn about the scope of the authority's obligations vis-à-vis the individual for a specific action. The grounds for damages are a warning light for public servants to behave in a normative and reasonable way, and to refrain from negligent conduct. The duty of care balances various considerations, in accordance with their unique nature and weight (Civil Appeal 1678/01 State of Israel v. Weiss, Piskei Din 58(5) 167, 182). On the other hand, the failure of a public authority to carry out a statutory obligation does not necessarily mean that it has committed a tort of negligence because the criterion required for exercising the statutory power is not necessarily identical to the normative criterion derived from the duty of care.
- 237. In addition to these basic assumptions, additional considerations are required in order to determine whether, in the circumstances of the case, a notional duty in torts applies to the public authority. Consideration is given to the interest in dissuading the public entity from using excessive power in exercising its authorities, and in encouraging it to make sound decisions; on the other hand, consideration is given to certain general dangers that citizens in modern society are routinely exposed to as a result of government activity that is important in itself; also taken in account is the fear of imposing an excessive burden on government entities and the intrinsic fear of excessive

- deterrence and the hindering of its ability to act. Considerations of excessive deterrence carry a special weight where there is a general duty assigned to the government that accords the authority broad discretion, and in a breach that has a general impact on a large and non-specific public.
- 238. The public authority's concrete duty of care vis-à-vis the individual arises in specific circumstances in which the notional duty takes on tangible actuality. The breach of the concrete duty by the public authority is conditioned upon the test of foreseeability, but does not necessarily depend on the test of the outcome. It could be that even if the authority fulfills its concrete duty, exercising due diligence in its activity, the desired outcome will not be achieved and the individual will suffer damage. The damaging outcome is indeed a necessary condition for the tort of negligence, but it is not a sufficient condition for establishing a breach of the duty of care. For this, it is necessary to show, inter alia, that the authority breached the concrete duty incumbent upon it, and in the circumstances of the case did not exercise the precautionary measures required of it. The test for this purpose is objective. The question of whether the authority fulfilled the duty incumbent upon it is examined according to the circumstances and facts in real time, and not in retrospect (Civil Appeal 3991/09 State of Israel v. Estate of the Late Fatma Abu Samra).
- 239. The evidence presented indicates that there is no doubt that both the engineering force and the operational force deployed on the [Philadelphi] Route that day had a notional and a concrete duty of care. Someone who operates the bulldozer a heavy work instrument in the vicinity of civilians, contrary to instructions, can anticipate the occurrence of ensuing damage. "The unreasonable danger, for which a concrete duty of care is imposed, is the danger the society regards with great severity, in the way that it demands that reasonable precautionary measures be employed to prevent it" (Civil Appeal 145/80 [1] above, p. 127A). The reasonableness of the dangers is also determined in light of the measures required to prevent them, and a danger that is easy to prevent imposes on its creator the obligation to take the appropriate precautions. The higher the probability that the damage will occur, the more severe the damage is, the lower the cost of preventing it and the lower the societal interest in providing the service the greater the tendency will be to assign liability to the damager. (See Civil Appeal 3124/90 Meir Sabag v. David Amsalem et al., published in Nevo.)

We argue that the society's demand to take these means of precaution is expressed in our case in the "Procedure for Operating Mechanical Engineering Equipment in a Limited Conflict," which was binding upon the defense forces in the incident discussed here, and a deviation

from the mechanical engineering equipment instructions or a violation of any instruction entails negligence.

When Y. P. operated the bulldozer and drove it, when the deceased was at a distance that ranged between 15-20 meters from it and he started to drive toward her – he was indeed acting in violation of the directives of the procedure for operating heavy mechanical equipment, which the army had adopted as a procedure that defines a standard of safety. In doing so, it was also possible to anticipate the occurrence of the ensuing damage. Above, we presented extensive evidence that the bulldozers were operated when the foreign demonstrators were in their close vicinity, at ranges that approached zero [meters] from the bulldozers. The bulldozer operators received an unequivocal directive not to stop the work and that it should be continued at any price, and did not consider or give thought to the grave danger to life and limb posed to the foreigners by continuing the work of the bulldozers, when it was their duty as careful and reasonable operators, and even more so as commanders, to anticipate that the continued operation of the bulldozers was liable to harm the foreigners, including the deceased. The deceased and her friends were "the neighbors" of the bulldozer operators and their commanders in the sense of the test of foreseeability in tort law. In our case, the operational force created the unreasonable danger of harming the deceased and her friends who were present at the site, as this harm was almost certain to materialize and its dimensions were liable to be death or very severe bodily damage. It was also the obligation of those who generated the danger to create monitoring and control mechanisms for preventing the danger, such as installing cameras on the vehicles at least and halting the work, at least for a short time until ensuring that the foreigners were distanced. In other words, the probability of damage occurring was very high, the probability of causing very severe damage was also very high, while the cost of preventing the damage was low and the societal interest in continuing the dangerous activity of the bulldozers was not desirable in the circumstances of the case.

240. The defendant might argue that a deviation from the Mechanical Engineering Equipment Procedure is not in itself indicative of negligence. Although we do not agree with this, there may indeed be a situation in which an action taken in accordance with the [Mechanical] Engineering Equipment [Procedure] would be considered a negligent action, as the honorable Justice E. Mazza write in Civil Appeal 3889/00 Yitzhak Lerner v. State of Israel – Ministry of Defense, Piskei Din 56(4) 304, p. 314 in addressing the rules of engagement:

"Due to the lack of full overlap between duty of care regarding damages and the duty to

adhere to the rules of engagement, there might be a negligent action that does not breach the rules of engagement, just as there might be a reasonable action that breaches these rules."

A review of the aforementioned rulings and the precedents cited above indicate that in each case the courts examined the factual basis upon which the authority's personnel acted. The defendant argued that IDF soldiers, including the bulldozer team, acted without fault.

- 241. The plaintiffs will argue that it is impossible to artificially separate the bulldozer team from the operations force and the commanders who instructed them to continue the work, despite the foreseeable danger in continuing to carry out the work. The question is whether the defense forces as a whole, the bulldozer operators and the forces around them, deviated from the level of conduct of a reasonable soldier and commander.
- 242. The plaintiffs will argue that the defendant did not succeed in convincing the court of the security urgency of the bulldozers' clearing activities that day, and certainly did not succeed in convincing that it was impossible to stop them and/or postpone them until the foreigners were removed. On the contrary, it was proved in court that these activities were quite routine.
- 243. In the case before us, it was proven that the bulldozer operator drove the bulldozer in violation of the instructions and approached the deceased and her friends, who were present there for about three hours, to a range that is forbidden according to the civilian and military procedure. Moreover, the bulldozer operator and his commander did not heed the warnings and signals of the deceased and her friends when it was moving toward the deceased. And also when it reached the deceased, it continued driving a distance of 4 meters until burying her in a mound it had piled in front of it.³⁸

"A black flag":

244. Even if Y.P. was mistaken about the situation, and imagined that the foreigners were not in his vicinity – a claim countered by the plaintiffs – he should, if he had examined the situation correctly, have reached the conclusion that the foreigners were indeed in the vicinity of the bulldozer, and he should have stopped the work. The responsibility of the operator and his commander in the bulldozer and of the commander in the field is a direct responsibility, theirs and the State's.

102

³⁸ A change in translators occurs at this point in the document. Minor stylistic differences may occur.

Furthermore, in our view the bulldozer operator ought to have preferred to obey the dictates of his conscience forbidding him from risking the life of the deceased or even placing her at risk of injury, over the order given to him to continue with the clearing activity, because in our view the order given by the commanders E.V., S.R., Sh.R. and Pinky Zoaretz to continue with the work was an immoral ["black flag" ³⁹] order and he was obligated not to obey it.

245. The fact that Y.P. ran over the deceased as the result of the negligent and express order from E.V., S.R. and Sh.R., that the work must not be stopped despite the clear danger to the deceased from the continuation of the work – in no way lessens the severity of the circumstances in which the deceased was run over. The order of the commanders was, prima facie, patently unlawful, and Y.P. was prohibited from obeying it. The "black flag" of immorality – a concept originated by Justice Benjamin Halevy in his decision in the Kafr Qasim case (Military Court Central Region /57/3/ Military Prosecutor v. Major Malinki, Verdict Abstracts 17 90) – is simply a metaphorical expression for the hallmarks of an order which is clearly unlawful. When any order bears these hallmarks, one may assume that no reasonable soldier is liable to err regarding the order's being patently illegal and regarding his being prohibited from obeying it. In the well-known words of Justice Halevy:

"The hallmark of a 'patently illegal order' – logic dictates that a black flag fly over the order given, as a warning inscription that says: 'Forbidden!'. It is not formal, disguised or half-disguised illegality, not illegality revealed only to sage jurists that is important here, but rather: a clear and overt violation of the law, a certain and necessary illegality that is clearly apparent in the order itself, a clearly criminal character of the order or of the acts that the order requires be committed, blatant and infuriating illegality to any eye not blinded and any heart not hardened or corrupted – this is the measure of 'patent' illegality demanded in order to annul the soldier's duty to obey and place upon him the criminal responsibility for his acts"

(ibid., pp.213-214).

³⁹ The Hebrew term is, literally, an act that "has a black flag flying over it."

246. Indeed, sometimes the conclusion is warranted concerning a patently illegal order, even when the "black flag" is not flying over it (see the commentary at "The verdict in the Kfar Kassem case, the test of a black flag and the concept of a patently illegal order," *TAU L. Rev.* ⁴⁰ 15, 1949-50.

The question of whether someone who carried out his commander's order was aware of the patent illegality of the order given to him, however, should arise only when the distinguishing marks of obvious illegality are not conspicuous. (See further HJC⁴¹ 46681/01 MK Yossi Sarid, Chairman of the Opposition et al. v. Prime Minister et al.).

- 247. Similarly, it was proven before the Court that the regulation that is to be followed during clearing operations at a time of limited confrontation is the one that was submitted to the Court. Continuing to conduct the operation in violation of the regulation was a haphazard decision, without reasonable consideration and without the caution demanded. If a reasonable commander had weighed appropriately the danger posed to the foreigners and to human life in general by continuing the operation, as against the danger liable to be caused to the prestige of the IDF as the result of stopping the work even for a short time to take other measures to distance the foreigners, hinder their movements or even detain them, and thereby insure that no serious bodily harm would come to any of them and had given instructions for a time out or a postponement of the work, perhaps the loss of life would have been prevented.
- 248. Even if the Court is persuaded that, in the circumstances of the matter and for any reason, the regulation in and of itself is not relevant, one may still attribute responsibility to the bulldozer operator based on the principle of usual expectations, which oblige any person to avoid doing damage to his neighbor as a result of his actions or omissions if there was a danger that could have been anticipated that the neighbor was liable to be harmed from a continuation of the activities of the bulldozer. In this matter the Court is referred to a comparison with the words of the Hon. Justice A. Gronis in the Civil Appeal 7995/02 Military Commander of Judea and Samaria et al. v. Muhammad Abud Elqarim Shanoubi, Takdin Elyon-Supreme Court Rulings (3)2007 4754, p. 4756 (from 25.9.2007, paragraph 5 of the verdict):

⁴¹ HJC: High Court of Justice; Hebrew: "Bagatz" an acronym of "Beit Mishpat Gavo'a"

104

⁴⁰ TAU L. Rev.: Tel Aviv University Law Review; in Hebrew, "Iyunei Mishpat." Hyphenated Gregorian year in a reference herein, identifying volume number and year of publication, indicates conversion from a Hebrew year (spanning the latter half of one Gregorian year and the first half of the next).

"In the wording of the open-fire regulations themselves, there must be suspicion based on facts, data or reliable information, all in the context of the place and time. Facts that turned up after the incident do not in and of themselves accrue the power to undermine the reasonableness of an action, just as they are not themselves sufficient to bestow a character of reasonableness on an action that was unreasonable."

(Emphasis mine-A.H.).

249. Hence one must take into consideration the conditions obtaining at the time that the incident in this case developed but, as I have shown above, the bulldozer operators were under maximal protection and no danger to any of them was foreseen, much less mortal danger, while under those conditions the bulldozer operator was not operating as required, and hence even if we assume that there was some kind of pressure, that is not sufficient to make his action reasonable, despite the conditions of pressure he was under.

The Court is referred to the words of Hon. President (retired) A. Barak in Civil Appeal 5604/94, Osama Hamad v. State of Israel, *Piskei Din* 58 (2) 498, p.508:

"Thus, when police or soldiers act under pressured or emergency conditions not of their own creation, which prevent them from the usual consideration and examination of the alternatives, and which require a quick decision for which preparation in advance is not possible, one must examine the reasonableness of their action in the context of these special circumstances. The behavior should not be detached from the conditions surrounding it. The behavior cannot be held to resemble 'laboratory conditions' (see Civil Appeal 3684/98 State of Israel v. Achleil [11]). Here one must take into consideration errors in judgment that do not amount to negligence. Nota bene, an emergency does not determine a special standard of reasonableness. An emergency is one of the circumstances that determine reasonable behavior. In emergencies, too, a person sometimes does not behave reasonably, and must bear the results of his negligence."

(Emphasis mine—A.H.).

250. Consequently, even if we agree that in fact the incident was in the nature of a situation involving pressure, this in and of itself does not justify the fatal running over by Y.P. which, as noted, was negligent and unreasonable in the circumstances of the incident as described above.

- 251. From the foregoing it also emerges that the running over that caused the death of the deceased, was incompatible with the norms of required caution in the circumstances of this case. After the hearing of the evidence, it became clear that the bulldozer operators were not properly familiar with the procedures of the Mechanical Engineering Equipment Corps regulation, and each of them provided a different response in the matter of safe operating distances, and the commanders S.R. and Sh. R. were not at all familiar with the regulation. Moreover, uncertainty and lack of clarity were typical of the responses of the many witnesses regarding whether the above regulation obtained or did not obtain in the Philadelphi corridor and all of this taken together demonstrates beyond the shadow of a doubt the moral confusion regarding what was permitted and what was prohibited, which obtained in the corridor with respect to this activity, and to dealing with foreign demonstrators.
- 252. As is known, the law is that if a party abstains from giving relevant testimony in his possession, without a reasonable explanation, the presumption is that if this testimony were to be given in court, it would work against him (see [Jacob] Kedmi On Evidence, Part Three (2003), pp.1649-1650 and the decision quoted there).

The non-testimony of the *tatzpitaniyot* [female soldier-observers] and the four additional fighters from the operational force who were in the area of the incident, whose testimony as noted earlier could have cast much light on what happened, works against the defendants. Furthermore, the failure in not obtaining the sections of the recording that document the hours of the foreigners' demonstration in front of the bulldozers and the approach of the bulldozers to the Palestinian homes near the [Philadelphi] corridor, also testifies to the powerlessness and lack of skill in the investigation of the incident.

253. The State also refrained from presenting to the court the regulations on clearing activity, the file on the mission and the regulation about moving the foreigners to a distance which were in their possession and which, apparently, determined the content and nature of the army's behavior in situations of this kind, and one may suppose based on the basic rules of evidence that disclosure of these rules would have functioned to the detriment of the defendant. Pertinent here are the words of the writer [and jurist] Jacob Kedmi in his book On Evidence, Part Three, p.1649:

"The manner in which a party conducts his matter in Court has evidentiary significance, as if this were circumstantial evidence. Thus evidentiary significance can be attributed to

evidence not being given, a witness not being heard, questions not being asked of a witness or a cross examination not being conducted of someone whose testimony was given in writing and presented by him. Such behavior, absent a reliable and reasonable explanation, works to the detriment of whoever employs it; since prima facie, the conclusion must be drawn that presenting the testimony or hearing the witness, or presenting the questions or conducting the cross examination would have supported the other side's version.

Withholding evidence – in the broader meaning of the concept as explained above – works to the detriment of the withholder and creates a presumption of fact, closely aligned with everyday common sense, to wit: not presenting the evidence is like a confession that the evidence, if presented, would have worked to the detriment of the withholder."

254. Consequently, logic dictates that the running over of the deceased by the bulldozer and the resulting death of the deceased, deviate from the norm regarding required caution and it is fitting that responsibility be lodged with the defendant.

Responsibility of the Military Police Investigation Unit for the tort of negligence

Responsibility of the military police for damages – the normative level

255. The Police are like any other administrative body, and are liable in principle for damages. Thus the High Court summarized this issue in the Weiss affair:

"The approach that affords the regime immunity from responsibility for damages is rejected in Israeli law. Indeed, 'the finest hour in Israeli jurisprudence was, when special immunity for the state was done away with...' (Civil Appeal 243/83 City of Jerusalem v. Gordon [1], p. 134). Responsibility for damages has also been lodged with the police for decades, for both actively negligent implementation of its obligations and negligent failure to implement them.

'...Whether the defendant's responsibility toward the state is direct or imputed, the acts of the police fall under Article 3 of the Law of Civil Damages (Responsibility of the State)' (Comments by Justice Beisky in Civil Appeal 337/81 Buskila v. State of Israel (hereinafter – Buskila verdict [2]), p.345). And see also: Civil Appeal 429/82 State of Israel v. Souhan [3]; Civil Appeal 126/85 R.G.M. Mart v. State of Israel [4]; Civil Appeal 5604/94 Hamad v. State

of Israel (hereinafter – Hamad verdict [5])). And as noted recently by my colleague, Justice Rivlin:

'The State is not immune absolutely from responsibility for damages... one cannot rule out the possibility that the State will be found responsible for damages due to non-prevention of criminal acts or even violent acts that were committed by another...' (Civil Appeal 6970/99 Abu Samra v. State of Israel [6], p.188)."

- 256. Let it be clear, every cultured society is interested in strong, serious and credible investigative bodies, and we must not interfere with their functioning. Our interest as a society aligns with that of the police and the Military Police Investigation Unit. In their capacity as an investigative body, we expect that they will find the wrongdoers and interrogate them and gather evidence in order to convict them.
- 257. The Military Police Investigation Unit is the military equivalent of the civilian police force and works under the Police Law [New Version], 1971. The role of the police is "prevention and discovery of crime, catching criminals and bringing them to justice, securely detaining prisoners, and maintaining public order and the safety of persons and property" (Article 3). Similarly the Military Police Investigation Unit is authorized to act as a military investigative body for all purposes and military policemen are given broad authority. Like all authorities of the regime, so also the Israel Police and the Military Police Investigation Unit are subject to the Basic Laws, and it is their obligation to defend the basic rights of the individual anchored in those laws. Particularly given the character and scope of the authority vested in the police and the military police, the improper use of which constitutes potentially serious harm to the legally protected rights of the individual his dignity, liberty and privacy.
- 258. Alongside its broad authority and responsibility, the Military Police Investigation Unit also has an obligation to be careful of doing damage as does the regular police force and has a conceptual and concrete obligation to take reasonable steps to be cautious in the use of its authority, so as to avoid causing damage to individuals or entities liable to be harmed by its activities. (See for comparison Civil Appeal 429/82 State of Israel v. Souhan, *Piskei Din* 42 (3) 733, 739 (1988) and see Civil Appeal 361/00 Azam Daher v. State of Israel). Concrete police action involves an obligation of caution both conceptual and concrete, on the part of the police entity toward the object of police action (Weiss case, p.181). Concerning the role of the police and the obligation for caution which is

incumbent upon it, the High Court of Justice noted in the Levy case, also addressing investigative authority:

"The police, in using its investigative authority over those being examined, operates under its authority as part of the regime. It acts in a statutory-governmental capacity intended to enforce on the public the appropriate behavioral norms defined in criminal law. It carries out a function intended to protect public wellbeing and security, and in that context it must gather evidence regarding a person suspected of involvement in criminal wrongdoing. ... Conducting a criminal investigation, with the person examined in police custody, engenders a conceptual obligation in principle that the State be concerned with the wellbeing of those investigated, whether physical or emotional"

(Civil Appeal 4241/06 Levy v. State of Israel-Israel Police, see Paragraphs 4-5 of the verdict).

- 259. As with any administrative authority, so also the investigative authority of the military police is governed by the basic principles of the system (President [of the HCJ] Barak in HJC 5100/94 The Public Committee Against Torture in Israel v. State of Israel, *Piskei Din* 53(4) 817, 835). Two central interests collide here: the will to discover the truth, and to actualize the public interest in uncovering wrongdoing in the realm of military service and how to avoid it, as against the obligation to defend the rights of those investigated, their liberty and dignity. These values demand an appropriate balance and neither is absolute.
- 260. As the police force is obliged to address complaints brought by someone about illegal acts, by submitting a complaint, the complainants come into proximity with the police and change its general obligation into a concrete obligation toward them. Likewise the investigative team at the Military Police Investigation Unit, from the moment it received a directive to open an investigation from Anat Ron, their 42 obligation to act with caution became a concrete obligation, and from that point on they became the "neighbors" of the Corrie family in the sense of the test of expectations. Police personnel are required to apply the authority vested in them wisely, and to use the powers given to them with skill and reasonableness:

"Policing actions are actions of expertise. Policing is a profession demanding a great deal of training, ability and skill. Policing actions must be examined using the standard of a reasonable expert in the given circumstances. ... The standard of reasonable behavior,

⁴² The original switched here from the singular to the plural.

therefore, is based on the level of performance that one may expect to see in the circumstances of the case handled by expert police personnel who have undergone appropriate training."

(Hamad affair, pp.516-517).

- 261. In our matter, Military Police Investigation Unit investigators violated their obligation of caution with respect to the plaintiffs. They could have on a technical level, and they should have on a normative level, expected the damage done by their deliberate behavior, which caused the loss to the plaintiffs of important evidence, harmed the values of justice and thwarted what should have been an in-depth, fair and serious investigation of the truth. The conduct of the investigative team did not meet the standard expected of them, and deviated from the realm of the reasonable, and their behavior was inappropriate. Had the investigative team acted in real time to obtain the real-time *Paskal* recording before it fell into the hands of the commanders who conducted the operational debriefing, chances are good that it would also have included the details of the incident.
- 262. One can determine on the basis of an analysis of the behavior of the investigative team that will, below, survey the evidentiary damage, that in this instance they acted unreasonably, and in complete indifference to the evidence before them, and in the worst case, they acted unlawfully.
- 263. In doing so, the police of the Military Police Investigation Unit violated their obligation of caution with respect to the plaintiff. They could have on a technical level, and should have on a normative level expected the damage that was caused by their deliberate behavior.
- 264. The conduct of the investigative team did not meet the standard of behavior expected of them, and deviated completely from the realm of the reasonable, and there is no doubt that their behavior was inappropriate, to put it mildly.

The Tort of Assault:

265. With due attention to the facts of the incident, it appears that the plaintiffs have proven grounds for the tort of assault as described in Paragraph 23 of the Torts Law, while the defendants did not show any special defense under Article 24 of the Law.

Assault in Torts is defined in Article 23 of the Law:

- "(a) Assault is the use of force of any type, deliberately, against the body of a person by beating, touching, moving or any other manner, whether directly or indirectly, without the agreement of that person or his agreement obtained prior thereto, also any attempt or threat, by an act or a movement, to use force as stated against the body of a person, when the person attempting or threatening causes that person to surmise, with reasonable cause, that he has at that time the intention and the ability to carry out his scheme.
- (b) 'The use of force,' for the purpose of this paragraph including the use of heat, light, electricity, gas, odor or any other material, if used to a degree that involves doing harm."
- 266. The injury to the deceased and the causing of damage was as a result of the use of force, and without any doubt, it was illegal. It is also clear that the State did not authorize the soldiers to carry out acts of assault on the deceased, but the acts that the soldiers carried out on the deceased were certainly connected with their activity, and were a consequence of this activity [conducted] in an "improper" manner. Hence, based on what is explained in the foregoing, the State bears direct responsibility and has an imputed liability for the acts of the soldiers⁴³. In the Beni Oudah case, during the deliberations in the district court, the court determined that the plaintiffs had ostensibly proved unlawful assault, although inasmuch as it found the defendant responsible by virtue of unlawful negligence, it did not discuss unlawful assault as the crux of the matter (Civil Suit 273/89 Jamal Beni Oudah et al. v. State of Israel, published in the Nevo Legal Database?).

