



25.1.2018

Dina Zilber
Deputy Attorney General (Public-Administrative Law)
Department of Justice

To whom it may concern,

Re: Memorandum on Administrative Affairs Courts Law (amendment – a decision of an authority in the area) 5768 - 2018

We hereby submit our comments on the legal memorandum regarding the application of the Administrative Affairs Courts Law 5760-2000 on administrative decisions of the authorities in the occupied territories, and transferring petitions currently brought before the High Court of Justice (HCJ) to the Court for Administrative Affairs in Jerusalem.

Israel's military control over the West Bank is an anomalous situation, occurring outside sovereign State borders. It entails extensive and extreme human rights violations, and involves complex and sensitive matters pertaining to foreign affairs and defense. In light of the distinct international laws that apply to occupied territory, the existence of two different and discriminatory legal systems for Palestinians and settlers, the risk of grave harm to the Palestinian population through the actions of the military authorities, and the lack of access to additional means of defending themselves aside from appealing to the Israeli court, **we believe that this bill should not be advanced**, as detailed below.

The anomalous nature of the military occupation

1. Judicial review over administrative decisions made by the military commander or other Israeli authorities operating in the West Bank is not a matter of law and order in the typical interstate sense. Rather, this is a matter relating to the judicial review over the mechanisms of military occupation exercised by Israel outside its sovereign borders. The difference between the two is significant and substantial, and it is the reason why petitions regarding the occupation are brought before the HCJ.

2. **Judicial review regarding the occupied territories must address multiple anomalous aspects as far as the identity of the petitioners, the normative framework, the administrative tools implemented, and their legitimacy:**

- a. **Identity of the petitioners:** By and large, Administrative Affairs Courts examine issues relating to Israeli citizens or to foreigners who have entered Israel. Palestinians from the West Bank are neither Israeli citizens nor are they foreigners who entered Israel or reside in it. Rather, they are people whom Israel exercises authority over outside of its borders.
- b. **The normative framework:** International Humanitarian Law (the law of occupation) is the normative framework for military rule in the West Bank, which is under belligerent occupation. The military, as any other Israeli authority, is subject to the rules of Israeli administrative law. However, the judicial review of the military's actions in the occupied territories requires reliance on a completely different normative framework, which applies to a unique and exceptional situation regarding a civilian population living under foreign military occupation.
- c. **The administrative tools:** The intensity and harm of the administrative tools that a military regime is permitted to implement are extreme compared to those implemented within the framework of a democratic regime. What is inconceivable in a democracy becomes routine under occupation: for example, issues of administrative detention and orders, restrictions on movement within the occupied territories as well as restrictions on exiting and entering them, land expropriation, breach of privacy, and more. Hence, the scope of possible harm inflicted by the tools employed by the military in the territories is significantly graver as compared to those employed inside Israel.
- d. **The legitimacy of administrative decisions:** Israel's regime, from which the authorities derive legitimacy to exercise jurisdiction and sovereignty over citizens and over those who have entered the country, is a democratic regime that enjoys both domestic and foreign legitimacy. In contrast, Palestinians reject the legitimacy of Israeli military rule to which they are subject. For 50 years, the occupation has remained a matter of profound disagreement both within Israel and around the world. In this aspect too, petitions relating to the territories that are brought before the courts are exceptional.

We believe that this anomaly, considering all its different aspects, justifies the current situation according to which petitions submitted by residents of the occupied territories, Palestinians and Israelis alike, are brought before Israel's High Court of Justice.