Evidentiary Damage:

Introduction:

267. This case is a torts case in which the plaintiffs seek to prove their civil claim against the State of Israel, for acts and omissions of the armed forces which were in the area of the incident on the day it occurred. Inter alia, the plaintiffs also argued that the investigation that was conducted after the incident was a negligent and unskilled investigation. In their amended plea, the plaintiffs added that the [National] Institute for Forensic Medicine was also responsible for evidentiary damage caused to them by a violation of a judicial order and by the destruction of a recording that documented the autopsy [on the deceased].

⁴³ Civil suit (Afula Magistrate's Court) 2666/92 **Yusuf Mahajne v. Juamis et al.,** Magistrates Court Verdicts 1991-92 (4), p.477, and the passage quoted there. See and compare Amendment No. 10 to the Torts Law, New Series 2004-05 No. 2026 dated August 10, 2005 p.950 *Kovetz Hatakanot* 2006-07 No. 6522 dated October 3, 2006 p.76 – Order [of] 2006.

268. The Rules of Evidentiary Damage were first expanded by the High Court to include claims whose cause is not medical negligence, in the case of Azam Daher: Civil Appeal 360/00 **Azam Daher v.**Captain Yoav (published in Nevo Legal Database), which held:

"Precedent in established law holds that a place where a defendant by his negligence causes evidentiary damages to the plaintiff – i.e., damages the ability of the plaintiff to use evidence which ostensibly has the potential to substantiate one of the factual claims on which their plea is based - the Court is likely to lay on the defendant the burden of persuasion that the factual claim in question is incorrect... This rule, based mainly on considerations of justice and the social interest in deterring potential defendants from losing evidence, expresses the evidentiary-deliberative aspect of the doctrine of evidentiary damage (See: A. Porat and A. Stein, Doctrinat hanezek hara'ayati: hahatzdakot le'imutza veyisuma bematzavim typusiyim shel ee-vada'ut begrimat nezakim ["The Doctrine of Evidentiary Damage: The justifications for its adoption and use in typical situations of uncertainty in causing damage", TAU L. Rev. 21 (1997-98) 191, 241-254; Porat & Stein, Tort Liability Under Uncertainty (2001) 165-167). This is distinguished from the tortsessential aspect of the doctrine, which has yet to be recorded in our ruling and the need for examining it does not even arise in our matter (Cf: the Meir case, in Paragraph 14; Civil Appeal 6768/01 Regev v. State of Israel [not yet published], in Paragraph 5). The evidentiary-deliberative law concerning evidentiary damage means, therefore, a factual presumption that had they not been damaged as a result of the defendant's negligence, the missing evidence would have supported the plaintiff's version concerning the claims of fact that are in disagreement. Even if this presumption is ostensibly contradicted, in the nature of things – and as in other presumptions activated at the conclusion of proceedings - it is needed only when it is known that there is no other relevant evidence existing; in other words, when with respect to the factual argument, the missing evidence is needed by the plaintiff as proof, there arises between the parties an 'evidentiary draw.' In this state of affairs the defendant is deficient in evidentiary terms from countering the presumption. And hence the existence of the presumption is actually decisive concerning the factual disagreement (Porat and Stein, ibid.; Civil Appeal 5373/02 Navon v. Kupat Holim Clalit, Piskei Din 57(5) 35, 47)."

269. The High Court of Justice in the Daher affair also said:

"The appellant is entitled to a decision regarding the doctrine of evidentiary damage. We are concerned with the claim of one who has been harmed versus the State, relying on his claim that he was shot and injured by IDF soldiers. An examination of the remnants of bullets by an expert from the DIFS⁴⁴ was supposed to make available to the appellant the ultimate evidence with the power to establish, or reject, his claim that he was injured when shot by a plastic bullet. Nota bene, the army and the police are state organizations and the state bears the responsibility for their actions and their failures. By its failure to have a DIFS expert examine the vehicle, the state withheld from the appellant the key evidence he required to prove his claim that he was injured by a plastic bullet fired by Captain Yoav. Since the appellant and the state are direct parties both to the claim of damages and the evidentiary damage, there emerges an evidentiary presumption in favor of the appellant that he was shot and injured by a plastic bullet."

The order to investigate the incident and the investigation team:

- 270. On March 16, 2003 the deceased was killed near Palestinian homes in the Philadelphi corridor while IDF forces were conducting actions there to clear the ground. On March 17, 2003 Anat Ron, Chief Military Prosecutor, issued an order to open an investigation to clarify the circumstances of the incident (P/13), and the investigation team headed by the witness Shalom began its work that same day.
- 271. The investigation team comprised three soldiers: Command Sergeant Major Shalom, First Lieutenant Oded⁴⁵ and First Lieutenant Elad (p. 543, line 13-20 / Session of March 17, 2010). **Oded** at the time was 20 years old, with only a high school education (p.1071, line 20-23 / session of September 5, 2009), and had passed a policing course combined with two months of basic training, during which he learned to be a military policeman and a soldier and subsequently was accepted into a three-month Military Police Investigation Unit course during which he learned to be an investigator (p.1073, line 18 to 1074, line 13 / session of September 5, 2010). Oded testified that he had had experience with one inquiry into a fatality before he began working on this case, and that the case he had handled in the past had been transferred to him to finish an investigation, after it was returned by the [military] prosecutor to him, without his having handled it from the outset (p.1077 / session of September 5, 2010).

⁴⁴ DIFS: Division of Identification and Forensic Science of the police

⁴⁵ Last name redacted in translation.

- 272. As for **Elad**, he testified that he underwent training in a one-and-a-half month course for investigators that included seminars at the Israel Police, and also that he passed an advanced investigations course lasting one to two weeks. Elad testified that he had no real experience dealing with a case like this, and the only similar situations he had dealt with involved taking testimony and making sketches "but not participating in a case from a management standpoint" (p.545, lines 17-20, p. 546, lines 1-10 / session of March 17, 2010).
- 273. As for **Shalom**, he was the senior investigator who headed the team and we will address his professional experience as an investigator below.

Receiving the court order for an autopsy:

- 274. The first action taken by the investigation team in this case was submitting a petition on March 18, 2003 for an order for an autopsy as part of the investigation into the cause of death, as per Para. 26 of the Statute for the Investigation of Cause of Death, 1958 of the Magistrate's Court, Rishon Letzion (6/P). The petitioner therein is a Special Investigation Team of the Military Police Investigation Unit for the South in Cause of Death Investigation Case 10009/03. As part of this request, the unit noted that: "A Special Investigation Team of the Military Police Investigation Unit for the South is conducting an investigation concerning the circumstances of the death of an American civilian, Ms. Rachel Corrie... at Rafah on March 16, 2003 and there is a reasonable basis to assume that an autopsy of the deceased is required to clarify the cause of death in this investigation." Further on, the petition to the court asked "that the National Institute for Forensic Medicine at Abu Kabir (Tel Aviv) be directed to conduct an autopsy of the deceased as soon as possible... and to convey the findings of the investigation to the Special Investigation [Unit] or someone on its behalf."
- 275. The aforesaid petition was submitted to the Court via the investigator **Oded**⁴⁶ and also present in that proceeding in court was investigator Sergeant Elad. Oded explained to the Court that the incident occurred in Rafah and that the IDF was performing operations to clear the field along the Philadelphi route. Oded added that the deceased, who belonged to a group of peace activists, was killed as they tried to interfere with the conduct of the work. Oded added that **during the course of the incident several hand grenades were thrown by terrorists** at the IDF force. He added: "Our need with the autopsy was to discover what precisely caused her death. Whether it was a

.

⁴⁶ Last name redacted in translation.

thrown hand grenade or the bulldozer and if she was injured by the bulldozer, the importance of the autopsy is to discover exactly where her body was injured in order to try to understand where she was standing and whether indeed the injury could have been prevented or not."

Oded also noted that an attempt was made to obtain a response from members of the family of the deceased via the United States Consulate in Israel. The court obliged the petitioner to accept the family's standing regarding the autopsy and to obtain its agreement and bring these to the Court's consideration the next day before the Justice on duty.

- 276. On March 19, 2003 the investigator Elad reported to the duty Justice at the Magistrate's Court in Rishon Letzion (Madame Justice Irit Weinberg-Notovitz), and notified the court that they had been asked to obtain the agreement of the family to the petition and hence this agreement was obtained **on condition** that the doctor performing the autopsy be a civilian not an army doctor and that the autopsy be performed in the presence of a civil servant from the US Department of State, and that the petitioner **would uphold these conditions**. The court cited the family's position regarding the autopsy in its decision and ordered as follows:
 - "1... I hereby order the opening of a proceeding to investigate the cause of death.
 - 2... I am persuaded that there is a reasonable basis for concern that the death of the deceased was not a natural death or was caused by a criminal offense.
 - 3... For the purpose of clarifying the cause of death I order that the body be autopsied at the Forensic Institute at Abu Kabir by a doctor who is not a military doctor and in the presence of a representative of the US State Department.
 - 4... After the autopsy is conducted it will be possible to fly the body to the USA.
 - 5... The petitioner will present to the Court file the findings of the autopsy as they are received." (P/6)."
- 277. When Elad appeared for questioning in court, he provided a new version of the reason for the petition to the court to obtain an order for an autopsy and that was the family's opposition to the autopsy, although he was unable to say who had given him this information, and without his having any documentation supporting this claim (pp.548-551 / session of March 17, 2010). To this day he has been unable to tell the court who was supposed to have made sure that the conditions set by the court were carried out, and did not remember that anyone at all had been charged with meeting the conditions (p.554, lines 1-2 / session of March 17, 2010), although, as noted, Elad had promised the

court that the conditions it had set, would be upheld. (See also the transcript of the Magistrates Court proceedings (**P/6**)). The witness was unable to tell the court who from the team had been the liaison person with the Forensic Institute and who had conveyed the court's decision (p.55, lines 5-6 / session of March 17, 2010), although he did not convey the findings of the autopsy directly to the court, and says that the order was given to the head of the team and was his responsibility and part of his role. (p.555, lines 19-20 / session of March 17, 2010. In the cross examination of the witness Elad it turned out that he had never encountered a case of the Police Investigation Unit opening an investigation and seeking to have a Justice investigate the circumstances of the death under the Law for the Investigation of the Causes of Death (p.739, lines 7-9 / session of March 22, 2010), and that all he wanted was an order for an autopsy!

- 278. As for **Oded**, who testified at the session of September 5, 2010 (pp.1066-1089), he testified that the petition to the court was prepared with the assistance of an attorney from the Military Prosecutor's office named Captain Kobi, whose job was supervising investigations. When asked whether he now knows the difference between an investigation into the cause of death under the Law for the Investigation of the Causes of Death, and an ordinary autopsy of a deceased person, he answered:

 "I think that now you are confusing me with terms beyond my knowledge" (p.1095, lines 11-13 / session of September 5, 2010) and further on answered that he had no prior experience with issuance of such an order. (p.1095, line 19 through p.1096, line 3 / session of September 5, 2010). According to him, thus far, the moment that the court gives an order his role is ended (p.1109, lines 1-9 / session of September 5, 2010). And he was unable to answer whether the court's order was carried out concerning conveying the report of the autopsy to the court, much less as to the presence of a representative of the US Embassy (p.1110, lines 7-22 / session of September 5, 2010).
- 279. The senior investigator **Shalom** outdid himself, as he was unable to provide important, essential answers concerning the autopsy and the issuance of a court order. According to **Shalom**, the Military Police Investigation Unit people were only messengers in getting an order issued (pp. 1407-1408), and he did not see it as his business to deal with honoring the court order. He did not know who the liaison person with the Embassy was, or how the family's agreement to the autopsy had been obtained. When Shalom was asked who was the liaison with the family and the Institute for Forensic Medicine, he replied "**Either the Foreign Ministry or the Ministry of Defense**," without knowing who the person at the ministry was, and added, "**One would have to see who was Defense Minister at the time and who was Foreign Minister and ask them whom they named for this purpose, and see. I have no idea."** (p.1408, lines 17-22). When Shalom was asked who

was supposed to follow up regarding the conditions requested by the family concerning the conduct of the autopsy, he again gave the surprising answer that he did not know and responded "It would have to be someone from the Ministry of Justice, the Foreign Ministry or the Ministry of Defense." (p. 1409, lines 16-17). When the witness was confronted with the conditions set by the court regarding presentation of an autopsy report for the court's review, he answered simply that he had no idea.

280. **Prof. Yehuda Hiss,** summoned to testify for the prosecution, testified that he is the one who autopsied the body of the deceased and wrote the autopsy report submitted to the court and marked Exhibit (P/1). Prof. Hiss testified that he was aware from the outset of the family's conditions for the autopsy, and that he had received the family's letter which included the conditions together with the court order (P/5), (P/6) (p.278, lines 1-14 / session of March 14, 2010). The witness stated on the first page of his expert opinion that "The US Embassy are not asking to include a physician on their behalf in the autopsy" and prior to that stated that the identification of the body was done by the Embassy with the assent of the family. The witness confirmed that the autopsy was conducted without the presence of a representative of the Embassy and in contravention of the court's decision, but he argued that the Embassy did not think it correct to send a representative on their behalf and that they had sent him a fax which he had seen as constituting the family's agreement to the autopsy, and which is attached to (P/6). Reading the fax shows that Prof. Hiss's argument is totally incorrect and mainly, that the fax does state that the family has agreed to the autopsy, without stating that this agreement makes redundant the conditions that the family set in its letter of March 18, 2010 (P/5). Moreover Prof. Hiss cannot point to a memo documenting his conversation with someone from the Embassy regarding the family's assent to the autopsy absent an Embassy representative, and cannot say with which person from the Embassy he spoke, or when (p.307 / session of March 14, 2010). Nor did Prof. Hiss see fit to contact the Military Police Investigation Unit to receive the court's authorization for conducting the autopsy other than in accordance with the conditions the court had set. (p.308, line 21 through p.309 line 4 / session of March 14, 2010). Nor did he see fit to consult the legal advisor of the Ministry of Health. He also recorded the autopsy proceedings on a cassette, and when his opinion had been printed, he reused the authentic cassette that documented the autopsy, so that actually the original audio cassette was destroyed (p.315, lines 22-28 / session of March 14, 2010). Hence prima facie, there is no proof that an identification of the body was done by the Embassy, and what Prof. Hiss wrote in this connection is incorrect, never mind the matter of the family's agreement, bearing in mind the

affidavit and testimony of Craig Corrie in the matter of the family's conditions [in agreeing] regarding the autopsy.

Violation of the court order:

281. As stated, the court set five conditions for the conduct of the autopsy, of which four -1, 3, 4 and 5 - are operative conditions on the order of a positive order⁴⁷. In hindsight, we now know that instructions one and five, directing the opening of a process of investigation into the cause of death and presenting the autopsy findings to the court for further clarification, were violated by the **investigation team**. The case was indeed opened at the court as a case of investigation into the cause of death and received the number 1009/03 ICD⁴⁸, but it was unwanted, and the autopsy report was never presented to the Court by the investigation team nor by the Abu Kabir Forensic institute. Likewise, instruction no. 3 that directed that the autopsy – as requested by the family – be performed by a doctor who was not a military doctor, and in the presence of a representative of the American Embassy, was also violated, as there is no disagreement that no representative of the American Embassy was present at the autopsy, and Prof. Hiss's explanation, concerning the agreement of the family to the autopsy without the Embassy representative, should be rejected.

Interim summary and conclusions:

282. The conclusion arising from the foregoing, that the investigation team named to handle this case was inexperienced and lacking in resourcefulness and initiative, the main characteristics that an investigator needs in order to get at the truth in a cause of death case. The team that submitted a request to issue an autopsy order under the Law for the Investigation of the Causes of Death did not know right from left. The two junior investigators - Oded and Elad - who appeared before the court and requested the order, knew nothing about what an order is under the Statute for Investigation of the Cause of Death, nor about the meaning of the procedure. Elad promised the court to meet the conditions set by the court, although when the order was issued, he thought that the court's role was finished and did not follow up, neither he nor others later on in the process and did not report to the court any of the autopsy findings. As to the head of the investigation – Shalom – he barely knew anything at all about the procedure or about the significance of this procedure or the requisite later clarification by the court of the outcome of the procedure.

Uncertain translation - Hebrew TSAV ASEH? ⁴⁷
⁴⁸ ICD: Investigation of the Cause of Death; the acronym in Hebrew: "Hasam – Hakira Sibot Mavet"

283. Further, the autopsy conducted by the Institute of Forensic Medicine was conducted in violation of a court order and in gross violation of the conditions set by the court for the conduct of the autopsy, in other words according to the conditions set by the family and accepted by the court. Prof. Hiss's explanation in this regard is not acceptable and should be viewed as an evasion and as noncompliance with court orders. Prof. Hiss outdid himself when he destroyed the cassette that documented the autopsy procedure and – in his words – reused the cassette to record another autopsy.

Visiting the scene of the incident:

- 284. Immediately after the incident, in which the deceased was killed, Sh.R. ordered that the work be stopped and that the vehicles be returned to the base, and among them the vehicle that was involved in running over the deceased. As stated, the incident occurred on March 16, 2003 at 17:00, and by March 17, 2003, Anat Ron had already ordered the opening of a Military Police Investigation. The team named did not visit the site of the incident, not on March 18, 2003 nor at any time thereafter, did not perform measurements and did not even photograph the site. (p.701, lines 5-19 / session of March 22, 2010).
- 285. There is no need to go into detail about the importance to the team of visiting the site of the incident close to the time it occurred, in order to document the site and preserve it, as a professional police investigation customarily does. The documentation can include photographs of the site, including video, measurements and collection of material evidence. According to the investigators' version, they did not go to the site of the incident due to the sensitivity of the area and the fact that it is in security terms a hostile area, and entry is permitted there only in protected vehicles (p.569, line 6 through p.570 line 4 and also p.580 / session of March 17, 2010). The witness Elad confirms that he did not ask to go to the site himself, and in hindsight not going to the site is an error from his standpoint (p.570, line 19 through p.571, line 4 / session of March 17, 2010), and it would have been preferable from his standpoint if he had gone with Y.P. and documented the reenactment on video (p.572, lines 12-20 / session of March 17, 2010).
- 286. Likewise the team leader, **Shalom**, never visited the site of the incident; he came to the Yaklaz.⁴⁹ outpost on March 17, 2003, met with the deputy battalion commander Major Sh.R., and made do with looking through an electro-optic video camera – which monitors the route seven days a week,

⁴⁹ "Yaklaz": Hebrew acronym for the Liaison with Foreign Forces

24 hours a day. He looked at the site and did not find it necessary to go there (end of p.1369). Sh.R. told Shalom that it was impossible to go to the site without a *nagmachon*, and Shalom did not ask to go there with a *nagmachon* (see also Shalom's memo **D/13A**).

During his testimony in Court, **Shalom** testified that in his experience and his considered professional opinion, "it was very dangerous to go out there with a *nagmachon*, and I made the decision that they would not go out there with a *nagmachon*, period" (beginning of p.1372). In the same stance, he conducted a physical inspection of the D9 vehicle and found no signs on it that could indicate that any person had been injured by the vehicle (**D/13B**).

- 287. Witness S.R. was asked during his testimony whether it would have been possible to reach the site of the incident with a *nagmachon*, and he confirmed that it was possible under battle procedure but "with Military Police investigators, I think it is problematical, because they have no basic training for coming to this space," (p.970, lines 18-19 / session of March 4, 2011) because they are not fighters. The witness was asked why he had not driven the Military Police investigators to the site of the incident, and he answered that it was a problem from a professional standpoint because "They are not fighters, and I don't think, if the senior commanders would approve it" (p.971, line 13 / session of March 4, 2011).
- 288. Witness Sh.R. testified that the battalion command post [sic] went to the place where the incident occurred with a *kasman*, which is an armored vehicle, an improved APC that permits better control than does the *nagmachon*, and is the vehicle used by the deputy battalion commander to travel around and sometimes he got out of the vehicle onto the ground (p.1138, lines 2-15 / session of April 6, 2011). The defendant's witnesses did not provide a persuasive answer, and the question arises as to why they could not take the Military Police Investigation people to the site of the incident in a *kasman* or a *nagmachon*. What S.R. said about the lack of training of the Military Police Investigation people and the poor prospects that the "senior commanders above them" would authorize entry to the field suggests that the Military Police Investigation Unit is subordinate to the commanders and is not independent.
- 289. The investigator **Shalom** drew, by hand, a drawing made without measuring to scale, that portrays the area of the incident, as it appeared to him using a video camera, and on the drawing he noted various reference points that included: The [Philadelphi] route, a road 10 meters wide, locals' houses, the place of the incident and noted the distance between reference points 21 to 23 which

Shalom estimated at 800 meters. Investigator Shalom knew that the source of Sh.R.'s knowledge about the site of the incident was hearsay, and that he had not been there, and nonetheless he relied on his statement in drawing the document *Het/*4 marked as (**D/13d**). All the values were drawn without measuring to scale, and obviously it is difficult to attribute to this document weight and importance in the absence of measurements (see p.1374, lines 8-19 / session of October 7, 2010). Every novice investigator knows that one can obtain the most current aerial photos of any area in Israel and in the occupied territories, which are a hundred times preferable to the sketch of the ground done by Shalom in longhand and without measuring to scale, but Shalom was in no hurry to obtain such an aerial photograph.

- 290. **Shalom** took three sketches drawn by three of the soldiers investigated: [one was] a drawing by Y.P., submitted and marked P/27 together with Shalom's memo. In Y.P.'s drawing he noted three positions of the bulldozer: the bulldozer at the start, the bulldozer afterwards, and the bulldozer when the incident occurred. Y.P. did not note the locations of the second bulldozer and the *nagmachon* and was not asked either by Shalom or by other investigators about the locations of the other vehicles not being marked. The document, as is, was obtained, and no questions of any kind were ever asked concerning this.
- 291. The second drawing was drawn by S.L. (P/28, which also includes Shalom's memo). S.L. noted on the drawing the location of his vehicle and the presence of people around both vehicles, the other being Y.P.'s vehicle, with a mound of earth in front of it and "an American [female] who was injured"—so it says. S.L. also did not note the location of the *nagmachon* and was never asked about his drawing or about the other two drawings.
- 292. The third drawing is by S.A⁵⁰. (P/29 together with Shalom's memo). S.A. noted on the drawing the location of the vehicle of S.L. and S.R⁵¹. -- the second vehicle which is not involved and that of Y.P. in front of it on the right side. This is the only one of the three that located the *nagmachon*, and located it behind and below. S.A. also noted the presence of a mound of earth next to the vehicle of S.L. and the presence of two mounds of earth at a great distance from the vehicle involved and the presence of an English American [sic] behind one mound of earth.

of the 2^{nd} bulldozer).

121

⁵⁰ S.A. used throughout this paragraph is likely a typo and reference to "A.S."- the commander of the 2nd bulldozer ⁵¹ S.R. in this paragraph is also likely a typo and reference to "A.S." (S.L. and A.S. were the driver and commander

The witness was never asked about his drawing nor confronted on the matter of the differences between his drawing and the other two drawings.

Interim summary and conclusions: the importance of arriving at the scene in real time:

293. From the defense witnesses, we learn that immediately after the incident of injury to the deceased, the work was stopped and an order was given to move back and afterwards the vehicles returned to the base.

The main assignment of the Military Police Investigation Unit is to gather evidence, and evidence that later on will be admissible in court, and hence time is critical; this is one of the biggest problems in any investigation. In our matter, when the Unit arrived at the *Yaklaz* outpost, there were no bulldozers there and there was no *nagmachon*, the body of the deceased was not there, the actual scene of the incident was elsewhere, there were no tools there for medical treatment for Rachel Corrie, there was no material evidence. From a juridical standpoint, this was a tainted scene. The only thing left for the Military Police investigator to do was to rely solely on what the soldiers told the investigators in their interrogation in the preliminary inquiry, and the preliminary inquiry turned into the most important thing.

The only means left to the Military Police investigator was to question them and interrogate them; the investigator could not present them with evidence. So in fact, you are telling the investigators, Go ahead and investigate, bring me the truth, look for the guilty, without giving them the tools and the only tool they have is a preliminary inquiry, and even when this authority is given to them they use it sparingly, without ingenuity, and without asking the questions that the circumstances of the matter demand, which any reasonable investigator would have asked.

294. We have heard from **Shalom** that he did not make a great effort to get to the field and that he heeded the advice of Sh.R. that it was dangerous, notwithstanding that S.R. himself had been in the field the previous day using a *nagmachon* and it is not at all clear why they could not go there with a *nagmachon* or a *kasman*. **Sh.R.** advised Shalom and the latter willingly accepted the advice that it was impossible to go there. As stated above, **S.R.** admitted under cross examination that the Military Police investigators did not have the qualifications [needed] and it was not certain that the higher-ups – meaning, the commanders – would permit it. These remarks of **S.R.** reflect the

position of the command level to the task of the Military Police Investigation Unit, and the investigators do not challenge this notion that views them as investigators who collect the evidence they are given and do what the command level expects of them, without using the authority vested in them as an independent investigative body and showing initiative and ingenuity in order to arrive at the truth.

295. If the Military Police investigators had gone to the scene immediately after the incident, and the bulldozer involved had not been returned to its base and had been kept at the scene of the injury, certainly the investigators would have had more means of arriving at the truth, since they could have gathered physical evidence from the scene of the incident, including checking angles of vision based on the field and in real time, measurements, photographs in real time and even conducting a credible reenactment. The conclusions would have been supported not merely by contradictions in the testimony, but also by factual findings in the field.

Moreover the investigative team did not make any use of the sketches collected from the people investigated, putting them into the file, instead of investigating the witnesses and challenging them with the contradictions between the various drawings.

The 'Paskal' Tape - Introduction:

296. "The *Paskal* cassette⁵². Everyone who dealt with this affair can understand, and must understand, the great importance of the *Paskal* cassette, since it is the only material evidence of what happened that morning near the *Girit* ["Badger"] outpost, that could shed light on the somewhat murky circumstances of the shooting done by the accused. Hence it was to be expected that the Military Police investigators would have invested all the required resources in order to arrive at a rapid and precise interpretation insofar as possible of the cassette, which documents inter alia the things said on the communications net during the incident. Thus we were amazed to discover the amateurish way in which the Military Police investigators transcribed the aforesaid on the cassette, as emerged in the testimony of the investigator Tal Weiner. It turns out that the task was assigned to four young investigators from the *Urim* Military Police Investigation Unit, who had the bad luck to remain that weekend on the base, and the work of transcription was divided among them, with each investigator transcribing one part of the cassette, without knowing anything of what was on the other sections that had been given to other investigators. The

⁵² Translators refer to this interchangeably as the Paskal (or Paskol) tape or cassette. In public discussions regarding the case it has commonly been referred to as the "IDF video." It contains both video and audio segments.

investigators for this purposed used a private video machine that one of the investigators had brought from home, and apparently they were not well versed in the style of speaking on the communications net, and did not even know the meaning of the codes and expressions used on the communications network."

297. The foregoing citation is taken from a verdict of the Military Court in the affair of R. (DR. (Darom)⁵³ 400/04 **Military Prosecutor v. R.**), which dealt with the killing of the Palestinian girl Iman al-Hams on October 5, 2004, near the Girit Outpost on the Philadelphi corridor. It turns out that the head of the investigation team that investigated the circumstances of the above-mentioned case was none other than the officer Shalom, and the Military Court South⁵⁴ found significant defects in the investigation conducted by Shalom and decided that the investigation had been conducted in a negligent and unprofessional manner, and at the end of the day the soldier who was put on trial there was acquitted, inter alia, due to defects and flaws in the investigation on the part of the investigation team.

Confiscation of the tape:

- 298. Military Police investigator Oded on March 23, 2003 at 14:20 confiscated, from Major Rafi, an Engineering Battalion officer, the video cassette which was filmed on March 16, 2003 in the Philadelphi route. The cassette was marked [unknown translation⁵⁵] March 23, 2003. Oded documented the confiscation of the cassette in writing in a memo submitted and marked as (P/20).
- 299. From the witness's responses under cross examination we understand that what we have here is a copy of a cassette and not the original cassette (p.1121, lines 9-20 / session of September 5, 2010). The copy was submitted to the court, while the parties are in possession of another copy of the cassette on a CD. In other words, the cassette was confiscated on March 23, 2003, that is **seven days after the incident** herein. **Oded** was asked to explain the delay in obtaining the cassette, and he explained **that he could not as a Military Police investigator take whatever he wanted** and since the cassette includes confidential material he had to receive special permission (see end of p.1116, lines 5-11). The witness was asked to point to the documentation in the Military Police Investigation Unit file, which substantiates his claim about obtaining special permission, and this documentation was not found. The witness was asked on what basis he believed that he could not

⁵⁴ i.e., for the Southern District

^{53 &}quot;Darom": South

⁵⁵ Hebrew letters "Ayin Nun/1".

take the cassette, and he explained that his security clearance was not high enough to confiscate **certain things.** The witness was unable to describe how he explained the fact that in the end, he did confiscate the cassette on March 23, 2003 and that the file contains no documentation of the permissions he obtained or of any changes in his security clearance (!). The witness was asked who the parties are who have to give him permission for the confiscation and he replied: "These parties are the parties who are in possession of the cassette." (p.1118, line 3 / session of September 5, 2010).

- 300. The witness **Shalom** confirmed that in this file there were **ten operational debriefings**, some of which began before the Military Police investigation, some during the Military Police investigation, and some after the Military Police investigation (p.1384, lines 17-20). The witness also confirmed that he did not take the cassette on March 17, 2003, because it was not accessible to him, because it was "in the possession of the senior commanders, not in my possession and not in the possession of the investigative echelon," without his knowing who these senior commanders were, although he knew that they were the ones who had conducted the operational debriefing. (p.1386, line 18 through page 1387, line 6).
- 301. Witness Oded, as a Military Police investigator, knew the importance of the cassette that documents the incident under investigation and the importance of immediately obtaining it since it was the "proof" (p.1135 lines 13-23 / session of September 5, 2010); the witness Oded did not know who had access to the cassette until it was obtained and confiscated nor what the linkage was between Major Rafi and the cassette, nor whom he asked to prepare him a copy nor how much time had elapsed between requesting the copy and actually receiving it. (p.1121, lines 5-17 / session of September 5, 2010). The witness knew of the existence of the cassette from the witnesses who had already been interrogated on March 17, 2003, (p.1116, lines 12-13 / session of September 15, 2010) and did not rush to obtain it.
- 302. **Oded** tried to excuse the insufferable tardiness in obtaining the cassette in terms of the difficulty in reaching the Yaklaz, but this excuse doesn't "hold water," considering that he admitted that he was at the Yaklaz on March 17, 2003 and questioned witnesses there (p.1123 / session of September 5, 2010). Witness Shalom gave another explanation for the tardiness in obtaining the cassette, that "when we began dealing with this incident, the incident was at the height of the operational debriefings. We came to check one aspect. There is an operational debriefing, and

⁵⁶ The Hebrew, verbatim, said: "...it was 'the proof' using the definite article".

that is what the cassette was meant for. It was intended to meet security needs and for the study of operational debriefings. The moment an incident occurs, <u>I just ask</u>, I can't" (end p.1382 through start of p. 1383, emphasis mine-A.H.).

Existence of the tape:

- 303. Witness **Shalom** testified that he knew of the location of the camera, which monitors the area seven days a week, 24 hours a day (p.1386, lines 11-19).
- 304. The soldiers and the commanders who were witnesses to the incident and who testified for the defendant, confirmed, nearly all of them, that indeed there is recording in the [Philadelphi] corridor. The defendant attached the cassette to the affidavit of S.R. (Paragraph 11 of the affidavit) without the witness having testified in his affidavit about any linkage to this cassette. The witness, under cross examination, testified that the attaching of the *Paskal* to the affidavit was coincidental and without any connection to him, and the recording was not under his control at any time (p.879 / session of April 3, 2011).
- 305. Witness **S.R.** testified that when there is an incident, it is recorded 24 hours, and if there is an antitank shooting incident, or a grenade is thrown, this is recorded and it can be reconstructed (p.885, lines 16-20 / session of April 3, 2011). The witness **S.R.** explained the process of recording:

"I will explain how it works, the recording system. It has a video system, which is automatically set up with the camera, and there's a video film there, which is running. Let's say that the film ends, and there was no incident, then she reverses it and documents again. Until there's an incident. An incident happens, she stops, and then she takes the specific [sic] of this incident, and conveys to...."

(p.885, lines 15-22 / session of April 3, 2011).

306. The witness **Y.P.** said that he knows that every incident in the [Philadelphi] corridor is filmed and recorded, so said the witness:

"Insofar as I know, every incident they do a recording. For every incident, what happens, for each activity they do a recording, first of all.

- Q: Everything is recorded?
- A: Yes. So what happened, I understood that there is also a recording of that."

(p.1544, lines 18-21).

The witness added that when they questioned him at the Military Police Investigation Unit he knew that there was a cassette, though later he retracted that response and answered that only at the Prosecutor's office did he know that there is a cassette but he thought that there was a cassette before he came to sign the affidavit at the Prosecutor's office (p.1543, line 18 through p.1546, line 16).

307. The witness **Sh.R.** was challenged with information that S.R. had given in his testimony about the observation in the [Philadelphi] corridor, and answered:

"At the Yaklaz the observer soldiers [female] sit, in front of screens, and they observe the Corridor. Each one has a certain section. Their job is to observe and give warning of terrorists, of the laying of mines, entry of smugglers, etc. etc.."

The witness confirmed that if the observer soldier sees something suspicious, she sends a report to the commanders, and they know what to do, but claimed in contrast to S.R. that not everything is recorded, and he personally did not check whether the observer soldiers were recording or not (p.1046, lines 8-17 and also p.1048, lines 6-9 / session of April 6, 2011).

308. From these statements, one may understand that certainly it was possible have found the section that recorded the incident, since according to S.R. there is recording all the time and when an incident happens and they want to go back to it, this is possible, especially since only five hours had passed between the foreigners' arrival and the incident in which the deceased was injured.

Who is responsible for recording and how is it conducted?:

309. According to Oded's testimony, the intelligence figures that sit? [sic; question mark is in the original] where the ones [are] who do the recording work, although he did not meet with any of them to clarify things relating to the cassette and did not deem it proper to interrogate any of them, and did not find any written document or memorandum documenting a conversation with these intelligence figures (p.1126 / session of September 5, 2010). The witness **Oded** did not recall the circumstances of the confiscating of the cassette, nor the discussion that took place between him and Major Rafi regarding the cassette, its characteristics and its content, and claimed at first that he took testimony from him, but it turned out that the testimony of Major Rafi was taken by Elad, and

amazingly this Rafi was never asked about the cassette that was confiscated. The witness **Shalom** was asked why Major Rafi was not interrogated concerning the cassette and replied: "Because he is the figure who brought me the cassette. If a driver brings me the cassette, I don't take testimony from him about the cassette." (p.1389, lines 17-18).

310. The witness **Shalom** clarified the way in which the recording is done:

"A: I will explain - When there is an incident, the operator of the equipment, who is sitting on the net, she listens to several communications nets simultaneously. The moment there is, they announce [it] on one net, there is some kind of incident, she tries to clarify where this is, who is the force working there, she directs the camera and switches over the means of communication, and then records them. She does the connecting of both things at once at the same moment. There is equipment that connects them."

```
(p.1402, lines 17-21).
```

And before that, added:

"A: What happens is like this – There is a camera that films 360 degrees. There is a [female] soldier or operator who operates the equipment using a joy stick. She receives call letters on the communications [net]. When she receives some kind of call letter on the communications [net], she turns the camera."

```
(p.1399, lines 10-13).
```

311. To demonstrate the helplessness that the investigator **Oded** was showing in his behavior regarding the cassette, he testified that what was important from his standpoint was the incident of the death and nothing more:

"A: I suppose that at the same time, the fact that we did not exert ourselves may be, first of all – if a cassette does exist, including the video, including the audio, if it did exist, we, it wasn't all that important. It would not document the incident itself. Possibly at that time there was such a cassette, but we did not exert ourselves to obtain it because we did not see that it was all that important. Even now, the importance of this, I don't see it as very great. The fact that they are filming four hours before, and talking on the communications net, we are investigating here a fatal incident. A fatal incident that happened. And the documentation is

supposed to see if they really see the incident happen or not happen. A few hours before can't help us."

(P.1188, lines 1-8 / session of September 5, 2010, emphasis not in the original-A.H.).

Where are the lookout personnel?:

- 312. We heard from the senior witness **Shalom** about the how the recording is done. Likewise according to the senior commander **Zoaretz**, there was one camera at the time in the area of the incident that roves all the time from place to place and monitors the place 24 hours, **and next to it is a human force of observers [female] who belong to Intelligence** (p.1276 / session of July 10, 2011) who observe a screen, and they can record. The witness confirmed that he saw the *Paskal* recorded on that day. (p.1392, lines 4-7, session of October 7, 2010).
- 313. Despite the foregoing statements by **Shalom** concerning the manner of recording, he confirmed that he did not investigate the woman soldier who is responsible for the direction of the cameras, and as far as he is concerned there was no point in interrogating her (p.1400, lines 19-23). Shalom's statements concerning the manner of recording are based on his assumptions to the best of his recollection, and in any case he did not ask anyone for the recordings and did not look for them (p.1402) with respect to the hours from 12:00 to 17:00 because in his opinion there need not be such a recording (p.1403, lines 3-6). There is no persuasive explanation as to why testimony was not taken from the observer soldier who was responsible for the recording that would explain what, how, when and what was recorded. All these questions remain without answers as a result of deficient handling by the team.

Questioning of the witnesses regarding the content of the *Paskal***:**

314. Although **Shalom** knew the importance of the *Paskal* cassette, he, as stated, did not hurry to obtain it in real time, and Oded got it on March 23, 2003 after most of the soldiers had already been questioned, at least once. Evidently the commanders made use of the cassette for operational purposes including the need to conduct a secret operational debriefing. After the investigation team got it, they did not investigate even one of the soldier witnesses about the *Paskal*. Ostensibly, the *Paskal* cassette contains serious material, with an Arabic speaker who asks "Did you kill him" and the other answers him "*Allah Yirhamo*" (May God have mercy on him). Despite the existence of this material, which was not transcribed, and without any of the three Military Police investigators understanding Arabic, the *Paskal* cassette remained buried in the Military Police Investigation Unit

- file as a stone unturned, and no one used it for the purposes of the investigation even though this material could serve as the basis for a turning point in the investigation.
- 315. The importance of interrogating the witnesses concerning the content of the cassette is a necessity in light of the fact that in the *nagmachon* were other Arabic speakers along with the deputy battalion commander, as testified to by **E.V.** (p.1749, line 19 through p.1749, line 15 / session of November 4, 2010). The witness **Sh.L.** testified that he heard the *Paskal* for the first time at the Prosecutor's office six months before his testimony (pp.1800-1801 / session of November 4, 2010), the witness **A.S.** did not recall that he heard the discussion that took place in Arabic on the *Paskal* cassette (pp.1509-1510), and he did not identify the speakers who were talking together (pp.1510-1511). The witness confirmed that they did not present the *Paskal* to him at the Military Police Investigation Unit (p.1519, lines 11-14). **S.R.** testified that he saw the cassette for the first time and heard it on the "Ovdah⁵⁷" [television] program (p.880 / session of March 4, 2011).
- 316. During the trial we could hear for the first time who the speakers on the Paskal were after the witnesses identified various speakers whose voices they had been able to identify (see for example the testimony of A.D. p.1201 through 1203 / session of April 6, 2011). The identification of the speakers and the codes heard on the cassette should have been done by the investigation team if a serious and fair investigation had been carried out and they had been used for the purposes of the investigation.

Transcribing of the tape:

317. In the Military Police Investigation Unit file there is a memo dated March 24, 2003 composed of four pages that purports to be a transcription of the cassette. Sergeant Dror, a Military Police investigator, wrote in it "That on the above-mentioned date while once again listening to and watching the video cassette (*Paskal* camera)... I transcribed what was said on it and below is the transcript" (P/21). Thereafter there is a sporadic transcription beginning at 17:05:07 [hours] until 17:07:51. The transcript did not state who the speakers are and by reading the transcript it appears that there are only three persons. The Plaintiffs sent the cassette for professional, comprehensive transcription, at the Interdisciplinary Center for Voice Characterization: Transcriptions [Hebrew: *Hamercaz habenthumi le'me'afyenei kol-tamlilim*, and in the professional opinion they submitted, and from the interrogation of the witnesses in court, it emerges that the

⁵⁷ A reference to Israel Channel 2 TV's investigative program "Ovdah" [Fact] with reporter Ilana Dayan. The program segment referenced herein was titled 'One Meter too Far' and aired nationally in Israel on April 5, 2003.

transcript done by the Military Police investigator is far from being a comprehensive, professional transcript, and according to the expert opinion there are 10 speakers participating in the conversation via the communications system, who are talking among themselves about the incident being adjudicated herein.

- 318. It is superfluous to note that no testimony was taken at the Military Police Investigation Unit from Sergeant Dror who transcribed the cassette, and the defendant did not submit an affidavit from him and did not call him to testify. When **Oded** was questioned about the cassette, he testified that the transcript reflects the Paskal recording on the cassette (p.1146, lines 13-15 / session of September 5, 2010), he did not know what instruments were used for making the transcript (op. cit., p.1147, lines 5-6), and he was not able to identify the speakers from the transcript, and did not see on the cassette anything out of the ordinary (p.1150, lines 2-4 / session of September 5, 2010) and hence he did not confront any of the soldiers with the cassette (p.1150, lines 10-16 / session of September 5, 2010). When the recording was played for the witness, and in general this is a conversation between someone speaking Arabic and asking: "Did you kill him" and the other answering: "Allah yirhamo" (May God have mercy on him), the witness testified that he did not recall having heard this conversation earlier and that he heard it for the first time in court (p.1160, line 20 through p.1164, line 9 / session of September 5, 2010). The witness **Shalom** testified that the investigator who transcribed the cassette has no connection to the case, and he speaks only Hebrew, he is not a professional transcriber and does not know what means he used to do the transcription of the cassette (p.1146, line 18 through p.1147 / session of September 5, 2010). Shalom added that he is the one who instructed the transcriber what to transcribe and that "the goal was to hear the talk on the communications net around the time of the incident," without this being documented in writing by either of them (p.1397, line 1). Shalom also testified that the transcription reflects the content of the cassette and there was no need to transcribe beyond what was transcribed, although he did not know how many speakers were talking on the cassette, and could not interpret what had been played for him of what they said in Arabic in their conversation, nor who had been talking, but in his opinion they were from the force that provided security for the instruments in the nagmachon, but he did not see fit to question them. He assumed that they belonged to the security force but did not clarify that (p.1394-1398).
- 319. The witness Oded also did not identify the speaker, Y.P. who announces on the communications net "I struck someone" (p.1162, lines 16-19 / session of September 5, 2010). Further on the witness tried to excuse the oversight in not having transcribed the continuation of the cassette by saying that

the remaining segments not transcribed from the cassette appeared to the investigation team as not relevant. (end of p.1168 through 1169, line 4 / session of September 5, 2010). At this point let us remark that there is no memo or note in the file about the investigation team's considerations regarding the transcription, and the only memo addressing the transcription is the one by Sergeant Dror (P/21), which was cited above. Hence, this explanation by Oded for the omission must be rejected and his explanation must be seen as a late attempt to repair an omission in the investigation especially in light of the testimony of the witness who could not remember having heard this discussion earlier and who was hearing it for the first time in court (p.1160, line 20 through p.1164, line 9 / session of October 5, 2010).

We could have supplied many more examples, but it appears to us that the ones presented are sufficient to show the amateurish, not to say negligent, manner in which the *Paskal* transcription was done by the Military Police Investigation Unit and the non-use of it during their investigation. This is also what happened in the R. affair cited above (Dr/Darom 400/04).

Where is the radio communication (the soundtrack) for the five hours prior to the incident in which the deceased was injured?:

320. From the testimonies of most of the witnesses, whether for the plaintiffs or the defense, there is agreement that some of the foreigners arrived at 12:00 noon at the area of the incident and others at 14:30 and – in close proximity, and that all were there until the time of death of the deceased at 17:00 or in close proximity thereto. Even if we accept the version of the defendant, that the cassette documented the area of the incident only when its occurrence became known – a fact absolutely refuted – the major question arises as to where the audio band is that documents the radio communication that took place between the forces present at the site with the command, including the discussion between the operators of the bulldozers among themselves, and between them and R. who sat in the *nagmachon*, and between the forces and Sh. who sat in the command post, and the discussion between R. and Sh. Of course these conversations, one may reasonably suppose, alluded to the interference by the foreigners, moreover soldiers testified in court that they did indeed talk among themselves about the foreigners and about their disruption of the clearing work and about the need to move from one place to another, and they even asked their commanders to stop the work!!

321. The witness S.R. testified that during the day he complained to Sh.R. about the presence of the foreigners and the disruption they cause to the bulldozers, several times, and this **should be documented on the** *Paskal* **prior to the incident,** but "it's not certain that they equipped it" (p.990, line 19 / session of April 3, 2011) – this goes to show that not all the communication that took place between the forces was conveyed to the Military Police Investigation Unit investigators, and furthermore, it was not disclosed during the handling of the case.

S.R. said that the company frequency is what is documented on the *Paskal*, but the battalion frequency, which is used for talking with the battalion echelon – the forward command and the battalions – is not documented (p.979-980 / session of April 3, 2011).

From the testimony of S.R. we also learn that there was also a frequency called "Larry" - a frequency reserved for administration and logistics (p.987 / session of April 3, 2011).

- 322. E.S⁵⁹. confirmed that there was radio communication on that frequency with the second bulldozer and with the operational force and whoever was sitting in the operations room at the *Yaklaz* could talk and hear (p.1502, lines 11-19). **E.S.** testified that in the operations room, they keep three if not five frequencies and can skip from one frequency to another and include others in the conversation, and in addition to these frequencies, the soldiers had mobile phones. (p.1526, lines 5-12 and p.1527, lines 1-5).
- 323. In addition to E.S⁶⁰., defense witnesses confirmed that indeed there were conversations via mobile phone. The Military Police investigators did not bother to question the soldiers and commanders about the content of the conversations that took place among them via their mobile devices, and why there was a need to conduct these conversations on mobile phones outside the army frequencies(!).
- 324. **Shalom** also confirmed that the soldiers at the scene of the incident talked among themselves on the net (p.1392).

- (

⁵⁸ In Hebrew לארי

⁵⁹ "E.S." is a typo within this paragraph and the next. It is likely a reference to E.V. (bulldozer commander). However, consult the official Hebrew court transcript (page numbers sited) for clarification. ⁶⁰ See footnote #57above.

The witness **Elad** was asked about the radio communication that occurred between the soldiers and answered thus:

- Q: Of course in your experience with these cases if I say to you that there is radio communication that happens between the operators and the people in the field what do you say?
- A: Generally one must get recordings or get that communication, that reporting that went between the vehicles.
- Q: There is reporting.
- A: If there is reporting between the vehicles, if there is radio communication between the vehicles they can report one to the other, even if it is via a third party then generally they try to locate that transcript of conversations between them."

(p.607, lines 2-9 / session of March 17, 2010).

By contrast, the witness **Oded** did not provide a persuasive answer about the radio communication that took place between the forces during the hours prior to the incident which is also recorded (p.1156, lines 9-13 / session of September 5, 2010) and claimed that possibly the forces did not talk and he simply does not remember whether they asked about this communication. (p.1169, lines 6-9 / session of September 5, 2010).

325. Hence, you can see for yourself that, despite the fact that the soldiers conversed among themselves on various frequencies among themselves and between them and their commander in the field – S.R., and although we know from witnesses that S.R. also talked with Sh.R., ⁶¹ the Military Police investigators did not ask or suggest to them how to look for and find the radio communication that could have shed light on the circumstances that preceded the incident and on the circumstances of the incident. The answer to this severe omission may perhaps be found in the statement by S.R., when he was not sure that the commanders would hand that over. The answer is one of two reasonable explanations, either Shalom did not look and did not have the ingenuity to find the radio communication, which is unlikely, given his extensive experience with inquiries, or he asked, and his request was refused by the commanders who knew that handing over the communication would be liable to create problems for people involved in the incident. It would not be superfluous to note

134

⁶¹A duplication error is deleted here... "and S.R. also talked with Sh.R." was typed twice in the original.

that the senior investigator Shalom knew how to obtain radio communications in the R. case cited above, but <u>did not do that here, for unknown reasons</u> (see Darom 400/04, published by Nevo, p.79).

Summary and conclusions pertaining to the investigation team, the 'Paskal' tape and the radio communication:

- 326. Thus, as you can see for yourself, we are talking about an investigation team that is, to put it mildly, not professional, and each investigatory action that is examined under a magnifying glass suggests the conclusion that we are dealing with an entity that is not independent, that lacks ability, tools, and professionalism, is negligent, lacks ingenuity and does not know what its job is and apparently also lacks the desire to arrive at the truth.
- 327. We are talking about a team that neglects for 7 whole days essential and cardinal evidence that should provide a picture from the scene of the incident, although it knows about its existence even before reaching the scene of the incident, and when the team arrived it did not ask for the recording and it was in the hands of the senior commanders who are responsible for the forces and who conducted an operational debriefing. In the evidentiary material there is no reference to an obstacle whether of confidentiality or security that prohibits the team from doing its work faithfully, and obtaining "royal proof" that could provide a credible picture of what happened in the area of the incident during those critical hours prior to its actual occurrence. And not only that, but also the cassette was obtained from Major Rafi on March 23, 2003, and he was even interrogated in the file, but amazingly, he was never questioned about the cassette or the circumstances of the recording or his connection to the cassette.
- 328. The witness **Shalom** did not see a need to question the [woman] soldier who made the recording, as in his eyes she is irrelevant, and he tried to provide explanations about her work and the methods of recording, although he was not a witness for the Military Police investigation but rather head of the investigation team, who should be using his ingenuity to arrive at the truth, and not serving as a commentator on his failure to obtain and document essential evidence, evidence he ought to have obtained.
- 329. And the version, the interpretation of the witness Shalom concerning the cassette and its lack of anything from the time of the incident, contains an internal contradiction that has no explanation, for he claimed that the recording begins from the moment that the recording soldier hears on the

communications net about the occurrence of a certain incident and then she orients the camera and adjusts the communications equipment and records, as if she is joining these two things together. From watching the cassette it turns out that it includes more than a few moments that are not connected with the incident, from the Egyptian border, and afterwards there is a kind of time out and disruption, and it is unclear what the source of that is or who caused it, and afterwards the camera is aimed at the scene of the bulldozers' work. The question arises, how is it that the recording includes filming from the Egyptian area, when there is no incident occurring there? If indeed the recording begins the moment there is an incident, what incident occurred on the Egyptian border that required recording, since we are looking at a recording when on the Egyptian border there was a pastoral calm and no scenario requiring recording. The witness Shalom tried to persuade the court by saying that the recording begins from the moment there is an incident and yet anyone watching the cassette sees that there is nothing whatever happening on the Egyptian border. Hence what is the meaning of recording those minutes? Apparently, it isn't so, recording is happening all the time, and even more so the communications system, yet someone made sure to provide [sic] the missing evidence, and apparently made sure to erase from it those same critical minutes when the deceased was run over.

- 330. And when the cassette was tardily obtained by the investigation team, a week after the incident, it was given to a soldier who transcribed a few seconds of it. The transcript, as stated, is partial, negligent and unprofessional, the transcription does not include identification and does not interpret the codes heard in the course of the recording. The soldier who did the transcription did not send a memorandum about the transcription and was not questioned. Furthermore, the investigation team did not know how to make use of the content of the recording, and did not interrogate even one of the witnesses about the cassette, and was asleep on watch despite the presence on the cassette of a "hot potato" in the form of a conversation in Arabic that raises very major questions concerning the circumstances of the death of the deceased.
- 331. According to all the plaintiffs' witnesses and those for the defense, beginning at 12:00, the foreigners began demonstrating with the aim of distancing the bulldozers from the houses, and they went from place to place and stood around the vehicles. Some of them were even in danger of injury. The presence of the foreigners and their protest actions interfered with the bulldozer operators, and they complained about that to the commander of the operational force, and the latter relayed the complaints to his commander Sh.R. who was at the *Yaklaz*. Was it not sufficient that this behavior comprises a kind of incident requiring recording, as we have heard throughout the

course of this trial that there were not a few cases when the lives of the foreigners were in danger and it was a miracle that they had not been injured sooner. And if so, how did it happen that there is no recording of these long hours on the cassette?

- 332. Given the statements by the witnesses: Y.P., Sh.R., and Zoaretz in relating to the cassette that documented the incident, a large tough cloud looms over the defense regarding every aspect of the investigation team's behavior with respect to the cassette. Y.P. confirmed that every incident is filmed and recorded (p.1544, lines 18-19). The witness **Sh.R.** testified that when there is an incident, it is recorded 24 hours and if there is an anti-tank shooting incident or a hand grenade is thrown, this is recorded and it can be reconstructed (p.1046, line 21 through p.1047 / session of April 6, 2011) and he even explained the recording process. Moreover, senior commander Zoaretz confirmed that, in the framework of the operational inquiry conducted right after the incident, he obtained the cassette and watched it. (p.1276 / session of July 10, 2011).
- 333. As stated, it was Zoaretz himself who intervened unlawfully in the Military Police Investigation Unit investigation, and it was he who instructed Sh.R. to stop the Military Police investigation. Prior to that, he was the one who obtained the cassette, which should be the strongest and most credible evidence concerning what happened at the scene of the incident. Adding to this evidence, is the simple fact that the cassette given to the Channel 2 Ovdah program contains longer time segments than does the cassette presented to the court concerning what happened before the injury to the deceased. 62 **S.R.** confirmed that he was interviewed for the Ovdah program and things he said on the program were presented to him, and he confirmed that the *Paskal* on that program begins at 16:58:49. Moreover the cassette submitted to the Court that was supposed to be authentic begins at 17:05:07. Meaning that someone made sure to censor the *Paskal* submitted to the prosecution and the court. This state of affairs points to concealment of information and evidence which could cast light on what happened before the injury to the deceased. This collection of data can point to "something rotten in the southern kingdom." In other words, Zoaretz not only interfered in the investigation and influenced its progress unlawfully; he also hindered the investigation of the truth.
- 334. As for the communication system, this also raises unparalleled questions for which the defense witnesses have no explanation, especially the investigation team members. Even if we accept their version that the camera was pointing toward Egypt, the communications network cannot be

⁶² A grammatical edit is made in the English translation.

pointing towards Egypt!, and it sounds like pure fantasy. For we heard from the witnesses that during the day, there were many instances of communication via the various communication systems in which reports and complaints were heard about the presence of the foreign demonstrators. From the testimony of Shalom in the al-Hams case, which was cited in the verdict of the Military Court for the South, this system is impressive (**DR(Darom) 400/04 Military Prosecutor v. R. published in Nevo**). As noted, Shalom did not provide an explanation as to why he did not look for the communication system and did not obtain it as evidence and did not investigate those involved in the incident regarding its contents, and hence his interpretation that there is no such communication system is unacceptable.

Interference in the investigation:

- 335. The Chief Military Prosecutor, on March 17, 2003, had already ordered the opening of an investigation into the circumstances of the death of the deceased, and the investigation team headed by **Shalom** and his two investigators Elad and Oded began their work that same day. From the testimony of E.V. from that day, we understand that (Reserves) Captain Baruch⁶³ entered the investigation room and instructed E.V. to stop giving testimony and not to cooperate with the investigator as per the order of the Commander at the time of the Southern Command, General Doron Almog. (Testimony of E.V. (**D/17A**)).
- 336. The witness **Oded** who interrogated E.V. did not see therein any disruption of the investigation process, and he related that he had encountered this in the past a number of times (p.1173, lines 17-23 / session of September 5, 2010), because according to him there had been a struggle for authority "because they don't know the authorities, who should investigate, if it's a military inquiry, if it's a Military Police inquiry. All in all [when] a civilian dies, it's a police inquiry" (p.1172, lines 16-18 / session of September 5, 2010). He himself did not attempt to clarify the meaning of the instruction of the then head of the Southern Command General Doron Almog, and left that to his superiors since "with my being a staff sergeant, it isn't customary for a staff sergeant to go and interrogate a general" (p.1179, lines 20-21 / session of September 5, 2010).
- 337. The witness **E.V.** did not remember the intervention of a soldier named Makarenko in the investigation, although this intervention is documented in the interrogation of this witness in the

6

⁶³ i.e., a captain doing his annual stint of duty in the military reserves.

first testimony at the Military Police Investigation Unit of March 17, 2003 (p.3 line 32-33), where it states:

"(32) The time is now 18:12 Reserve Captain K.⁶⁴ Baruch entered the room and announced to the witness that he should not say anything and not write anything, by order of the General of the Southern Command. As evidence of the accuracy of these words I append my signature."

See also documentation of this intervention in the testimony of March 19, 2003, p.1.

- 338. Alongside the interrogation of E.V. by Oded, in an adjacent room at the same time Y.P. was also being interrogated and at the end of the testimony the investigator noted the following:
 - "At 18.13 Major Sh.R. entered the room and forbid the suspect from saying anything or signing any document whatever, and asked that the suspect leave the room." (D/17A).
- 339. The witness Y.P. confirmed that Major Sh.R., Deputy Commander of the Desert Reconnaissance Battalion, entered the interrogation room on March 17, 2003, asked him not to sign the testimony and instructed him to leave the interrogation room. The witness confirmed that he obeyed the commander's instruction, but he had no explanation for the behavior of the commander (p.1669 / session of October 21, 2010).

Sh.R. instructed the Military Police Investigation Unit investigators to stop the investigation, and also ordered Y.P. not to add anything further and not to sign his testimony (p.1123 / session of April 6, 2011).

Amazingly – the commander **Zoaretz**, who had investigated the incident and obtained the cassette documenting the incident before the Military Police Investigation Unit [did], and although he instructed Sh.R. to stop the Military Police investigation – not only did the Military Police investigators not ask him about his involvement in disrupting the investigation process, but they presented to him the soldiers' testimonies and their findings, and asked for his opinion about their behavior. Thus he testified before them: "I am serving in the unit noted below as a brigade commander for the last eight months approximately. I was asked by the undersigned Military Police investigator to address the incident in which the American citizen Corrie Rachel Aliene died on March 16, 2003 near the Philadelphi Corridor point 23 below are my remarks: After they had

⁶⁴ First name redacted from translation.

presented to the Military Police investigators all the testimonies they had taken and the findings they had gathered and without addressing the operational debriefings..." On the other hand, the witness denied during his testimony to the court that he saw the soldiers' testimonies that had been given to the Military Police investigators and claimed that they were not presented to him (p.1281, lines 19-23 / session of July 10, 2010).

Operational debriefings:

- 340. As stated, the Military Police Investigation Unit is the criminal investigations unit of the army and is authorized, inter alia, to investigate incidents in reliance on an order from the Chief Military Prosecutor. The investigation team appointed to investigate an incident has powers defined by law (The Code of Military Justice, 1955), to take testimony, including testimony under caution. The unit is authorized to perform searches and obtain evidence, and to arrest suspects and bring them for extended detention before a court in order to carry out the investigation process. The Military Police Investigation Unit is in fact comparable to the civilian police who investigate criminal incidents involving civilians. Anything said by a soldier interrogated by the Military Police Investigation Unit can serve as evidence against him later on in any future criminal process.
- 341. By contrast, an operational debriefing is conducted by commanders and the whole point of this is to deduce lessons from an operational standpoint. In other words how the military mission can be performed better from the standpoint of procedures for the next such mission. Essentially, in the operational debriefing the army tells the soldiers, Come document truly and openly for us what took place, nothing bad will happen to you as a result of the operational debriefing. Note that the military debriefing is privileged and the content of its testimonies remains privileged, and it is not available to the Military Police Investigation Unit or its investigators. The Military Police Investigation Unit cannot make use of the operational debriefing. Thus, as distinguished from the process at the Military Police Investigation Unit, the testimonies of the soldiers from the debriefing remain privileged and hence inaccessible to the Military Police investigators. During the trial it became evident that there were a great many operational debriefings in the wake of the incident, some of them overlapping with the conduct of the Military Police investigation and some even after the end of the Military Police investigation.
- 342. The Military Police investigator **Shalom** confirmed that he came into the picture after there had already been operational debriefings and he was not exposed to the content or aims of these

debriefings held to learn about operational mistakes (end of p.1435 through beginning of p.1438). The witness **E.V.** confirmed that there were several operational debriefings and he was questioned at them, **but he did not remember if this was before the Military Police investigation or after it** (p.1738, lines 14-23 / session of November 4, 2010).

The witness **S.L.** confirmed in his testimony in Court that there was an operational debriefing, **that they were called and were asked questions** and that there were twenty people at the debriefing, and that was **before the Military Police Investigation Unit entered the picture,** and each of them **heard what the other soldiers were saying** in the debriefing (end of p.1798 through 1799, line 8 / session of November 4, 2010).

A.S. confirmed that there was a debriefing done by the division commander who asked them about the incident and that this **was before the Military Police Investigation Unit** investigation. (p.1501, lines 6-14).

- 343. The witness S.R. testified that there is a preliminary debriefing that was done right after the incident and thereafter there is a more in-depth debriefing that got to the general's level, and these things are privileged at all the levels. Further on, he elaborates: a company level debriefing, a battalion level debriefing, a brigade level debriefing, a division level debriefing and a command level debriefing that went as high as the Chief of Staff (p.1105 / session of April 6, 2011). He also confirmed that when the deputy brigade commander does a debriefing, he also gets to the field **and sees the people involved** (p.1110, lines 6-8 / session of April 6, 2011).
- 344. As stated, **Y.A.** stated at the start of his testimony that he was a member of a committee named by the army and headed by General [Giora] Eiland (p.1334, line 7 / session of September 6, 2010) to investigate the circumstances of the incident in which the deceased was killed and they reached the conclusion that the bulldozer "was clearing and lifted a battery, in order to enable what is called lookout" (p.1328, line 11 / session of September 6, 2010) and that the investigation by the committee was not short and all the material from the investigation is in the witness's possession (p.1328-1329 / session of September 6, 2010). This version is a new version that touches on the mechanism of injury to the deceased that is completely different from the principal version related by the defendant (paragraph 38(b), in the amended Writ of Defense) and certainly is completely different from the version of the witness Zoaretz.

345. The witness **Zoaretz** testified that after the incident -- and before the Military Police investigation – he conducted an operational debriefing, in the course of which he met with everyone who had been at the incident, including the bulldozer operations, S.R. and Sh.R. and the soldiers from the operational force. They are talking about the incident and the purpose of the inquiry is operational (p.1187-1188 / session of July 10, 2011). The witness added that there were several other debriefings by the division commander, a debriefing by the command general, and two other debriefings conducted at a later stage, by Giora Eiland and another by Dan Harel.

The findings of the debriefing by Zoaretz were that the deceased was killed by a mound of earth and debris that was **there and one of the concrete pillars struck her**, the blade of the bulldozer was pushing sand and a concrete pillar struck her. This is **what he heard from the operators of the vehicle.** (p.1192-1193 / session of July 10, 2011).

- 346. The military debriefings that were conducted in this case remained privileged, although from the statements by the witness Shalom, we understand in language that is unequivocal that the Military Police investigation was conducted in the shadow of several operational debriefings, some of them conducted before the Military Police Investigation Unit entered the picture, while the senior commanders had possession for a week of the cassette that ought to have thrown light on what happened there. The investigation team received the cassette from Captain Rafi whose connection to the cassette we did not know, without his [having been] or the recording woman soldier's having been interrogated, and without anyone having provided an answer as to what was done to the cassette during that week, and without the provision of any logical explanation as to why the cassette conveyed to the court documents only what happened after the death of the deceased, and contains nothing of the occurrences or segments starting from 12:00 noon!!
- 347. Moreover, the operational debriefings take place when the soldiers involved in the incident gather together and talk together about the incident and hear the versions of their comrades about the incident, in other words there is coordination of versions. Zoaretz' version evokes great amazement as he reached the conclusion that the death of the deceased was caused by a concrete pillar that fell on the deceased and killed her, and he reaches this conclusion based on statements from the vehicle's operators, while the people in the debriefing overseen by General Eiland, including Y.A., reach the conclusion based on the interrogation of those involved that the deceased was hurt by the battery, and in the words of S.R. that there is no doubt, it was in all the debriefings that were conducted, and noting his position as a commander in the field she was injured by the blade?!

These conclusions of the debriefings cannot be reconciled with the Defendant's version of the mechanism of injury as elaborated in Paragraph 38(b) of the Amended Writ of Defense, for the defendant of the patrons [sic⁶⁵].

- 348. To conclude the main point here, then, we know that there were a number of operational debriefings before the Military Police Investigation Unit entered the picture, and the soldiers and the commanders talked among themselves about the incident, and heard what each of them had to say; the cassette was in the possession of their commanders, and only later on did the Military Police Investigation Unit enter the picture and begin to investigate. It is clear that the existence of debriefings prior to the incident [sic; possibly meant: "prior to the Military Police investigation of the incident"] creates a problematic situation, since the soldier being investigated by the Military Police Investigation Unit already knows what he said in the debriefing and what the other soldiers said and what the commanders responded, and thus there is a real concern about coordinating testimonies and a concern that the soldiers did not tell the truth to the Military Police investigators, inasmuch as they are liable to find themselves accused in a criminal proceeding.
- 349. Commander Zoaretz, as noted, had access on the day of the incident to the most decisive evidence the *Paskal* cassette before it was obtained by the Military Police Investigation Unit, and there is no explanation for the erasures or for the fact that the *Paskal* cassette that was relayed to the Ovdah television program included segments from before the injury to the deceased. The Military Police investigators, as noted, obtained this decisive evidence on March 23, 2003, and were negligent in their work of interpreting what was documented on the cassette.

> <u>Summary and conclusions - regarding the operational debriefings and the interference in the investigation:</u>

350. The influence of the senior commanders is evident in the inability of the investigation team to obtain the cassette in real time, due to the cassette's being in the possession of the senior commanders who used it for the purposes of the operational debriefings held immediately after the incident occurred and until March 23, 2003 – the date on which it was obtained by the Military Police investigators. The Military Police investigators could not obtain the cassette in real time, and each of them provides an unpersuasive reason for not obtaining it, inter alia because "it was in the possession of the senior commanders."

143

⁶⁵ Misspelled Hebrew word – likely "patrons" but could also be "solutions." Exact translation of sentence is slightly unclear.

351. The lack of independence of the investigation team named to investigate the incident is evident also in the fact of intervention by senior commanders in the investigation process, and their entrance into the interrogation room to prohibit their subordinates from cooperating. And not only that, but also Pinky Zoaretz, commander of the southern brigade, was summoned for an interrogation and questioned on March 20, 2003 to provide an expert opinion and not to be interrogated like any other soldier or commander involved in the incident. The investigator Elad lays before him all the evidence and testimonies collected in the case, lets him read through them and asks him for his expert opinion concerning the behavior of the forces. Zoaretz opens his Military Police testimony with these words: "I am serving in the unit noted below as a brigade commander for the last eight months approximately. I was asked by the undersigned Military Police investigator to address the incident in which the American citizen Corrie Rachel Aliene died on March 16, 2003 near the Philadelphi Corridor point 23 below are my remarks: After they had presented to the Military Police investigators all the testimonies they had taken and the findings they had gathered and without addressing the operational debriefings....." (P/56).

Elad was questioned in court and required to provide an explanation as to why he presented to Zoaretz the soldiers' testimonies and his reply in court was:

"A: He is actually the brigade commander who is responsible for the entire sector. I don't know if he was knowledgeable about all the details of the investigation. We presented to him all the findings we had gathered, all the testimonies that, some from testimonies we have taken and we wanted just to get his expert opinion about the matter."

(p.727, lines 10-13, session of March 22, 2010).

- 352. Hence, the Military Police investigators treated Pinky Zoaretz as an expert witness and asked for his expert opinion concerning the functioning of the force he commands. Does allowing a commander with command responsibility to express his opinion about the functioning of his subordinates and ignore grave deviations indicated by the severity of the incident, comprise a responsible and professional investigation or is this rather a whitewashing?
- 353. During the course of the trial, the witnesses confirmed, and among them the father of the deceased, Craig Corrie, that in the wake of the incident, the then Prime Minister Ariel Sharon promised the then President of the United States George Bush that the IDF would conduct an independent,

unfettered and thorough investigation⁶⁶, but it is very hard to get the impression that such an investigation was indeed conducted. True, that there was an investigation; it was far from being independent, unfettered and thorough, and at most it was an exercise in going through the motions of an investigation, while it was being conducted in the shadow of the operational debriefings and the soldiers involved were meeting and talking among themselves, and each of them heard the version his comrade gave of the incident, and only afterwards did they report to the Military Police Investigation Unit investigators, when they had already heard their own and their comrades' versions of the incident. Is this what would be called an independent investigation by the Military Police investigators?

354. Above we have summarized the existence of operational debriefings with influence on and overlapping with the Military Police investigation, and although the debriefings remained privileged, from the reduced amount of information the commanders allowed to the court concerning their conclusions, which were based on what was said by the soldiers involved, there are essential contradictions which cannot be bridged regarding the mechanism of injury to the deceased, and which are not reconcilable with the version the defense attached to it in Paragraph 38(b) of the amended writ of defense.

Clearing regulation, mission file and distancing regulation:

- 355. The engineering force on that day conducted actions to clear the ground in the [Philadelphi] corridor, and it was only natural that a question as to the existence of a clearing regulation would arise in the discussion during the investigation of the witnesses in court. The Defense witnesses testified unequivocally about the existence of a "clearing regulation," and some even talked about a "mission file," which includes the clearing regulation and the developments that occurred on that day. Another witness even spoke of the existence of a "distancing regulation."
- 356. The witness **Sh.R.** stated with certainty that for a clearing operation in general there is a mission file, and that for this specific clearing operation on that day there was a mission file:
 - "A: But I do remember that there is a mission file. A mission file, it has written in it the briefing points, what they address, the safety procedures, the briefing of the engineering force, which works with us, how we handle the cooperation, how the

. .

⁶⁶ "thorough, credible, and transparent investigation" is the terminology that was reportedly used.

work is carried out, what threats there are to the mission. This is the mission file, which I approve. If I approve it, then the debriefing is based on the mission file.

- Q: And this mission file is a file, a file that goes with the force, for the specific mission on that day.
- A: Yes.
- Q: In which is recorded the mission assigned to the force, the force that goes out to perform it, the engineering force and the operational force, and the developments that happen.
- A: Yes.
- Q: And you remember that there was a mission file in this case.
- A: Had to be. There's no such thing as an action would go out. Yes.
- Q: A written mission file.
- A: A written mission file, which I approved. There is no such thing that a mission would go out, without a mission file."

(End of p.1072, lines 1-16 / session of April 6, 2011).

He added that the person who adds to the file the developments that take place during the day is the *hamal*⁶⁷ who is in the *nagmachon*. There is a *hamal* who pays attention and writes down what happens.

357. The witness testified, about the content of the mission file, that "it defines the mission, what they are going to do, what the threats are to the mission, what the safety procedures are... who is the command hierarchy, who are the commanders, who are the force that participates... that is the file that is saved. Again it is used." (p.1073, lines 509 / session of April 6, 2011).

When the witness was asked for his considerations concerning the developments that took place during the mission, and he answered that they respond in light of the developments, and that a new situation assessment was done in that case, then apparently the matter was not recorded in the

⁶⁷ Uncertain term. Might be a form of the Hebrew term "hayal miluim." Possibly a reference to a reserve soldier.

mission file, because "the mission file is an off-the-shelf file." (p.1074, lines 108 / session of April 6, 2011).

The witness again emphasized that he does not remember what he said in the debriefing to S.R. and that he doesn't work from memory and that he gave the briefing based on a "file with written particulars, a mission, goal, forces and assignments, who is doing what, what the safety procedures are, factors having an influence, cases and responses, they are discussed, what happens if..."

358. Sh.R. added that he did not prepare his affidavit that was submitted in the framework of primary testimony based on the mission file, from that day, because:

"Go find it, eight years.

0: The last time you saw the mission file, it was eight years ago.

A: Yes."

(p.1075, lines 13-15 / session of April 6, 2011).

359. The witness **Zoaretz** also confirmed that the clearing action had a mission file, and according to the witness, a mission file includes:

"Operational orders. There is a goal, there is a mission, there is intelligence. A structured file, this is an operational file, it is built from the intelligence, that we have, on what happens, it is built from what the goal of the mission is, how the mission is to be performed, what the forces are, the mission file is constructed that way, with a briefing."

(p.1213, lines 1-4 / session of July 10, 2011).

360. The witness $\mathbf{E.D}^{68}$, testified initially that there is a clearing regulation when going out to a mission like this, but later he retracted that and claimed that there is no specific regulation for clearing. (p.1160, lines 5-15 / session of April 6, 2011).

Lieutenant Colonel **Y.A.** confirmed that there is a combat doctrine for clearing (p.1330, line 16 / session of September 6, 2010). S.R. testified that for a clearing action there is certainly a combat doctrine and a regulation and a mission file, and this regulation would have been taken that

⁶⁸ This is a reference to "A.D." – the platoon commander in the APC.

defines exactly the manner of behaving in the Corridor, thus replied **S.R.** during his cross examination:

"We also had a mission file. I don't know what you mean exactly, but there is,

- Q: That defines the manner of behaving in the Corridor. Correct?
- A: Yes.
- Q: That tells you, as the commander, how you have to behave, if you are removing a mine.
- A: There is a drill for this, of course. Yes.
- Q: And this combat doctrine also addresses how to behave toward someone who is in the Corridor.
- A: Of course, yes.
- Q: Whether someone favorable or someone who is an enemy.
- A: Correct. Quite correct.
- Q: You acted according to this regulation. Correct?
- A: Yes.
- Q: And this regulation is one that exists, that existed then, at the time of the incident.
- A: Yes, there is an orderly directive. There is an orderly directive, there are also openfire regulations. Everything is there.
- Q: No problem. I am not talking about open-fire regulations. I am talking about a regulation for clearing the ground, and various situations of injury, of encountering terrorists, of encountering people who are in the Corridor, correct?
- A: Quite correct."

(p.897 line 8 p.898 line 4 / session of April 3, 2011).

361. The witness **S.R.** added further, that the regulation on clearing the ground relates to various situations of injury, encounters with terrorists and encounters with people who are in the Corridor (p.898, lines 1-3 / session of April 3, 2011).

- S.R. testified about the existence of a "distancing regulation" in the brigade (p.901, lines 1-5 / session of April 3, 2011). By contrast, counsel for the defense declared that there is no such regulation. Attorney Kalman declared further: "To the best of my knowledge, and from all the material we have reviewed thus far, there is no such regulation. We have not encountered such a regulation, and insofar as we have clarified, there is no such regulation (p.905, lines 18-20 / session of April 3, 2011).
- 362. However, we see that the senior witnesses for the defense testify to the existence of three regulations: a clearing regulation, a mission file and a distancing regulation, which regulate the clearing action: the work, the intelligence, the risks inherent in the work and the manner of dealing with the presence of "a person" in the route and the manner of distancing him, but amazingly enough counsel for the defense declared that such a distancing regulation does not exist. Support for this line of thinking may be found in the testimony of the witnesses who confirmed the fact of the existence of the foreigners in the Corridor for the last three months, and especially in the words of the witness Sh.R. who testified, that they talked about the foreigners in the weekly and monthly situation deployment, they analyzed ways and focused carefully on the subject in terms of their presence and the need not to injure them (p.1064, lines 1-2 / session of April 6, 2011).
- 363. The witness **Zoaretz** confirmed that he, too, knew of the existence of the foreigners, and that he encountered them during many incidents (p.1203, lines 10-15 / session of July 10, 2011) a few months before the incident when which they disrupted the work of his forces.
- 364. As is known, the law holds that when a party to a suit refrains from bringing relevant evidence in his possession, without reasonable explanation, it raises the presumption that had this evidence been submitted to the Court, it would have worked against him, as determined by Madame Justice H. Ben-Ito in Civil Appeal 548/78 Sharon v. Levy, *Piskei Din* 35(1) 736, p.760:

"This approach taken by the legislature originates in the longstanding rule of the court's having clean hands, which subjects parties to a suit to the presumption, that they will not withhold evidence from the court that is in their favor, and if they refrain from submitting relevant evidence in their possession, without reasonable explanation for so doing, it may be concluded that, were the evidence to be submitted, it would work against them. This rule is solidly accepted both in civil cases and in criminal cases, and the more

significant the evidence is, the more the court may, from the non-submission, draw decisive and far-reaching conclusions against the party who withheld it."

See also <u>Civil Appeal 55/89 Koppel (Nehiga Atzmit) Ltd. V. Telcar Ltd.</u>, *Piskei Din* 44(4) 595, p.602-603.

365. Likewise, see the writings of Hon. Justice (Ret.) J. Kedmi, in his book (J. Kedmi, *Al hara'ayot* [On Evidence], Part Three [Hebrew], (2003), p.1649-1650):

"Sometimes the way a party to a lawsuit conducts his matter in court has evidentiary significance, as if this were circumstantial evidence. Thus evidentiary significance may be attributed: to evidence not being presented, to a witness not being heard, to questions not asked of a witness or to the refraining from cross examination of someone whose testimony was presented in a written affidavit signed by him.

Such behavior, in the absence of a credible and reasonable explanation, creates a presumption against the one taking such action; and prima facie, compels the conclusion that, had the evidence been presented, or the witness heard, or the questions asked or the cross examination taken place, it would have supported the version of his adversary.

Refraining from presenting evidence – in the broad sense of the concept as described above – actually raises the presumption to the detriment of the refraining party, consonant with logic and life experience, that: the law of refraining is as the law of confession in that had that same evidence been brought, it would have worked against the refrainer. In this manner evidentiary weight may be attributed to evidence that was not brought."

(emphasis mine-Y.J.)

366. In my opinion, not presenting the clearing regulation, the mission file and the distancing regulation about which the defense witnesses testified, by law must work against the defendant, since one may reasonably assume that these regulations would have helped throw light on the standard of caution that the IDF set for the clearing work and for relating to the foreigners coming to the Corridor during that work and the non-presentation of these important documents – requires investigation.

367. When this is combined with the picture arising from the testimonies, according to which the issue of the foreigners was known to the IDF forces several months before the incident herein and with respect to which orderly regulations had been formulated and hence it appears that the defendant's refraining from bringing these documents reinforces the conclusion that the presentation of these documents would have worked against the defendant.

Failure to question Palestinian witnesses to the incident:

368. At the incident itself no Palestinians were present, although there is no disagreement that the deceased was evacuated by a Palestinian ambulance coming from Rafah, after Dr. Samir called for help, and in the Rafah hospital she was examined by a medical team that included three doctors, among them Dr. Ahmad Abu Nakira, who filled out a medical certificate documenting the examination of the body just after its transfer by the Palestinian ambulance to the hospital in Rafah. The investigation team did not question the ambulance team or the members of the medical team who examined the deceased in the minutes after the incident. A copy of the certificate was conveyed by agreement to the court.

The witness Shalom confirmed that he did not seek to reach them and question them, and he had no explanation as to why he did not do that (p.1439, lines 3-12). The witness Military Police investigator **Oded** testified likewise (p.1180 line 22 through p.1181 line 3 / session of September 5, 20110. As noted, none of the Palestinian witnesses was investigated, including Dr. Samir, Dr. Abu Nakira and the ambulance team who evacuated the deceased from the site of the incident and whom no attempt was made to reach.

Failure to consider the problematic background of the battalion:

369. The soldiers involved in the incident in this case, at least those who were in the *nagmachon*, belonged to the Desert Reconnaissance Battalion, a battalion that from the standpoint of its historical background, many soldiers who served in its ranks took drugs during their military service and were brought to trial and convicted of violations involving widespread drug use. (see in this regard: DR ⁶⁹ 446/03 Military Prosecutor v. Abu Bilal Ghassan; DR 488/03 Military Prosecutor v. Abu 'Anem Soulmi; DR 449/03 Military Prosecutor v. Abu Sabit Haiman; DR 490/03 Military Prosecutor v. Zahagria Khaled; DR 459/03 Military Prosecutor v. Alabeed Tarek; Appeal 26/04 Alabeed Tarek v. Military Prosecutor; DR 455/03 Military Prosecutor v. Souad Samra; Appeal

151

⁶⁹ DR: "Darom", i.e., Military Court for the Southern District.

219/03 Samra Souad v. Military Prosecutor). This fact per se, apparently was not known to the Military Police Investigation Unit investigators and they did not give it any attention whatever, and clearly a skilled investigation team would have investigated the criminal record of the soldiers involved, especially when these soldiers are being questioned under caution, or questioned about an incident in which a young civilian lost her life.

Failure to consult with experts on accidents and safety:

- 370. At the beginning of this section on evidentiary damage we pointed out the lack of experience and expertise of two of the three investigators who were named to handle this complicated case. From the testimony of **Shalom** we understood that, within the Military Police Investigation Unit, there are special investigators who specialize in investigating road accidents, but for whatever reason the task of investigating this case was not given to them although it was known from the outset that a heavy bulldozer was involved in the circumstances of her death, and instead a team was named that has no experience in investigating road accidents and none of the three members of the team belongs to that unit. (end of p.1360 beginning of p.1361).
- 371. Not only were the investigation team members lacking in experience with investigating road accidents, they did not even get help from a neutral safety expert, but chose to take testimony from an expert in the safety of mechanical engineering equipment who is in charge of the operation of the vehicles that were involved in the incident that caused the death of the deceased. In other words, the two bulldozers that operated at the scene on that day belonged to an engineering equipment division and there they are subordinate to the operational force although professionally they are under their own home unit, which is the mechanical engineering equipment division. **Shalom** and his two helpers investigated Colonel Sh.L., who was the commander of the unit that is responsible for the operation of these vehicles in the Southern Command, and during the relevant period was in the position of base commander. The team also investigated Major Sh.R. and Colonel Y.E., whose forces are responsible for the incident. The team members did not, however, see fit to go with any of those people to the scene of the incident and they made do with taking testimony at the base. The team members did not get help from an expert safety consultant about the rules for safety in the area surrounding the vehicle in operation.

> Interim Summary and Conclusions:

- 372. Hearing the testimonies of the Military Police Investigation Unit investigators left a very sad impression, and it turned out that there were many flaws in the investigation, inter alia, the failure to obtain the *Paskal* cassette on March 3, 2003, and thereby they stripped it of the only advantage it offered objectivity, since it was the only material evidence that ought to have been free of leaning toward one side or the other, and which could have thrown light on the murky circumstances of the running over of the deceased. One might have expected that the Military Police investigators would obtain the *Paskal* cassette immediately once they were named to deal with the affair and would supply an immediate and precise interpretation insofar as possible of the cassette, which documents inter alia the things that were said on the communications net during the incident. Thus we were amazed to discover the amateurish manner in which they dealt with obtaining the cassette and with its transcription. It appears that the task was assigned to a transcriber who is not professional and that the Military Police investigators did not take his testimony and that he does not speak Arabic though he transcribed brief segments of it and did not transcribe codes that are heard on the net.
- 373. We could have presented many additional examples, but we think that the ones we have given suffice to show the amateurish, not to say negligent, way in which the *Paskal* was transcribed by the Military Police Investigation Unit investigators, and there is nothing here to explain why they refrained from investigating the witnesses about the conspicuous contradictions between their testimonies and other testimonies. Thus for example, they did not confront Y.P. with E.V. concerning the location of the deceased's body after the incident. Likewise, they did not confront any of the witnesses with the *Paskal*, or with its correct transcription.
- 374. The Military Police investigators did not confiscate the work regulation for the bulldozer nor make any use of it during their investigation despite its being a basic document in this investigation, and even when they learned of its importance they again did not trouble to investigate those involved in the matter. Likewise they neglected to obtain the clearing regulation, the mission file and the distancing file [sic; meant: distancing regulation], and they did not obtain from the foreigners the photographs they took in real time. Given all of the foregoing, there is no avoiding the unfortunate conclusion that there were numerous flaws in the investigation of the case by the Military Police investigators, to an extent sufficient to damage the quality of the investigation and the credibility of the findings.

<u>Disregarding the safety procedures of the Mechanical Engineering Equipment</u> Division:

- 375. We have engaged, elsewhere in the summations, in a broad discussion of the civilian safety procedures that were adopted by the Technology Division of the IDF for use in its military safety procedures, and also of the IDF safety procedures written by the army for the operation of mechanical engineering equipment during limited confrontations. The investigator Shalom who read the safety instruction manuals on March 31, 2003 took a negligent decision that they were not relevant, and hence did not see fit to obtain them as an exhibit and investigate those involved in light of these regulations. More serious is Shalom's behavior in also influencing the other two investigators Elad and Oded not to investigate those involved in the incident in light of these safety procedures.
- 376. Not only that, but also when testimonies were taken from the senior commanders at the training base and the commander in charge of writing the IDF combat doctrine, when he [i.e., Shalom] understood that the safety procedures are indeed relevant to an investigation of the incident, he did not rush to go back and obtain the regulations, and in light of them to examine those involved in the incident in which the life of a young woman was cut short. This manner of investigation is characteristic of an investigator who assembles evidence, without using ingenuity or thinking through the content of the evidence assembled, so as to probe deeper in order to discover the truth. The investigative failures of the investigation team concerning the Engineering Division regulations is completely incomprehensible, and amounts to negligence unparalleled among professional investigators, who are expected to exert themselves repeatedly to discover the truth and probe deeply in order to discover evidence. Even if Shalom believed at the outset that the Mechanical Engineering Division procedures are not relevant, from the moment he heard from the senior commander of the training base that the safety procedures do exist for the IDF Mechanical Engineering Division, he could no longer close his eyes and not investigate in accordance with these regulations. As will be remembered, Y.P. testified that the dead [visual] area in front of the bulldozer was three meters, and according to the Mechanical Engineering Division safety procedures, it is absolutely prohibited to engage Y.P. in clearing work when in his near vicinity at a distance of a few meters and sometimes less than a meter there are civilians who are demonstrating. Was it not Shalom's duty and that of his team to ask and investigate S.R. and Sh.R. under caution why they gave orders for the continued conduct of the work despite the existence of demonstrators at a distance prohibited by the regulations?

Photos from the scene of the incident:

377. Amazingly, despite all the foreign friends of the deceased who were with her at the scene of the incident, and [were] interrogated by the Military Police Investigation Unit on April 1, 2003, and who had in their possession many authentic pictures, which documented the incidents of that day, the investigation team, for whatever reason, did not obtain these photographs and interrogate the foreigners and the other soldiers who were present at the scene of the incident, in light of them. It is superfluous to note that the interrogation of the foreigners was done after most of the testimonies of the soldiers involves had already been taken, and that included the members of the Engineering Equipment crew. And the investigators managed to hear from them about the behavior and movements of the foreigners on that day, and the investigators had before them pictures taken in real time and in the absence of any other, better documentation, it was only logical and inevitable that a professional investigator who seeks to discover the truth would confront those involved in the incident from both sides – the foreigners and the soldiers – with the pictures taken on that day. The explanation provided by the investigator Elad about the failure to obtain the photos taken by the foreigners and look through them because of the "urgency of the investigation and the need to finish it" (p.702, lines 8-23) is simply unpersuasive to the layman, since receiving the photos from the foreigners and confiscating them would not have delayed the investigation in the slightest, on the contrary it could have helped the team in clarifying the truth and confronting the witnesses with photographs taken in real time.

Application of the law to the facts pertaining to the evidentiary damage:

378. The point of departure to any discussion of an issue is the centrality and importance of the defense of the right to life. This right is a basic right, anchored in Israeli law and is the right of every person and is anchored in the law of war and occupation. The approach underlying these laws is that even during violent confrontations, rules apply that oblige the warring forces to honor human life and insofar as possible to honor the basic rights of civilians not involved in the fighting. Thus determined the High Court in HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel ([published in Nevo] December 14, 2006) (hereinafter: the matter of targeted elimination):

"A central consideration influencing the break-even point is the identity of the injured person or the injured target in armed confrontation. This is the basic principle of distinction (see Dinstein, p.82; Ben-Naftali and Shani, p.151). Customary international

law regarding armed conflict rests on a fundamental distinction between combatants and military objectives and non-combatants, in other words civilians and civilian objectives) (see the matter of the legality of atomic weapons, p.257; paragraph 48 of the first transcript). According to the basic principle of distinction, the break-even point between the military need of the state and combatants and the military goals of the opposing side, is not the same as the break-even point between the military needs of the state and the civilians and civilian goals of the opposing side"

(op. cit., paragraph 23 of the verdict of President (Ret.) Barak).

379. In the deliberations in the HCJ 5817/08 **Bassem Aramin et al. v. Attorney General,** the Court was required [to consider] a decision of the Attorney General to close an investigation file concerning the circumstances of the death of a young girl, a Jerusalem resident, and in the framework of the verdict, the Court decided, inter alia:

The fact of the investigation has implications for the defense of the right to life – the investigation allows, first and foremost, bringing to justice, in appropriate instances, and holding responsible those who deviate from the law. Beyond that, a criminal investigation works to preserve the forward-facing component of the duty to protect life, in that it deters the infliction of harm in the future, prevents disrespect toward the right to life and contributes to an atmosphere of the rule of law."

<u>Investigative failures and the resulting evidentiary damage suffered by the plaintiffs:</u>

- 380. Although in this case a decision is already given by the Military Prosecutor, Anat Yaron [sic], to open an investigation on the day after the incident, and indeed a special investigation team was named, to be headed by Shalom, to investigate the circumstances of the incident although from the foregoing review it appears that, along the path pursued by the special investigation team named to investigate the incident, there were innumerable investigatory failures. If a magnifying glass is trained on the investigatory actions taken by the team, it would disclose that there were investigatory failures, lack of ingenuity and lack of initiative everywhere.
- 381. A rule well established by the courts holds that, in a place where a defendant causes evidentiary damage through negligence that is, damages the ability of the plaintiff to make use of evidence

- that ostensibly has potential to establish one of the factual claims on which the suit is based the court should place on the defendant the burden of persuasion that that factual claim is improper.
- 382. This rule is based mainly on considerations of justice and on the social need to deter potential defendants from losing evidence, and it expresses the evidentiary-deliberative aspect of the doctrine of evidentiary damage (see in this regard Civil Appeal Azam Daher v. State of Israel; Civil Appeal 9328/02 Meir v. Leor; Civil Appeal 6160/99 Druckman v. Laniado Hospital, published in Nevo).
- 383. The significance of this rule is thus in the establishment of a factual presumption, because were it not for the damage due to negligence by the defendant, the missing evidence would support the version of the plaintiff regarding the factual claim in dispute. This rule was broadened as stated in the Daher matter beyond claims of medical negligence.
- 384. Because of the failure of the investigatory team to respect the court's order regarding the autopsy of the deceased's body, as well as the violation of the order itself by the National Institute of Forensic Medicine, as detailed above, the file on the cause of death which was opened by the court was left as it was. Moreover, Prof. Hiss confirmed during the course of his testimony as stated that he destroyed the audio voice recording that documented the autopsy, and that in and of itself caused the loss of essential real-time evidence, and prevented the plaintiffs from arriving at credible evidence concerning the documentation of the autopsy. One must reject Prof. Hiss's explanation regarding the performance of the autopsy in the absence of a representative of the American Embassy as per the request of the family and as given force by a court decision and this omission denied them the direct testimony of a person whose fairness they trusted regarding the course of the autopsy and its findings.
- 385. It may be that a claim will be raised by the respondent that in any case the National Institute of Forensic Medicine determined the cause of death as "mechanical asphyxiation," and what help would it have been for the matter to return to court. The answer to that is simple: by the power invested in the court, it can order the Institute of Forensic Medicine to provide explanations and responses to questions concerning the cause of death, and is certainly authorized to instruct the summoning of witnesses and the investigation of the incidents that preceded the injury and issue an indictment if it finds that the evidence brought before it is such as to prove ostensibly that there was a criminal offense committed by a person unknown (paragraph 32 of the Law for the Investigation of the Causes of Death, 1958).

- 386. The authority vested in the court by that law is unusual for the Israeli legal system, which is an adversarial system, while the Law for the Investigation of the Causes of Death gives the court the authority to investigate and clarify, which are characteristic for an investigating Justice under the principles of the Continental system of law. Moreover a violation of a judicial order is not a trivial thing.
- 387. Above we have also pointed out the investigatory omissions of the investigation team concerning a visit to the scene of the incident, that the investigation team was prevented from reaching the scene in real time and gathering fresh and coherent evidence. The truth is that this omission first of all starts with the force operating in the field, who ordered the return of the vehicles to the base before the Military Police Investigation Unit entered the picture and before there was an order to investigate the incident. As will be remembered, the deputy battalion commander Sh.R. ordered S.R., commander of the operational force, to stop the work and return the bulldozers to the base immediately after the incident occurred. And when Shalom arrived at the *Yaklaz* he was counseled that going to the Corridor is dangerous and he accepted this counsel readily while neglecting his task as head of an investigation team, although he was aware that going to the Corridor would be a way of arriving at the scene of the crime and from there he could photograph the place, gather evidence and take measurements of what was still in the area.
- 388. Moreover, the *Paskal* cassette that comprised the ultimate evidence was not obtained by the team in real time and was in the possession of the senior commanders who conducted the operational debriefings. The team as stated obtained the cassette on March 23, 2003, in other words seven days after the incident, and it knew that there was a conflict of interest in the cassette's being in the possession of the commanders, since it was possible that the cassette contained evidence concerning the running over [of the deceased] -- evidence which the commanders were not interested in the investigators' learning about, and hence made changes by erasing those critical minutes that preceded the running over and the incident of the running over itself. The investigation team transgressed in its job when it did not make an immediate effort to obtain the cassette as the first step in the investigation and before the military commanders got possession of it.
- 389. The omissions by the team actually did not end when it did not obtain the cassette speedily; they continued when the team did not make sure that the cassette was properly transcribed and the codes used by the speakers identified, and when they did not investigate even one person about the

contents of the cassette. We have showed above that the cassette was in the nature of a "smoking gun," relating to the incident of the running over in Arabic, although the guards fell asleep on their watch, or ignored the content of the cassette, and did not probe deeper into what was said by the soldiers and the commanders. If they knew anything of the existence of this material and did not undertake to investigate, this is much more serious. Likewise the soldier observers who are responsible for recording and for how it is carried out were not investigated by the investigation team, and no persuasive explanation [for that] was provided.

- 390. We also noted earlier the helplessness shown by the Military Police Investigation Unit investigators in not obtaining the radio communications that took place between the forces in the field, among themselves and between them and the command communications that could throw light on the behavior of the forces in real time concerning the presence of the foreigners, concerning the apparent dangers to them and possibly even concerning the decision that someone made to injure the deceased. We will also add here that the investigation team did not see fit to obtain the pictures in possession of the foreigners and which they had taken that same day over many hours, dozens of photographs from the incident. Certainly there is supreme importance to these pictures in that they are the most reliable pictures taken over the course of the day at the scene of the incident. Certainly these photographs are preferable to meaningless drawings, without measured dimensions, which the investigator Shalom drew by hand based on the view of a camera located at the *Yaklaz* and based on things said to him by Sh.R. who was not at the scene of the incident. These photographs could have helped the investigation team in investigating the soldiers who were involved, at the very least with regard to seeing the foreigners on that day, the discovery of the body and the presence or non-presence of a mound of earth in the vicinity of the deceased before and after the incident.
- 391. We also discussed above the conducting of the operational debriefings before the Military Police investigation, coinciding with the Military Police investigation and after the conducting of that investigation, and there is no factual disagreement that the soldiers and the commanders met, heard and shared versions of the incident; and who can assure us that the version Y.P. adopted that he did not see the deceased before she was run over, wasn't the fruit of coordinating positions and versions following those same debriefings that took place before the incident [sic; should be: before the Military Police investigation]. This possibility is absolutely reasonable, given the confidentiality promised to the soldiers who took part in the operational debriefings, whose statements will not be revealed to the Military Police investigators.

392. When to the operational debriefings factor one adds the fact of the bald interference in the investigative process by the senior commanders – Pinky Zoaretz, Sh.R. and Makarenko – this adds an important dimension to the non-independence of the investigation, and its dependence on the umbilical cord to the commanders for their orders from above. Bear in mind that S.R. stated in his testimony that he was not sure that the senior commanders would have permitted obtaining the radio communications. Also bear in mind in this regard that one of the investigation team members testified that the recording was intended for the operational debriefings, and was not obtained on time because he had no authorization from those same parties and did not have an appropriate security clearance.

This, then, was the atmosphere of the investigation that took place, with the investigators doing what is expected of them and not obtaining the evidence that they are obliged to obtain in real time.

The helplessness and lack of skill of the investigation team, is evident also in their not obtaining the Mechanical Engineering Equipment Division's regulations on limited confrontation, not making an effort to obtain the clearing regulation, mission file and distancing regulation as discussed above.

393. Thus, we would have expected from an investigative body appointed in accordance with the law in order to investigate the circumstances of the incident, that it perform its work faithfully, as a professional and skilled body. Unfortunately, the team failed to investigate the bulldozer operators and their commanders in light of the Mechanical Engineering Equipment Division regulation on limited confrontation. Any reasonable novice investigator would ask these soldiers and commanders the "million dollar question" - why they continued to perform clearing work in the Corridor, despite the obvious mortal danger to the foreign demonstrators, who stood at distances from them that are prohibited under the safety regulations for the use of vehicles as per the regulations? Why did they not think of other alternatives such as suspending the work – even for a short time – until they could make sure of distancing the foreigners and continue doing the work. Why did they not stop and/or delay the foreigners right after their entry into the Corridor on that day.

We have heard from the commanders in the field that they knew of the existence of the foreigners several months before the day of the incident and knew of their arrival at points of friction with the army and of the interference with their work. Was it not imperative to ask those same commanders

what steps they had taken in order to insure the non-entry of the foreigners into the Corridor or into areas of friction with the army before it was too late.

Even when the team understood, from those interrogated, that the Mechanical Engineering Equipment Division safety regulation is applicable under the circumstances of this matter, they did not rush to obtain it, again, and to interrogate the soldiers involved and the commanders in the light of this regulation.

- 394. The plaintiffs' argument is that, in light of these investigatory omissions, the decision makers reached the conclusion that the investigation file should be closed in the absence of a sufficient evidentiary basis for an indictment. So we are deliberating in a torts case, and one of the torts on which the suit is based is that of causing death by negligence, as this civil wrong is the equivalent in civil law of the crime in criminal law of causing death by negligence. Given these facts, clearly the investigatory omissions of the investigating agency the Military Police Investigation Unit caused the loss of significant evidence against those involved in the incident that at the end of the day led to the tragic consequences of the death of the deceased. We are arguing that, had the team behaved reasonably and cautiously, it would have, at the very least, taken the statements of those involved in the investigation [sic] and received from them an answer to the question of why they did not stop working in light of the mortal danger posed to the foreigners, despite the existence of a regulation prohibiting the continuation of the work when, at a distance of 20 meters in front of or behind the bulldozer and 5 meters to its sides, there are civilians, and in the absence of security-related necessity.
- 395. On the assumption that the answer received would have reinforced the plaintiff's claim, that those involved conducted themselves contrary to the orders, for whatever reason, therein lay a sufficient basis to indict, at least the bulldozer operators and the commander E.V. criminally involved in the crime of causing death by negligence, and thus the way would have been paved for the plaintiffs to rely on the outcome of a conviction if obtained as evidence in their civil suit. Be that as it may, the transcript of the deliberation would have also provided an evidentiary foundation.
- 396. With all of the foregoing, taken together, it appears that the plaintiffs have proven that they were caused evidentiary damage as a result of the investigatory failures and behavior of the military authorities who handled this sad affair throughout, and the law and considerations of justice and the social need to deter potential defendants from losing evidence, it would be only just to move the

burden of evidence to the defendants, to prove an absence of negligence. The defendants caused, by their negligence, evidentiary damage to the plaintiffs – in other words, they damaged their ability to utilize evidence that ostensibly had the potential to comprise a basis for the factual claims on which this claim is based. Hence, the Court is requested to lay upon the defendant the burden of persuasion that these factual claims are not fitting.

An Act of War: the Legal Discussion:

General background:

- 397. Preliminary note: As will be remembered, in the summer of 2005, Israel evacuated the settlements in the Gaza Strip and withdrew its armed forces, and clearly this change had consequences for the status of Israel as an occupying power; however, since the incident being litigated herein took place in March 2003, we will address the legal situation that obtained then, at that time, without entering into a legal analysis concerning the change that occurred in the status of Israel in the Gaza Strip following the disengagement.
- 398. Since the Six Day War, Israel has held the West Bank territories and as of the day of the incident litigated hereunder, also the Gaza Strip (hereinafter, the area) in *occupatio bellica*. Under the principles of international law, the military commander in the area has a duty to assure the legitimate security interests of the occupying power Israel and the needs of the civilian population (see HCJ 393/82 Jamaet Askan Al-Ma'lmoun A-ta'aouniya Al-Mahdouda Al-Masouliya, a cooperative association legally registered with the Judea and Samaria Military Headquarters v. Commander of IDF Forces in the Judea and Samaria Region [1], p.794).

The normative framework:

399. Since Palestinian plaintiffs began submitting damage suits against the State of Israel and the Ministry of Defense for damages suffered due to actions of IDF soldiers in the territories, the State has agreed, whether specifically or generally, that the State's responsibility for damages due to the result of acts and omissions of the State and its emissaries will be determined according to Israeli torts law and on that basis only. President [of the HCJ] (Ret.) Barak in the Adalah affair: "The rights of the residents of the area, which are injured by Amendment No. 7, are rights provided to them in Israel. These are their rights based on private Israeli international law, under which, when the appropriate circumstances exist, Israel can also be sued under Israeli

torts law, for damages committed outside Israel." This law is affixed to the directive on damages [new version]. This directive – in its original version (Civil Damages Directive, 1944) - took effect in 1947. It reflected the traditional position of common law which affords full immunity to the crown (The King can do no wrong). The changes in English law following the Crown Proceedings Act, 1947, were not included in the directive. With the establishment of the State, the Civil Damages Law (State Liability), 1952 (hereinafter, the Damages Law) was enacted. The general principle expressed in the law is that "The law for the State, regarding responsibility for damages, is the same as for any incorporated entity" (Paragraph 2). A number of restrictions were fixed for this principle. One of the restrictions deals with "acts of war."

- 400. Paragraph 5 of the Civil Damages Law (State Liability), 1952 states: "The State is not responsible for damages for an action done as a warlike action by the Israel Defense Forces." What is a "warlike action" that bestows a defense from responsibility to the State? The State of Israel is not responsible for damages from an act or omission in a "warlike action" by the Israel Defense Forces. The meaning of this directive is at the foundation of this case. In other words, is the State entitled to an exemption from liability in this case, when there is no disagreement that the deceased met her death at the time a bulldozer was operating near the Philadelphi Corridor on the outskirts to the city of Rafah, as a result of asphyxiation resulting from pressure on the chest from a mound of earth pushed onto her body by the bulldozer?
- 401. In Civil Appeal 623/83 Levy v. State of Israel, High Court Decisions 40(1)477, p.479, it was held that in order to decisively answer the question of whether something is a warlike action, one must examine whether the act bears obvious identifying marks of war.

The facts in that case were that during the Yom Kippur War, a unit with multiple containers of fuel was located at a kindergarten for use during emergencies. During about three and a half months in the field, the unit caused heavy damages to development and paving work and to materials that had been brought to the field to use in paving work. The State claimed a defense of a "warlike action." Under those circumstances in that particular case, the claim was rejected. In that same matter the Court cited the verdict in Civil Appeal 311/59, 317 Mifal Tahanat Hatractorim Ltd. V. Hayat et al. and Counter Appeal⁷⁰, and held that: "We are not, in my opinion, to see in the act of guarding a warlike action, not only because it is an act done every day of the year... but

⁷⁰ Civil Appeal 311/59, 317 **Mifal Tahanat Hatractorim Ltd. V. Hayat et al. and Counter Appeal,** *Piskei Din* 14 1609, 1613-1614.

because by its quality and nature it has no element of combat; and although there is no war without it, it is an act of assisting or an auxiliary act only, like logistics or medical aid without which there could be no war and yet are not necessarily acts of war."

In my opinion the broadest possible interpretation of the term "warlike action" cannot apply to an event in which there is no opposing combat force, but rather, two bulldozers accompanied by a *nagmachon* performing clearing operations and in which the lives of the soldiers are not in any danger during five hours.

402. In <u>Civil Appeal 5964/92 Jamal Kasem Beni Oudah v. State of Israel, *Piskei Din* 56(4) 1 (hereinafter: the Beni Oudah matter"), this interpretative question reached the High Court of Justice at the beginning of the 1990s, in the matter of Beni Oudah, when the HCJ with a full complement of justices was first asked to decide on the defense in the claim of bodily damages to Palestinians residing in the territories occurring with the outbreak of the First Intifada in August 1988. Then President [of the Court] Hon. Justice (Ret.) A. Barak wrote about the assumption at the foundation of this order of exemption, thus:</u>

"It seems that the approach is that acts of war that cause damages to the individual need not be decided by the usual laws of damages. The grounds for this are that acts of war create special risks which must be handled outside boundaries of the usual responsibility for damages. The risk is special from the standpoint of the risk creator (a military person who carries out a warlike action, who plans it and the country that sends him on his missions)" (op. cit., p.6).

This precedent-setting verdict made a clear distinction between military acts in territories that comprise "warlike actions" and actions that are not such, and the decisive test is the test of objective risk.

403. In our matter, the State argues that the incident took place in the Philadelphi Corridor, a route replete with incidents, in March 2003, that is, after September 2000, **during Operation Defensive Shield in the Gaza Strip** (!!!), when IDF forces were in that corridor at the time of the incident "for purposes of combating terror and discovering land mines and removing them" (Paragraph 10 of the amended writ of defense).

- 404. To begin with, the plaintiffs argue that the State's claim that the action was taken during Operation Defensive Shield is a generally and specifically incorrect factual claim, since it is in the realm of judicial knowledge that Operation Defensive Shield took place between March 29, 2002 and May 10, 2002 in the West Bank alone, with no operations in the framework of that campaign taking place in Gaza at all. Likewise, the plaintiffs argue that one must reject the argument that the exemption should apply across the board to the entire period after September 2000, without being required for each separate incident in a concrete manner. Given that there is no argument that, since September [2000], there have been days and places in which no operational action was taking place in the nature of a warlike action, certainly no inclusive exemption should be given to the State for all the incidents that happened since then and until the day of the incident herein and onward, without examining each separate incident in its own right.
- 405. It is not superfluous to note in this regard, that the High Court sitting with an expanded complement of justices struck down the amendment to the Law of Civil Damages (State Liability) (Amendment No. 7), 2005 (hereinafter: "Amendment No.7"), which was meant to provide an across the board exemption to the Sate for damages that happened in areas of confrontation since the outbreak of the events of September 2000. (HCJ 8338/05, 8276/05 and 11426/06 Adalah et al. v. Minister of Defense). On July 27, 2005 the Knesset amended the Law of Civil Damages in a way that narrowed the responsibility of the State for damaging acts that took place in such areas. The core of the amendment was in the addition of Paragraphs 5B and 5C to the Law of Civil Damages. Paragraph 3(b) to Amendment No. 7 authorized the Minister of Defense to declare territories as areas of confrontation and he made use of this authority in declaring so retroactively regarding the period from the start of the confrontation (September 29, 2000) until six months after the publication of Amendment No. 7. The Minister of Defense made use of his authority per this paragraph and declared (on February 9, 2006 and on February 12, 2006, Yalkut Hapirsumim⁷¹ 5942 and 5943 respectively) areas of confrontation regarding periods that preceded the enactment of the amendment. The meaning of this declaration was to nullify the right of residents of the territories to bring suits filed in the years 2000 to 2005 and regarding which the Minister of Defense had declared that they took place in a confrontation area.
- 406. It also seems that these things are simple and clear, as stated by the President [of the Court] (Ret.)

 Barak: "The point of view is aimed at the essence of the act and at the special risk it brings about. The question is whether the act that caused damage is a 'warlike action'. 'You must

165

⁷¹ An official government publication of announcements, declarations, etc.

examine the act – not the war" (Justice H. Cohen in Civil Appeal 311/59 Mifal Tahanot Hatractorim Ltd v. Hayat, p.1613; compare in Petition for Permission to Appeal (bet shin⁷²) 16/93 Hamagen Hevrah Lebituah Ltd. V. Wasserman). The act is a warlike action if it is an act of combat: moreover the order for an exemption applies narrowly. We argue that the fact that during that period, army forces conducted clearing activity to find mines does not imply the conclusion that actions conducted by the army in the Corridor at that time were in the realm of a "warlike action," as written by the Hon. President (Ret.) M. Shamgar in Civil Appeal 623/83 Asher Levy v. State of Israel – Ministry of Defense, High Court Decisions 40(1) 477, p.479-480:

"Regarding Paragraph 5 above, the nature of the period, in which the damage was committed is not decisive, obviously the fact that it is a period of war, is not enough, because in the period as stated an act was committed by the army. Even in wartime there are actions mostly committed by the army which do not carry with them an exemption under Paragraph 5. Only a real warlike action in the narrow and simple sense of this term, such as: assembling forces for a battle, combat attack, exchange of fire, shelling and the like, expressing the special nature of combat with its risks and mainly its ramifications and outcomes, these are the ones at which the words of Paragraph 5 are directed. Concentrations of vehicles and movement of vehicles on a distant front, when there is nothing warlike about them apart from it being a time of warfare and they were commandeered, does not activate the privilege that Paragraph **5 above seeks to create."** (Emphasis mine – A.H.)

407. Regarding the categorizing of an act as a warlike action, Hon. President (Ret.) A. Barak noted in the matter of **Beni Oudah**, pp.7-8:

"It is not required that the act take place in opposition to the army of a State. Actions against terror organizations are also likely to be acts of war. Thus, for example, the warlike nature of the act directed against an enemy (whether an organized army or terror entities) seeking to harm soldiers is liable to create the special risk that justifies immunity for a State. President [of the Court] Shamgar pointed this out, in noting:

'Only a real warlike action in the narrow and simple sense of this term, such as: assembling forces for a battle, combat attack, exchange of fire, shelling and the like, expressing the special nature of combat with its risks and mainly its ramifications and outcomes, these are the ones at which the words of Paragraph 5 are directed (Civil

⁷² "bet shin": probably "bakashot shonot" meaning: miscellaneous pleas

<u>Appeal 623/83</u> Levy v. State of Israel, Ministry of Defense (hereinafter – the Levy matter [4]), p.479).

The army in the areas of Judea, Samaria and Gaza conducts various 'actions' that create risks of various kinds. Not all of its actions are actions of 'war'...

Take a case of an army unit patrolling an area for the purpose of maintaining order. So long as it is conducting ordinary policing tasks, with the ordinary risks of policing actions, these actions are not to be viewed as 'actions of war.' This is not so if disturbances break out, with stoning and even firing, placing the soldiers of the unit in danger. In that situation the action ceases being police action with ordinary risks and becomes war action involving special risks…"

and continuing on p.9:

"Therefore, in giving an answer to the question of whether an act is an act of 'war' one must examine all the circumstances of the incident. One must check the goal of the action, the place of the incident, the duration of the activity, the identity of the army force operating, the threat that preceded it and can be anticipated from it, the intensity of the military force and the scope and duration of the incident. All these throw light on the nature of the special war risk that the act caused."

408. Note that in Amendment No. 4 of 2001-2002, an addition was made to <u>The Law of Civil Damages</u> (State Liability), of a definition that did not exist prior thereto as to what a "warlike action" is:

"A 'warlike action' – including any act to combat terror or acts of hate or uprising, as well as acts to prevent terror or acts of hate or uprising which are carried out in circumstances of risk to life or bodily harm."

This amendment was adopted by the Knesset on July 24, 2002, an amendment that applies to our matter, although as written in this case by Hon. Justice A. Rubenstein in <u>Civil Appeal 9561/05</u>

<u>Aouni Abd al-Rahim Hatib v. State of Israel</u> (of November 4, 2008, in section 24 of the decision), this amendment does not affect the situation existing prior to the amendment.

409. Thus, to determine the question of whether a "warlike action" is involved, one must examine the circumstances of the incident in the said case, meaning, one must examine the goal of the act, the place of the incident, the duration of the activity, the identity of the army force, the threat

that preceded the activity and the threat anticipated from it, the intensity of the military force and its scope, and the duration of the incident.

- 410. Likewise, one must pay attention to the fact that the instruction for an exemption fixed in Paragraph 5 of the above, is to give, as noted, a narrow meaning, that is, it applies only to an incident that evidences the special nature of war and its risks.
- 411. The decisive factor in the question of whether an act is a "warlike action" is a consequence of the circumstances, as explained above, and hence one must examine the concrete circumstances of every incident before deciding on the question of whether one is in fact dealing with a "warlike action."
- 412. Thus in <u>Civil Appeal 5604/94 Osama Hamed v. State of Israel, Piskei Din 58(2)</u> 498, a boy of about 11 was injured by a rubber bullet fired by Border Policemen during a disturbance at which the protesters threw rocks at an army command post near the Jenin Refugee Camp.

The Border Policemen arrived at the place to deal with the disturbances and on their arrival were hit with stones. Two Border Policemen got out of their vehicle and then the protesters began throwing stones at them. The policemen chased the stone throwers and shouted at them to stop. During the chase, one of the policemen fired rubber bullets at the stone throwers and the child was injured. In the same incident it was decided that the State had not brought any evidence to substantiate its claim concerning an exemption from responsibility due to a "warlike action."

413. In <u>Civil Appeal 8384/05</u> Masri Munir Salem v. State of Israel (verdict of October 7, 2008) an incident occurred during a motorized patrol by two IDF vehicles in Khan Yunis. The first vehicle proceeded while the second was blocked by a cart, and then the crowd began throwing stones, bottles, iron bars and crates at the force. One of the soldiers fired rubber bullets and a protester was injured. In that case, the Court found that the act of shooting falls within the exemption arising from a "warlike action" <u>because the soldiers were at risk</u>, and they fired in order to save themselves from the hail of bullets aimed at them.

Hon. Justice A. Hayut noted in Paragraph 7 of the verdict that the patrol mission of the force changed in nature from the time that the path of one of the vehicles was blocked and dozens of

people surrounded the place and began throwing rocks and other objects at the soldiers, so that the soldiers were caught in a situation of real distress and threat to their lives and their welfare.

- 414. In <u>Civil Appeal 9561/05</u> **Aouni Abd al-Rahim Hatib v. State of Israel** (decision of November 4, 2008) the appellant, a resident of the Gaza Strip, was injured in the head by a rubber bullet during mass protests at an IDF position during which many people were throwing rocks and iron bars toward the soldiers' post and there was a fear that the protesters would succeed in invading the post itself.
- 415. Hon. Justice A. Rubenstein noted, op. cit., Paragraph 11, that the situation involved <u>unruly protests</u> by <u>hundreds of participants</u> who attacked IDF soldiers positioned inside the post, <u>and consequently the soldiers in the post were in danger</u>. The soldiers sought to defend themselves from an attempt to invade the position.

Hon. Justice A. Rubenstein writes:

"Considering the number of protesters, the position of the soldiers and the danger anticipated, I am persuaded that the district court properly determined that an exemption applied. Soldiers defending themselves inside a position, from a mob of protesters, are engaged in a warlike action."

416. The High Court was required to rule on the limits for applying "warlike action" in Civil Appeal 971/03 Avner Baga v. Eli Malloul et al., which dealt with a citizen employed as a truck driver transporting water to an IDF outpost in Southern Lebanon, and who was injured, when the truck he was driving was ambushed by terrorists during a journey in Southern Lebanon. There the State argued that the driver was injured by firing from terrorists, who ambushed the convoy in which he was driving, and that a real battle developed at the site between the terrorists and the IDF forces, and that the injury took place during a "warlike action" and that it qualified for immunity under Paragraph 5 of the Civil Damages Law.

Both the District and the High Court rejected the argument and determined that it was an exception to the general rule concerning state responsibility for damages, which should be narrowly interpreted and applied to clear acts of war, as distinguished from acts of the army any day of the year.

The Court further held: "It appears to me that the question of whether the incident during which Baga was injured was a 'warlike action' or not, does not demand a ruling in the instant case for the simple reason that the act, or more precisely the omission, at the heart of the negligence attributed to the State in the verdict of the previous court, touches on the fact that it did not prohibit and even enabled Baga to join the convoy, although it knew or ought to have known that the truck he was driving was not armored. This omission has nothing to do with the actions of the soldiers during the confrontation itself, and these actions are not under discussion at all in the appeal before us."

- 417. We see that in the cases described above: Civil Appeal 8384/05, and Civil Appeal 9561/05, it was found that the State is exempt from responsibility because the damage occurred during a "warlike action" and hence the soldiers were at real risk and were obliged to fire in order to defend themselves and save themselves. By contrast the argument was rejected in Civil Appeal 3991/09 where the array of facts as determined by the district court, is not in dispute and I will present it in brief. On May 5, 2002 when IDF forces departed on a mission to open a route on the Ganim-Kadim route in which a tank and a *nagmachon* of the "Achzarit" type participated. During the journey along the route, the tread of the tank split open and consequently it veered off into a ditch at the side of the road. The tank commander (hereinafter: Itai) thought that the tank had driven over a mine and so reported on his communications device to the APC which stopped about ten meters behind it. Since he thought that the tank had driven over a mine Itai opened fire at figures that appeared to him to be suspicious. After the fact it turned out that the figures were a mother and her two children, who were engaged in harvesting grapevine leaves in the area of the route. As a result of the shooting the mother and the two children died.
- 418. The district court therein held that the shooting by the tank commander was negligent under the given circumstances. The court noted there that although the tank commander had erred about the situation and believed that the tank had run over a mine, this was not the reasonable conclusion under the given circumstances. If the tank commander had read the situation correctly, he would have reached the conclusion that what happened actually was a slashed tread on the tank. The district court based its decision, inter alia, on the fact that the explosive noise caused by the split tread, was not heard by other soldiers who were near the tank.

The district court also held that the defense fixed by Paragraph 5 of the <u>Civil Damages Law</u> (State Liability), 1952 did not protect the State because the shooting was not performed in the course of a

warlike action. In this connection the court held that one ought not conclude from the fact that the incident took place during Operation Defensive Shield that every action by the army performed in the territories during that period falls within the definition of a "warlike action" and that in light of the rules determined in this ruling by the court, and in light of the fact that on the day of the incident there were no alerts concerning special risks in that route and that the residents of the area were not instructed not to be present in the area, it does not appear that the act of opening fire was a "warlike action."

The Hon. Justice Jubran, in his ruling on the appeal, rejected the State's argument for an exemption and held that:

"The case before us does not deal with a case in which the military force, which was engaged in the activity of opening a route, was in mortal danger. This was a technical mishap that happened to a tank and nothing more. In the sense that, if the tank had run over a mine, my conclusion might have been otherwise, but that is not what happened and one cannot hold that this was a warlike action solely based on the subjective grasp of reality of the tank commander. The situation resembles a case in which the commander of a force asserts and believes that the noise of a puncture in a wheel is in fact the noise of shooting. Clearly if the commander opens fire at a vehicle only due to the fact that he erred in identifying the noise he heard, one cannot decide that the shooting should be considered within the definition of a warlike action. This is an action the goal of which was to open a route, regarding which there were no specific threats on that day. And apparently the deceased did not receive any instruction not to work in the nearby fields on that day. Although this was a period of combat, during the course of Defensive Shield, the rule is that not every action performed during the course of warfare is necessarily a warlike action..."

(Paragraph 19; emphasis added).

And subsequently:

"The deceased did not open fire toward the IDF soldiers and did not even move in their direction. Moreover, Itai even testified that he did not see the deceased carrying weapons... Clearly under these circumstances a technical mishap with the tank cannot turn the opening of a route into a warlike action taking place when there is mortal danger to IDF soldiers... Thus, the district court's conclusion according to which, in contrast to

other cases in which this court recognized a defense involving a warlike action, in this case the soldiers were not at any real risk and did not have to open fire in order to defend their lives, is acceptable to me" (Paragraph 20)."

419. In opposition to this ruling by the Court in Civil Appeal 3991/09 a petition was submitted as noted for Supplementary Civil Deliberation 8425/10; the explanation was in light of the rule determined therein, pursuant to which there was a limitation placed on the application of restricted state liability for damages due to a warlike action, but for a situation of a real threat to life or person, as distinguished from a seeming threat.

However, Hon. President [of the HCJ] Beinish denied the petition for supplementary deliberation on this point as well, from the fact that "the main concern of the verdict was in applying this law by this court to the concrete facts of the case as established in the verdict of the district court, and hence the deliberation on appeal is to be denied. Either way I was persuaded that the verdict as written overrides the customary legal framework, in accordance with the rules of this court, both regarding the examination of the basis for negligence and the demand for reasonableness included in it..." (Paragraph 6 of the decision of March 6, 2011 – published in the Nevo database).

420. In the case before us, is there justification for extending the exemption provided in law. In my humble opinion, the answer is definitely negative. In the case before us, the task of the [IDF] force was a ground clearing action in every way. This is an action that was routinely done several times a week (see discussion above under subheading "the nature of clearing work as routine work").

The defendant's witnesses testified at length that the Philadelphi Corridor was a "hot route," where there were many incidents, and hence that it was a threatening route, and hence they went on their mission in an armored vehicle, meaning two D9 bulldozers and a *nagmachon*.

When one examines the circumstances of the incident as described by the defendant's witnesses, it emerges that the goal of the action was clearing the ground to uncover land mines and level the surface to prevent the laying of mines and remove hiding places for Palestinians liable to come to the Corridor, with a force carrying out the mission of two teams of two bulldozers⁷³ guarded by an operational force in a *nagmachon*. Even if we accept the defendant's argument that we are dealing with a sector with a history of land mines, there

⁷³ ... of two teams with two bulldozers in each.

were, regarding the specific mission being litigated, no prior reports about special risks. The nature of the Corridor as a dangerous route in which there is sometimes shooting does not turn the action into a "warlike action" because the tank commander imagined a mortal danger, which in fact did not exist.

421. Moreover, from the outset, the intelligence did not provide any information whatever concerning the presence of a terrorist cell, nor issue a warning about any danger from the foreign activists, and we have heard that the army knew of the presence of the foreigners for months before that, and that the express orders were not to injure them. Moreover, on that same day some of them were present at the scene of the incident just after the start of the clearing action while others of them joined in later in the day. Objectively, it was not argued and was not proven that any of the soldiers at any stage were in mortal danger or any danger whatever. All that there was, was that the foreigners tried to interfere with the bulldozers' work on the assumption that they were going to destroy Palestinian houses at the edge of the Corridor.

The action itself, the clearing action, continued for a long time and extended from 12 noon to five o'clock in the afternoon and was stopped only when the deceased was killed. The length of time of the clearing action testifies in hindsight that there was no danger of any kind – and certainly to the soldiers – in the continued presence of the foreigners in the vicinity of the bulldozers. From the outset, it was a patrol operation which undoubtedly was done several times a week, and was a planned routine operation and it is hard to see how one could define this action as a warlike action. This action did not turn into a warlike action due to the entry of any terrorists into the near vicinity and no additional forces were called and no real threats or dangers were documented in the operations log. Possibly if there had been terrorists who shot at the tank and the army had replied with massive fire, and in consequence someone had been injured, it is very reasonable to suppose that the State would have been exempt under "warlike action." Then one could have spoken of an action that became more sophisticated than a regular clearing action and became a warlike act or a clearly operational military act.

422. The fact that one can see a situation in which the bulldozer driver or his commander would be in "pressured conditions" and "mortal danger," is not enough to ascribe the character of "war" to the action, despite pressured conditions, if any, in which they found themselves. The court is referred to the words of President (Ret.) A. Barak in the Hamad case, where it was held:

"Indeed, when police or soldiers are operating under pressured conditions or emergency conditions that they did not cause, and which prevent them from thinking and examining what happens in the usual way, and which necessitate a rapid decision which cannot be prepared for ahead of time, one must examine the reasonableness of their action in the context of these special circumstances. One cannot detach the behavior from the surrounding conditions. The behavior cannot be shifted to "laboratory conditions" (see Civil Appeal 3684/98 State of Israel v. Achleil [11]). Certainly one must take into consideration errors in judgment that do not amount to negligence. Nota bene, the emergency situation does not fix a special measure of reasonableness."

Also worthy of citing are the words of Hon. Justice (Retired) Dorner in the Hamed case:

"In my opinion, policing actions are actions of expertise. Policing is a profession demanding a great deal of training, ability and skill. Policing actions should be examined using an expert standard that is reasonable in the circumstances of the case. Compare: Civil Appeal 2694/90 Hadassah Medical Union v. Maimon [20]; Civil Appeal 3056/99 above [5]; and see Note: 'Police Liability for Negligent Failure to Prevent Crime [39]; indeed' ...in police cases, the analysis is in effect not addressed in light of a 'reasonable person' standard, but instead a 'reasonable police officer' standard, because police officers can be expected to behave differently than the rest of the population" (S.D. DuCharme "The Search for Reasonableness In Use-Of-Force Cases: Understanding The Effects Of Stress On Perception And Performance" [40], p.2534).

And further on, Justice (Retired) Dorner added, concerning the actions of the forces:

"Deploying and training for them cannot therefore, in general, bring about a relaxing of the standard of liability of professionals in the area of dealing with emergency situations, thus one should not see in the entirety of the actions of civil or military agencies required to be responsible for preserving security and order, actions '74 under pressured and emergency conditions... that prevent them from regular consideration and scrutiny of what happens, and that require a rapid decision that cannot be prepared for in advance... (in paragraph 12 of the verdict of the president). Clearly one cannot be prepared for everything. There are certainly situations that would be considered emergencies by the standard of a professional policeman. But nor can one ignore that the goal of training is to

7

⁷⁴ Missing an end quote – not certain of its proper location in text.

impart abilities to the policeman for dealing with situations that for the average person are in the nature of emergencies, as routine."

- 423. And thus we see that the ruling was able to distinguish between routine operational actions and real war actions with inherent, grave risk to life, and between one and the other there might be intermediate situations which could be considered policing actions that become war actions with real danger to life or limb (Civil Action 8345/05 or 9561/05 Hatib v. State of Israel). In the circumstances of our case, the bulldozer operators continued their work for an entire day, during five full hours, they went from place to place, they did not get out of the vehicles for even a moment, and the foreigners did not endanger nor could they have endangered a hair on the heads of any of the soldiers in the vehicles. All the danger was to the foreigners from the continued work of the vehicles that were in different situations of possible harm.
- 424. When examining the circumstances of the incident, as described by the defense witnesses, it appears that the goal of the action was clearing the ground, by two armored bulldozers in each of which was a commander and an operator, with nearby security from an operational force comprising the commander of the operational force S.R., a platoon commander and two additional combat soldiers who sat in the armored *nagmachon*. Indeed this was a sector with a history of land mines, but on the specific mission under discussion there were no advance reports about special risks. Moreover, the two bulldozers were in no danger whatever for several hours, and the defense witnesses testified that the foreign demonstrators did not threaten them and could not have threatened them, and they only interfered with their work.
- 425. The injury to the deceased, was caused as a result of criminal negligence on the part of the bulldozer driver Y.P. and his commander, who carried out the work, even when there was real danger to the lives of the protesters, and a reasonable alternative to distance the foreigners was not weighed or implemented. This injury, in the circumstances of the case as detailed above, cannot be considered as part of a warlike action, only because the route where it took place is a dangerous route.
- 426. In contrast, the courts were able to distinguish between cases involving violence and mortal danger (Civil Appeal 1071/96 Azboun Nader v. State of Israel; Civil Appeal 951/05 Hatib v. State of Israel; Civil Appeal Authority 10482/07 Alouna v. State of Israel) and cases in which the use of weapons was hasty or unjustified under the circumstances of the matter and without mortal danger

having been apparent. The Court's attention is directed to the rules set in the case of Beni Oudah (Civil Appeal 5964, 6051/92 Beni Oudah et al. v. State of Israel et al., *Piskei Din* 56(4) 1), the case of Hamed (Civil Appeal 5604/94 Osama Hamed et al. v. State of Israel, *Piskei Din* 58(2) 498) and the case of Akesha Mahmoud (Civil Appeal 1354/97 Akesha Mahmoud v. State of Israel, *Takdin Elyon* (4)2004, 1939).

427. In the verdict in the Akesha case, it was held that the shooting was intended to disperse the stone throwers from the roof in order to enable the route to be opened. "The incident was not considered by the officers as an emergency situation in which live ammunition is required to save soldiers from real and immediate danger to their lives" (op. cit., p.1943).

Characteristics of the route and the work executed by the bulldozers:

- 428. The Defense brought numerous witnesses on its behalf who, in their affidavits and in their testimony before the Court, addressed the dangerous nature of the Philadelphi Corridor and of the clearing work performed in the route on that day. We will even at this point ask to direct the attention of the Court to the significant gap between the testimony of the witnesses taken by the Military Police investigators on the one hand, and the content of the testimonies in the affidavits of direct testimony and before the Court on the other hand. In a nutshell, the testimonies to the Military Police investigators portray the incident as an "accident" that happened during routine action, while on the other hand, in the affidavits of direct testimony and in Court the witnesses sought to give the route the character of a war route in every way, with the presence of the foreigners there absolutely prohibited. Regarding the incident in which the deceased was injured, the treatment by the defense witnesses was ambiguous.
- 429. As will be recalled, the Commander of the Southern Command Pinky Zoaretz claimed in his affidavit that entry into the Philadelphi route is prohibited to civilians by a general's order, although on cross examination it turned out that there is no such order, and in any case the State has not provided the Court with a copy of any order in that spirit, and clearly one cannot determine a finding of any kind which prohibits entry to the corridor by civilians based on a hidden law.
- 430. According to the witness Zoaretz, the mission on that day was a mission of clearing the ground and "the goal is to prevent and thwart any terrorist action toward IDF soldiers or the State of Israel in the Rafah vicinity. The mission, the force will clear the ground, in order to prevent

terrorists from laying mines, using the ground, to their advantage." (p.1261, lines 1-13 / session of July 19, 2011).

431. According to the witness Zoaretz, the area in question is an area where there is combat every day, "and rational people do not permit themselves to roam around in the route, unless their goal is to attack our forces" (p.1186, lines 6-7 / session of July 10, 2011). He went on to claim that this situation of combat began at least with the events of 2000 and continued at least until the period when he was there as commander of the sector in 2004, and during all that period the area was defined as a closed military area for all intents and purposes (pp.1186-1187 / session of July 10, 2011).

Pinky Zoaretz exaggerated by treating the entire area of the Southern Command as a combat zone, in his words:

- "Q: When you tell me a war zone, you are referring to the entire Southern region, and not just the Philadelphi route itself.
- A: All the area of the Southern Command is a very, very significant combat zone, but the Philadelphi route was the most significant of all." (p.1187, lines 4-7 / session of July 10, 2011). In this corridor there is no situation of getting out of the vehicle (end of p. 1210, lines 1-6 / session of July 10, 2011).

He went on to argue that, in the Philadelphi route, civilians do not roam around and "it is a route where anyone roaming around is courting death." (p.1213, lines 20-23), since "Anyone who is there, his intentions are not innocent" (p.1214, lines 1-2 / session of July 10, 2011).

According to Zoaretz, in that route there is a war going on:

- Q: There is a war going on there.
- A: Yes.
- Q: And anyone who comes to the route, his blood is on his own head.
- A: Absolutely. And much more so at night.
- Q: But also in the daytime.
- A: Also in the daytime.

Q: And on the level of principle, a person who comes to this route in the daytime, it is permissible to kill him.

A: Affirmative."

(p.1237, lines 8-23 / session of July 10, 2011).

And according to the witness:

"A: ...On the level of the State of Israel, we are in a limited confrontation. On the level of the combat soldier, who gets up in the morning at his post, he gets up every morning to a war, he is in a war. Up to the level of the division in Gaza, the division was in a war situation. Every day we were fighting a war.

Q: Every day a war.

A: Yes.

Q: From when to when?

A: From September, when it began, until the disengagement they were in a war."

(p.1238, lines 7-9).

According to the witness, from September 2000 the entire state was in a situation of limited confrontation between Israel and organized terrorism, but in a war situation in the southern sector.

The witness Zoaretz was shown the deputy battalion commander's summary from the operations log from that day, attached to the affidavit of S.R. and he said that the statements were correct and accurately reflect the open-fire orders and that every adult person who comes into the route, from the standpoint of the open-fire orders, can be hit (p.1249, lines 6-8 / session of July 10, 2011).

432. Pity the ears that heard the words of Colonel (Res.) Pinky Zoaretz, who headed the Southern Brigade at the relevant time, who saw the southern region – including the [Philadelphi] route – as a war zone in every way beginning in 2000 and until 2004, and that every person by being there is marked for death and may be killed, never mind that person's identity, age, gender or reasons for being in the corridor. For this reason, in Zoaretz' opinion, if someone were to fire from a tank and kill 15 foreigners, according to him this behavior would be consistent with the open-fire instructions and with the orders (p.1232, lines 13-21 / session of July 10, 2011).

Zoaretz's position ignores the reality in the occupied Palestinian territories, and contradicts the directives of international humanitarian law, intended to protect civilians in situations of armed conflict.

- 433. By contrast, **S.R.**, commander of the operational force that protected the force at the site that date, had a different opinion on this subject. This witness was unable to answer whether there was an order prohibiting the entry of the foreigners to the route (p.929, lines 1-6 / session of April 3, 2011). According to the witness S.R., the foreigners interfered with the work of clearing during a few hours prior to the incident (end of p.886, line 3 / session of April 3, 2011), and after the foreigners first arrived there were reports made to the commanders, there was a situation assessment, and the force was equipped with means of crowd dispersal: tear gas and stun grenades expressly for them (p.901, line 16 through p.902, line 7 / session of April 3, 2011).
 - **S.R.** did not have a problem with the foreigners, and his problem was with the terrorists who laid land mines, contrary to the position of Pinky [sic] (p.992, lines 18-20 / session of April 3, 2011).
- 434. **S.R.** was also asked about the open-fire instructions in the [Philadelphi] route, and answered that they distinguish between the stance toward terrorists in the route or when approaching him, and then **the instruction is to fire to kill** because the terrorist is coming to lay mines, or to kill a soldier or to abduct a soldier and the instruction is unequivocally to kill.
 - As for a civilian who is in the Corridor, the directive consists of a rule keep a distance, the person is distanced from the route and is not hurt (end of p.899-901 / session of April 3, 2011).
- 435. The operations log, at least according to the brigade commander's summary, also relates to the presence of civilians in the route as completely prohibited and permits the force to use lethal shooting against any adult in the Corridor. And hence, the picture that emerges is that the commanders set the tone of the war which obliges the mode of behavior toward people who are in the Corridor, without consideration and in a completely fixed and decisive way.
- 436. It is hard not to distinguish the difference in tone between the warlike tone of Pinky Zoaretz, and the tone of S.R., for Zoaretz sees the route as being in a state of war, not only the Corridor but the entire southern brigade area and the Gaza Strip from the year 2000 at least through his leaving his position in 2004, and harming someone who is in the Corridor without any consideration even

unto death – is permitted. Whereas S.R. and Sh.R. had reservations about the verbal interpretation of the statements written in the name of the deputy brigade commander and claimed that one must use judgment before injuring civilians who are in the Corridor.

Comparative Law: The right to legal remedy and compensation for violation of basic rights and the tort of damages as anchored in international law:

437. As noted, the provisions of international humanitarian law apply in the territory of the Gaza Strip, including the outskirts of the city of Rafah and the Philadelphi Corridor at the time of the incident. The High Court noted the application of humanitarian law in the occupied territories in a series of decisions. The point of departure is that one is dealing with occupied territories, and from that arises the applicability of international law to them, including the laws of occupation and the laws of war. It is not superfluous to note that the law is very clear that even at the height of war, the state has an obligation to defend humanitarian law and implement it, the more so in regard to razing homes or routine work by Engineering Corps bulldozers.

(See: HCJ 1661/05 Gaza Coast Regional Council v. Knesset of Israel et al. (Paragraph 77), published in Nevo, HCJ 4764/04 Physicians for Human Rights-Israel et al. v. Commander of IDF Forces in Gaza, *Piskei Din* 58(5) 385; HCJ 2056/04 Beit Sourik Village Council et al. v. Government of Israel et al. (not yet published), *Tik-Al* (2) 2004, (Paragraph 23) 3035; HCJ 3239/02 Marab v. Commander of IDF Forces in Judea and Samaria, *Piskei Din* 57(2) 349; (Paragraph 13) 3035; HCJ 7015/02 Ajouri et al. v. Commander of IDF Forces, *Piskei Din* 56(6), 352; HCJ 3451/02 Almadani et al. v. Minister of Defense, *Piskei Din* 56(3) 30, 34-35; HCJ 3114/02 Member of Knesset Baraka v. Minister of Defense; HCJ 615/85 Abu Satiha v. Commander of IDF Forces, *Tik-Al* 85(4) 10, 13; 18. (Paragraph 7), 365; HCJ 102/82 Samal et al. v. Minister of Defense et al., *Piskei Din* 37(3), 374-375).

Obligation of compensation based on humanitarian law:

438. The duty of the State of Israel to compensate for damages caused to protected civilians arises directly from the basic rule of humanitarian law which comprises customary law, that the occupier has a duty to defend the occupied population which is known, and not for nothing, as "protected."

The duty to protect the occupied population is not limited to a negative duty, meaning, preventing harm to those protected, but also includes a positive duty, meaning, to prevent harm to the protected

and to work to assure their wellbeing and security. This rule is anchored in regulations 43 and 46 of the Hague Convention of 1907 and in paragraph 27 of the Fourth Geneva Convention.

Humanitarian law includes an express provision concerning the duty of the occupier to compensate for damages caused to the protected. Thus states Paragraph 3 to the Hague Convention of 1907:

"Á belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

On the intent that this paragraph apply to individual damages, see: Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond," 40 International and Comparative Law Quarterly (1991), 827-858, 830.

Addressing the duty applying to the occupier, there is also Regulation 29 of the Fourth Geneva Convention, which states:

"The Party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred."

And similarly, Article 91 of the First Protocol of the Fourth Geneva Convention, which comprises customary law, states:

"A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Obligation of compensation based on international human rights law:

439. International human rights law also recognizes the duty of a state to compensate for violations of protected rights. Thus holds Article 2(3) of the Convention on Civil and Political Rights of 1966, which was ratified by the State of Israel in 1991:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"

This article is interpreted in Paragraph 16 to General Note No. 31 of the UN Commission on Human Rights, which is the official interpretation of the Convention on Civil and Political Rights, as follows:

"Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.

The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."

http://www.ohchr.org/english/bodies/treaty/comments.htm

- 440. The International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 1984, which was ratified by the State of Israel in 1991, states explicitly the right of a victim to compensation and the duty of the State in this connection in Article 14 of the Convention, which holds as follows:
 - "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 dependents shall be entitled to compensation.
 - 2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law."

It is further stated that the International Court of Justice has held more than once that any violation of the duty creates a duty to compensate, and that this rule is among the principles of international law as determined in the **Chorzow** case:

"It is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation [...] Reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."

(Permanent Court of International Justice, Chorzow Factory Case, 13 September 1928, (Series A, No. 17 p. 29).

(http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_09/28_Usine_de_Chorzow Competence_Arret.pdf)

441. In the Adalah case (HCJ 8276/05) the High Court insisted upon the guiding arrangements in comparative law in the matter of the right to compensation in a situation of war or warlike action and noted concrete examples from American, English, and Canadian law. Below is the relevant passage from the decision by the President [of the Court] (Ret.) A. Barak:

"Thus for example, in American law, the Federal Tort Claims Act recognizes, alongside the general liability of the federal government for damages, in an exception that frees the State of liability for damages due to combatant activities. But this exception is limited to actions of the security forces in wartime (article (j) 2680). This article is nevertheless interpreted broadly. It was held that 'a state of war' happens also during a period of significant hostile confrontation between the American army and other military forces, and that 'warlike actions' include both the war action itself, and the actions directly connected with them (Koohi v. United States, 976 F.2nd 1328 (1992). Although even in its broad interpretation, this article establishes regular arrangements similar in essence to the arrangement set by Amendment No. 4, and not to the comprehensive immunity established in Amendment No. 7. Likewise in English law. In its framework, the State has a recognized immunity from claims of damages arising from combat warlike actions (combat immunity). As stated by Justice Glidewell: 'During the course of hostilities, no duty of care is owed by a member of the armed forces to civilians or their property' (Mulchy v. Ministry of Defence QB 732 [1996]).

Though the rejection of this liability is interpreted broadly, it is done without expanding to a comprehensive rejection: '[Combat immunity] must cover attack and resistance, advance and

retreat, pursuit and avoidance, reconnaissance and engagement. But the real distinction does exist between active operations against the enemy and other activities of the combatant services in time of war' (<u>Bici v. Ministry of Defence</u>, ESHC 786 [2004]).

This case (from 2004) involved a claim of damages by Albanian residents of Kosovo who were injured in shooting by British soldiers in Kosovo as part of NATO forces sent there. The Court held that the soldiers were negligent in that they violated the open-fire instructions and, given the circumstances of the case, rejected the State's argument according to which it should enjoy the law relating to lack of liability due to warlike actions. Thus, although the arrangement in English law resembles in essence the arrangement established in Amendment No. 4, the rejection of state liability due to warlike actions is the broadest in Canadian law. Article 8 of the Crown Liability and Proceedings Act holds that: 'Nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.'

This article revokes the state's liability for claims of damages arising from the actions of the Canadian army conducted for the defense of Canada. It applies whether in peacetime or wartime, and whether involving actual combat activity or training in preparation for it. Yet even this broad arrangement does not provide the state with comprehensive immunity, and the state must show that the action of the military forces that caused the damage was done for the defense of Canada.

In the **Bici** verdict discussed above, the English High Court held that 'battle immunity' obtains in special and extraordinary cases in which there is a state of war or state of imminent attack or real and imminent threat. In the Court's words: 'This is exceptionally a defense to the Government and indeed individuals, who take action in the course of actual or imminent armed conflict and cause damage to property or injury (including possibly death) to fellow soldiers or civilians.'"

Interim summary and conclusions:

442. Despite the mentality of Pinky Zoaretz that was also evident in the operations log, concerning the character of the route – as a war corridor to all intents and purposes, so that it is permissible to kill

anyone in the area, because civilians should not be there – one must examine the circumstances of the matter in their entirety in order to decide the question of whether this was a warlike action or not.

- 443. In our opinion, the open-fire instructions that were expressly evident both in the deputy brigade commander's summary in the operations log and in the scathing words of senior commander Zoaretz that everyone in the corridor is to be killed contradict the laws of war and of occupation that dictate a clear distinction between combatants and civilians who are not involved in combat. Nevertheless they testify to the worldview of the military command echelon as to the attitude they have toward "foreigners" or, if you prefer, "civilians" who are in the Philadelphi Corridor, without distinction as to age, purpose, etc.
- 444. The bulldozers worked in the corridor for several hours from the time they left the base at 12:00 noon. During the day, the deceased and her comrades were protesting against home demolitions, carrying signs along those lines, and some were wearing reflective jackets to warn of their presence, and even announced their presence with a megaphone and were warned about the danger of injury. None of the foreigners used any sort of violence against Engineering Corps personnel or against the operations force, neither violence using weapons nor any physical violence of any other kind. The presence of the foreigners was a physical presence that did not endanger a single soldier among the soldiers present in the field, and certainly did not endanger any Israeli civilians. The [IDF] forces on that day continued to perform their mission without encountering any terrorists. Earlier we addressed the incident of a grenade being thrown and we attempted to persuade the Court that this did not involve a live grenade and that the record in the operations log for that day and the absence of any mention [of this] by any of the witnesses who testified for the Military Police Investigation Unit just after the incident, only supports this argument.
- 445. In contrast to Zoaretz's "warlike tone" concerning the "war" in the Southern brigade, he had a completely different explanation for the incident, which gave it the character of an accident arising from *negligence*:

"And unfortunately, this accident was an accident, an accident, and not a combat incident, in which someone gave an order to strike the deceased, but rather the vehicle operator did not see her, and consequently she was struck, and so it was an accident, nothing else. The accident was caused in the wake of negligence, not by the army

personnel, in this specific instance, but by whoever pushed his way into a combat zone, and to a front opposite tractors."

(p.1250, lines 9-13 / session of July 10, 2011).

The witness clarified his words further, testifying:

"First of all, I am sorry for every death of someone who shouldn't have to die. I really mean it. Unfortunately, in the two incidents, both the incident of Rachel Corrie, unfortunately, and also the incident of James Miller, we had mishaps, from the standpoint of the fact that they were people, who if you asked me if they have to be shot and it had to happen, I don't want it to happen, I don't want them to be hurt. Why? Because in the case of Rachel, unfortunately she was injured in an accident, from my standpoint in was a road accident, more than anything else. It is not connected with operational action. And I said, the reason was her negligence, absolutely and completely." (emphasis is not in the original – A.H.; p.1271, line 22 through p.1272, line 6 / session of July 10, 2011.)

- 446. We do not agree with the conclusions of Zoaretz concerning the behavior of the deceased, whether she was negligent or not, nevertheless, his statement that the deceased was injured in an "accident" and nothing else and it is not connected with the operational action, have maximum importance and prove that this did not involve a warlike action. If we accept Zoaretz's approach, it does not matter how the army force operated, since the killing of civilians can be thought of as an "accident," with no connection to any standard of behavior of the army in violating basic rules of caution and defense of innocent civilians.
- 447. If we seek to implement the tests that the High Court established in various rulings that concerned the issue of warlike acts, it is very hard to see in the act of clearing [the ground] performed by the Engineering force that day as a warlike action, according to the characteristics of this definition as established in the law.

Application of the characteristics of a warlike action, as established in the Beni Oudah case, brings us to the conclusion that we are not dealing here with a warlike action. As noted, the goal of the action on that day was clearing; the site of the incident was the Philadelphi corridor which was under IDF control during that period. The duration of the action was about five hours from the time the bulldozers left the base, and the work itself begins at approximately 14:00 and

continues until approximately 17:00. The identity of the army force that was operating was two bulldozers in each of which there was an operator and a commander along with an operational force for security, comprising five soldiers. The bulldozers that were doing the clearing work were not exposed to any concrete threat on that day, but rather, at most, a potential threat of snipers or terrorists that did not actualize at any stage during the day. Moreover as proven in Court there was no advance, specific intelligence report on that day that warned of a planned terror attack or the presence of snipers in the area.

448. As noted, to determine whether the action is warlike or a consequence of the circumstances of the matter, one must examine the concrete circumstances of the specific incident. Thus, the goal of the action as a clearing action, the absence of an actual threat in practice at the time of implementation, the identity of the army force working as a relatively small force, and the absence of military strength in the military force that was operating in the area – all these together throw light on the absence of a special warlike risk created by the action.

In light of the foregoing data, even though we are dealing with a corridor saturated with incidents, there is no room to define this operation as a warlike action, especially since the incident did not escalate into an incident of confrontation with Palestinians or terrorists and most importantly, the deceased was not killed as the result of firing but by an accumulation of earth on her slim body. Common sense makes it hard to see in this incident a warlike action. As will be remembered, in the Fatma Abu Samra case, the State argued that the incident took place during the Defensive Shield campaign and the corridor was a black corridor saturated with incidents in which soldiers had fallen in the past. There the District Court and the High Court rejected the State's argument that it was a warlike action, after determining that the subjective thinking of the tank commander that the tank had hit a land mine was not enough to give the incident a warlike character, and in the words of the district court:

"When one examines the circumstances of the incident, as described by the defense witnesses, it emerges that the goal of the action was opening the route to traffic, using two armored vehicles. It is true that the sector has a history of land mines, but regarding the specific mission being discussed here there were no advance reports about special dangers.

The firing itself, as noted, the source of which was an unfortunate error on the part of the tank commander, who thought erroneously that the tank had gone over a mine – does not

turn the action into a "warlike action," since the tank commander imagined a risk of combat that in fact did not exist."

(Civil Appeal 420/04 Estate of the Late Fatma Abu Samra v. State of Israel, op. cit., p.28).

- 449. There, in the **Abu Samra** case and also here, we are dealing with "black" and dangerous routes; the case there deals with opening a route during the Defensive Shield campaign, and here the case deals with a routine clearing action taking place several times a week to keep the ground clear and prevent the laying of explosive devices. **In that case a mother and her two children died from shelling by the tank,** while here the deceased was buried by the bulldozer and killed. Here, during five long hours, there was no exceptional incident, apart from shooting crowd dispersal materials at the foreigners, and as a result of not meeting the standard that the army had set for itself, the accident was caused that Zoaretz termed an **accident** and nothing more. This is the action, and this is its character, with a grave result and the State should not be granted immunity for it.
- 450. Moreover, we wish to apply the High Court's ruling in the Baga case, addressing the circumstances of the matter. There, all were agreed, the exchange of fire between the IDF forces and the enemy forces, in the course of which the driver was struck, comprised a warlike action in every way. However, the Court refused to grant the exemption, and directed attention to the beginning of the army's failure, which enabled the trip by the driver in an unprotected vehicle in a very dangerous area, despite the fact that it knew or should have known that the truck he was driving was not protected.
- 451. Briefly stated, from the outset this was a patrol and clearing action, and there is no doubt that it was performed several times a week, and it is an ordinary preventive action and it is hard **to see how one could define this action as a war action,** just because it was in the Philadelphi Corridor.

Voluntary Assumption of Risk:

435. One must assume that the defense will in its summation again argue that the behavior of the deceased was a kind of voluntary assumption of risk⁷⁵, waiving the kind of liability provided in Article 5(a) of the Law of Damages and we wish to discuss the applicability of this defense, and to

^{75 &}quot;volenti non fit injuria," literally (Latin): "to a willing person, injury is not done"

persuade the Court that there is no room for this argument.⁷⁶ Article 5(a) of the Law of Damages holds:

"In the complaint submitted for damages there was a defense that the plaintiff knew and appreciated, or one may assume that he knew and appreciated, the situation that caused the damages and that he voluntarily exposed himself or his property to this situation." Ostensibly, the defense of voluntary assumption of risk applies to all the torts in the Law of Damages, except a violation of law. (Tedeschi, Law of Damages 336-337).

In order for a defense of voluntary assumption of risk to be formulated, then, there must be three cumulative conditions: The first involves the injured person's detailed knowledge both of the facts that expand the danger in the specific case and the scope of the risks involved in this danger with its anticipated damage. (Civil Appeal (Haifa) 4219/97 Abu Gazala Elias v. Hamoadon hayisraeli leglisha avirit et al. Civil Appeal 335/59 Rehani v. Tzadki, Piskei Din 15(1) 159, 162, and the type of risks involved (see Civil Suit 1354/97 Akasha v. State of Israel, Piskei Din 58(3) 193, 204). Indeed, clearly someone who is not aware of the possibility of a danger's existing or who is aware of the way things stand but is unable to estimate their dangerous character, will not be considered someone who willfully endangered himself. The knowledge required is personal, subjective knowledge (Civil Appeal 753/75 Belaga v. Estate of Taft, Civil Appeal 3124/90 Sabag v. Amsalem, Piskei Din 49(1) 102). What is the situation? The risk is clarified in the ruling as the kind that does not include only the physical, but rather a kind of hidden risk, as compensation will not be received for damage caused following the behavior. Put differently, the risk bearing that defense also includes the possibility that if the physical damage occurs, the legal loss will fall to the damaged party and not to the damager who is sued (see Civil Appeal 145/80 Vaknin v. Beit Shemesh Local Council, Piskei Din 37(1) 113, 147. Civil Appeal 73/86 Sternberg v. City of B'nei Brak, Piskei Din 43(3) 343 350.

- 436. The second condition is that the damaged party must expose himself in practice to the situation creating the risk, physical and legal (Law of Damages, op. cit., p.327).
- 437. The third condition is that the damaged party must expose himself to the risk willingly, which must be accepted with a clear recognition of the danger, with the damaged party knowing his right to be

⁷⁶ Note in the Hebrew original an error in paragraph numbering occurs here. This paragraph, which should be #452, is erroneously marked in the original as #435. Thus, from here to the end of the document, paragraph numbering will duplicate prior numbers used. For purposes of referencing specific text, it is important to note this overlap.

189

protected from it, and by free choice the damaged party agrees to take on himself the risk and the loss involved in the damage if it happens. The condition of agreement is that the damaged party must agree not only to the fact of the physical risk, but must undertake also the legal risk that he will not receive compensation for the damage. This requirement was added by the ruling and is intended to narrow the boundaries of the defense. (Civil Appeal 987/75 Westchester Fire Insurance Company v. Koren, *Piskei Din* 31, p.660, 664-665).

- 438. Indeed, just as Justice Cohn noted in the Rehani case, "knowing is one thing and agreeing is another," so too the agreement may sometimes be given implicitly or be deduced from the knowledge, and does not always have to be explicit, and someone wishing immunity under the defense must prove positively that the damaged party actually assumed the risk willingly (op. cit., p.63). In this matter, willingness that arose from an absence of realistic choice or due to pressure, coercion or fraud is not willingness (see for example Civil Appeal 971/03 Baga v. Maloul, Paragraph 14 of the verdict. In Westchester there was stated a test to identify the willingness of the damaged party to be exposed to risk, called "the transaction test." Under this test, learning about the existence of agreement to be exposed to risk, requires bringing evidence of the existence of a transaction, explicit or implicit, between the damager and the damaged party, pursuant to which the damaged party agrees to forego the cause of his claim for damages that he is liable to absorb due the unjust behavior of the damager (op. cit., p.665).
- 439. It will be noted in this connection that the question of whether the foundation of willingness must be proven objectively, meaning in reliance on the question of whether a reasonable person in the situation of the damaged party would have accepted the risk, or whether there is a need to prove subjective free willingness, has not yet been established unequivocally in the ruling (see the Akasha case, p.204 and the Vaknin case, p.148 where the two types of willingness were examined, objective and subjective; Boaz Schnur "Voluntary assumption of risk: rules and reality" [Hebrew], *Alei Mishpat* First Volume A(2) 327, 332-333).
- 440. Needless to say, the defense of voluntary assumption of risk has not enjoyed great success in the courts in Israel or in countries using customary law, where it has been narrowly interpreted (Weissman, p.470; Schnur, p.327). Indeed, as Justice Haim Cohen emphasizes in the Westchester case, "The defense of *volenti non fit injuria* can succeed but only rarely" (p.665). And indeed, there must be extraordinary circumstances in order that one might have said that a reasonable man willingly relinquished his legal right to claim compensation for an injustice that caused him

damage. The defense should become clear as economically inefficient, in light of its possible harm to deterrence for unjust acts, and as unjust, sometimes, from a social standpoint. When bodily injury is involved, the defense in certain cases is even liable to harm the principle of the sanctity of life (Civil Appeal 285/73 Lagil Trampoline v. Nahmias, *Piskei Din* 29 (1) 63, 72.

441. This argument was adjudicated in Civil Appeal 753/75 **Yocheved Belaga et al. v. Estate of the Late Taft et al.,** which dealt with the appeal of the heirs of the late Zvi Belaga concerning the verdict of the Beersheba District Court, which denied the claim for damages inter alia by relying on a claim of voluntary assumption of risk. There, the circumstances were that on April 23, 1972 Belaga and Taft were riding in a truck (Taft's truck, driven by him to the grounds of Kibbutz Ein Hashofet). At a certain point the truck drove off the main road onto a dirt road and very soon the front left tire went over an anti-vehicle mine, planted apparently by terrorists. In the explosion the driver and Belaga were killed.

The district court rejected the claim, mainly on the foundation of the claim that Belaga exposed himself to this risk willingly, since they both knew of the risk of land mines involved in driving a "soft" vehicle on a dirt road, and both of them were interested in making the journey.

Regarding the dirt road where the accident happened, the court held that there was not a shred of evidence that this was a private road and that the entrance to it required a permit. In the near vicinity of the road there was no sign, while in each direction on the Magen-Kissufim road, on which one could reach the dirt road, there were warning signs, but only about the danger of mines, without prohibiting traffic.

The court further found that it is not sufficient to know about the risk of mines involved in driving a "soft" vehicle on a dirt road, to be the adequate factual foundation for a conclusion of voluntary assumption of risk. Claiming the defense of voluntary assumption of risk is not extracted from information in and of itself.

442. In Civil Appeal 6649/96, (**Hadassah Medical union v. Ofra Gilad**), the appellant was found by the district court as liable for damages for the suicide of Tal Gilad at the time of his hospitalization, after a serious suicide attempt. The court found that the appellant had not taken all reasonable steps to prevent the suicide and hence violated the duty of care that applied to her.

191

⁷⁷ A close parentheses mark was added by translator where it appeared to be missing from the original.

The High Court rejected the appellant's argument of voluntary assumption of risk (volenti non fit injuria) and held that a patient who is operating from depression is not in a state of volens, such that it can be claimed that he voluntarily assumed risk. In addition, when it is the duty of a person, in this case of the hospital, to prevent the voluntary act of the other, the liability toward the other cannot be revoked when the given voluntary act is performed.

443. The argument of voluntary assumption of risk was adjudicated recently by the High Court in **Civil Appeal 11172/05 Ziv Elon v. Noam Hadad et al.,** where the appellant was shot by respondent 1 while engaged in criminal activity, or at least while trespassing in the yard of the respondent and behaving in a way that was threatening. Inter alia, the court found that the appellant voluntarily assumed a risk by his suspicious presence in the respondent's yard, and by raising his hand to strike the respondent when the latter called on him to stop. My opinion differs.

The High Court thought that the facts of the case do not support the view that the appellant voluntarily exposed himself to risk in a way that justifies the rejection of his appeal based only on this reason, both in light of the first condition for the doctrine to be applied, and in light of the third. The court held that there is a difficulty in determining that it was proven that the appellant was aware of all components of the risk to which he exposed himself, both regarding his decision to break into the house of the respondent or trespass on his yard, and when he raised his hand to hit the respondent, which led to the shooting. Concerning the break-in or trespassing, this prohibited behavior of the appellant does not in and of itself permit opening fire at him. Indeed, given the lack of severity in the acts of the appellant, it is difficult to determine that the injury from the deliberate shooting falls within the area of the risk that the behavior created or that the appellant ought to have expected. As noted, there are, however, risks regarding which one may determine that any person would be considered as being aware of them or as appreciating them, since they are "natural" for the relevant behavior.

The High Court further held that:

"However, I harbor considerable doubt as to whether one can indeed say this about the physical risk to which the appellant was exposed in this case. As noted, when dealing with trespassing, Real Estate Law and the Law of Damages permit the use of reasonable force in order to prevent the trespass. The reasonableness of the use of force is a circumstantial matter, and in the circumstances of the case before us, the relation between the trespass

and the shooting at the person's body does not in my opinion place the appellant as having been able to evaluate the essential nature and degree of the risk."

As to the application of the third condition, the condition of willingness, it was held that:

"One cannot disagree that in the instant case an explicit willingness was not proven on the part of the appellant to be exposed to the damage he absorbed, both the physical and even more so the legal. In my opinion it is not possible to infer even the tacit the agreement of the appellant in our case. In performing his prohibited acts one may attribute to the appellant tacit agreement to absorb damages that are the outcome of a reasonable use of force (Paragraph 18 of the Real Estate Law; Paragraph 24 of the Law of Damages). As will be clarified below, the decision of the respondent to shoot at the appellant as being reasonable is an outcome of the sense of threat felt by the respondent following the other's raising his hand to hit him. Nevertheless, as noted, the previous court did not positively determine what caused the respondent to believe that the appellant had a weapon in his hand. Absent evidence concerning the presence of an object in the appellant's hands, which would place the response of the respondent in proportion to the purposeful acts of the appellant from an objective standpoint, one cannot hold that it was proven that from the viewpoint of the appellant, who raised his hand and nothing more, the inference can be made as to tacit agreement to bear the risk of injury from gunfire. And even if one could infer the tacit agreement of the appellant to be exposed to the risk that correlates fairly with his behavior, a risk that involves the use of reasonable force on the part of the lawful possessor of the land, I am not persuaded that one can infer a positive assent to bear the outcome of being shot with live fire from a weapon (Akasha case, p.204). That is the law concerning the condition of voluntary exposure to the legal outcomes of the damage to which the appellant was exposed. Evidence was not provided to prove that the appellant agreed that if he were injured by shooting from the landowner, the damage would fall upon him and he would not be entitled to damages. One could almost say that in this context one cannot speak of the existence of a kind of "transaction" between the appellant and the respondent, as noted above, and not necessarily tacit, pursuant to which the appellant abandoned his right to claim compensation were damage to be caused to him. And an objective examination of these things does not suggest that a reasonable person in the place of the injured party would agree to bear the risk of damage without compensation" (Akasha case, ibid.). To summarize this point, let us say that as opposed to the finding of the district court, she [the Appeals Court Justice] is not persuaded that the respondent can take refuge in the instant case under the defense of the appellant's voluntary assumption of risk.

From the general rule to the specific case:

- 444. After a survey of the foundations of the defense of voluntary assumption of risk as elaborated in the ruling and in the literature, we shall go on to examine how, if it is even possible, to implement this defense under the circumstance of the instant case. As we have seen in the foregoing, the damaged party must be aware of the facts that caused the increased danger in the particular case. It is true that the deceased was there in the corridor beginning at 14:30 or about that time and until she was run over around 17:00 and that during those hours, she and her comrades stood in front of the bulldozers and tried to interfere with their work. It is very difficult to say that the deceased was aware of all the facts that established the risk, before the damage happened. Possibly one can attribute to the deceased knowledge at a certain level of the probability of negligence by the bulldozer operator but she did not know with certainty that this negligence would occur, moreover it is very difficult to prove that indeed she anticipated the type and degree of deviation from the behavior of a reasonable bulldozer driver or the scope or nature of the risks that would be presented from such negligence.
- 445. The problem arose in English law in cases in which people who traveled with a drunk driver were injured in road accidents following incautious driving arising from drunkenness (Dann v. Hamilton (1939), All ER 59, 63). In these cases English law was not prepared to recognize the defense of voluntary assumption of risk as the entry to the vehicle preceded the negligence that caused the accident, and hence the negligence was not known to the damaged party before the occurrence of the damage.
- 446. The relationship between the presence of the deceased in the corridor and the interference with the work of the bulldozers and her being buried in a mound of earth that caused her death does not in my opinion rank the deceased as someone who could have evaluated the nature and type of the risk.
 - It is very difficult to determine that it was proven that the deceased was aware of all the components of the risk to which she exposed herself, at the time she stood in front of the bulldozer and in its path in order to dissuade him [sic] from continuing to drive, which brought in its wake her burial in a mound of earth. In any case her presence was not in the realm of a prohibited presence since it was not proven that the entry into this corridor was prohibited by law. However, even if we assume that her presence was in the realm of trespassing, this prohibited behavior by the deceased

does not in and of itself permit the criminal negligence of driving over her and burying her in a mound of earth. It is even more difficult to determine that her burial by the mound of earth to the point of causing her death, was in the realm of the area of risk that her behavior caused or that the deceased should have anticipated it.

- 447. There is no disagreement that in the instant case there was not proven an explicit willingness on the part of the deceased to be exposed to the damage she suffered, both the physical and even more so the legal. In my opinion, one cannot infer the consent of the deceased in our matter even tacitly.
- 448. As stated, the consent to a risk must be given in the context of an awareness of the details of the risk, and the fact that the damaged party knows that he is in a situation in which negligence is going to occur, and even that he consents to a particular negligence arising from the situation, does not mean that he consents to the specific negligence that caused the damage. In other words, it is not enough that the damager proves that the damaged party was in a situation in which he assented to take upon himself a certain negligence arising from an existing risk, but rather he must prove that the damaged party expected that particular negligence that materialized and assented knowingly to take it upon himself. The deceased, as stated, on that day was wearing – she and two of her comrades ⁷⁸ – fluorescent jackets in order to make conspicuous their presence to the bulldozer operators and the operational force. They also carried signs against house demolitions, and during the course of the day they raised the signs in their hands and waved them at the bulldozer operators to inform the operators not to hurt them. We would like to say that the desire of the deceased to go on living, hers and her comrades', was very strong and they did everything they could to inform the bulldozer operators about their presence there. Given that state of affairs, in the absence of an evidentiary foundation, there is no basis to conclude that the deceased, by a subjective test, took upon herself the "legal risk" of damage. ⁷⁹ Likewise from an objective standpoint one cannot say that a reasonable person in the deceased's place would have taken upon himself the risk of injury without compensation. Furthermore, the deceased did not represent any sort of danger to the lives of the bulldozer operators or anyone else, while the negligence of the others was broad and extreme. Considering all of the foregoing, logic dictates a rejection of the claim of voluntary assumption of risk.

78

⁷⁸ Grammatical error in original. The record reflects that Rachel and Richard were the only ISM wearing florescent orange jackets that day - for a total of two ISM (including Rachel). Phrasing mistakenly appears to imply three.

⁷⁹ This sentence (beginning "Given that state of affairs"), actually a partial sentence in the original, reads as follows, and appears to be in error (text is missing): "Given that state of affairs, and in the absence of an evidentiary foundation, from which one may conclude, that the deceased, based on a subjective test, took upon herself the 'legal risk' of the damage."

In Brief

- 449. As stated, these summations address the question of liability only, and the plaintiffs have brought before the court the best evidence at their disposal in order to prove the State's liability for damages in the death of the deceased Rachel Corrie on March 16, 2003.
- 450. The plaintiffs argue that they have proved their claim beyond the level of proof required in civil law by the balance of probabilities, so that the scales lean, even heavily, toward the obligation of the State.
- 451. Perhaps it would have been enough in this case to show that the defendant, by means of the commanders of the IDF and its soldiers, violated the Mechanical Engineering Equipment Division's own procedures for limited confrontation, a serious violation, when they permitted the bulldozers to work while in their immediate vicinity there were civilians, and as a consequence of this violation, the deceased was buried under a mound of earth, causing her "mechanical asphyxiation" which led to her death shortly after the incident.
- 452. There is no graver act of criminal negligence than this when one expects commanders to be responsible for human lives, and they behave with outrageous haste, riding roughshod over safety procedures and using no balanced judgment to provide a resolution even when human life is at stake. However, we did not rest with that, but also proved that the tort of assault with damages applies to the circumstances of the matter. In that state of affairs, the defendant is obligated by the direct acts of the soldiers, both in direct liability and in imputed liability.
- 453. The plaintiffs also sought to impose liability on the defendant by reason of the evidentiary damage caused to them as a consequence of the conduct of the investigation team named to investigate the circumstances of the incident as well as in light of the conduct of the Institute for Forensic Medicine. These two agencies together violated a judicial order, and Prof. Hiss destroyed evidence documenting the proceedings of the autopsy, evidence that might have contained additional findings supporting the plaintiffs' version.
- 454. We noted above, throughout the summations, the significant defects in the work of the investigation team, all along the way, and the investigatory omissions that characterized the work of the team, lacking in ingenuity, experience, and possibly even the will to arrive at the truth.

those responsible in the incident, and today there is no disagreement that the behavior of Y.P. and E.V. did not meet the standard of caution of a reasonable bulldozer operator, who should have been

455. As a result of these investigatory failures, the military prosecutor reached a decision not to charge

aware of the IDF safety procedures; however, they obeyed the instructions of their commanders that

they should continue performing the clearing work, despite the danger presented to the lives of

civilians over about five hours on account of the fossilized concept that "civilians are not present in

a war zone." This worldview is not only negligent but is also a kind of outrageous closing of one's

eyes, a cruel indifference, and is also contrary to the values of a society whose culture respects

human life and the principles of international humanitarian law and human rights.

456. At the end of our summation we also discussed the defense of warlike actions and of voluntary

assumption of risk claimed by the defendant, and sought to persuade the Court that these defenses

do not apply in our case, and hence it would be only right and just to impose liability on the State

for the death of the deceased and to deal justly with her and with her memory even at this late hour.

457. In addition the Court is requested to hold the defendant liable for the attorneys' fees and the court

costs for this stage.

H. Abu Hussein, Attorney at Law

Representing the Plaintiffs

Date: December 12, 2011