Optimal defense for protected persons

3. International Humanitarian Law stipulates that a population subject to foreign military occupation retains the status of a "protected persons." This unique status is intended to protect the population from the whims of a foreign military regime, which the residents take no part in and have no influence over. It constitutes one of the main foundations on which the laws of belligerent occupation are based.
4. Protection afforded by international law is required when there is no state regime taking care of its citizens. Instead, a military control of a foreign state is established with different, even clashing, interests. In such a reality, the potential for harm is much greater, and the capacity of the individual to defend himself is much weaker. This state of affairs is reinforced in a situation whereby the civilian populace of the occupying state resides in the occupied territories, and is clearly served by the military regime's interests, and in addition enjoys direct access to military commanders and to decision-makers in the government.
5. Harm caused to Palestinians due to the military commander's actions and decisions can only be stopped by appealing to the court. This is in contrast to citizens of a democratic country, who have various tools to influence government and parliamentary decisions, including freedom of expression and protest, and direct contact with elected officials. In a democratic regime, decisions that hurt the public may cause harm on election day to those politicians who had promoted these decisions. This reflects the public's power to influence elected officials' decisions. This situation is completely alien to Palestinians who are subject to military occupation.
6. In light of all this, judicial review is required to provide maximum protection to the Palestinian population who are in a vulnerable situation, and to ensure that the distinct protections they are entitled to are maintained in a reality in which the interest in violating them is great, and the power of the Palestinians to resist them is very small.
7. The HCJ has a unique role and status as the Supreme Court of the State of Israel, with the greatest authority, status, and independence. It determines rulings that obligate the authorities in the most significant manner. When a need arises to protect a vulnerable population under military rule, it is necessary to bring the matter before a court that possesses the most power to minimize harm and to provide the required protection.
8. The decisions of the HCJ are final and constitute a binding precedent for the authorities, in contrast to the decisions of the district courts. Experience indicates that authorities do not comply with district court decisions in their standing as Administrative Affairs Courts as principled rules binding the authorities in all their actions. While an HCJ decision clarifies the law and sets a precedent, thus preventing the army from continuing to carry out some form of harmful conduct, the military may continue to carry out such harmful conduct following an Administrative Affairs Court ruling against it. In light of the vulnerability of the Palestinian population and the severe means employed against it, we believe that it is appropriate for the

HCI to continue to determine fundamental rulings that will instruct the army regarding the rules of what is permitted and what is forbidden, without leaving room for doubt regarding binding precedents.

The complexity and the implications of petitions relating to the territories

9. There is no dispute that complex issues of importance are brought before Administrative Affairs Courts in Israel, about which the court is required to discuss with serious consideration. Yet in the occupied territories the legal issues are even more complex in that a foreign population under military occupation is at hand, outside of the territory of the sovereign state, and within the context of an international conflict rather than interstate administrative law. Due to the anomaly of the military regime, as well as the existence of settlements in the occupied territory, HCI Justices have been required to make decisions over the years on a series of extremely complex issues relating to the territories with implications on political, security, and humane matters.
10. A clear example of the immense complexity - of political, legal, security, and humane nature - is the issue of planning and building, which is included in the memorandum as a field proposed for referral to the Administrative Affairs Court for discussion. This is not merely an administrative matter, but rather an issue that lays at the heart of the Israeli-Palestinian conflict. This is an issue in which the law applied in the territories cannot be compared with the law inside Israel, nor can there be comparisons as far as the implications of this matter on the reality for people living in the territories as well as on Israel's foreign relations.
11. The legal system in the West Bank relating to planning and building is based on elements of Ottoman, British, Jordanian, and Israeli military laws. The planning and building mechanisms developed under Israeli military rule are systematically used for the sake of realizing the interest of expanding settlements and pushing Palestinians out of areas that Israel has a desire to annex, such as the Jordan Valley and the Jerusalem area. All this is in clear violation of international law.
12. Enforcing planning and building laws in the occupied territories entails severe harm to the Palestinian population through the demolition of homes and infrastructure, the refusal to connect Palestinian localities to electricity and water, to establish schools and clinics, and so forth. Unlike the situation within the State of Israel, this is a legal field where the primary essence is to cause extensive damage to the realization of the Palestinian population's basic rights, including the right shelter, the right to health, the right to education, freedom of occupation, and more. Unlike in Israel, the implications do not solely concern one family or another, but rather have broad implications for national and political matters that impact the lives of millions of Palestinians and Israelis.

13. It would be naive to state that following 50 years of military control, planning and building in the West Bank are by their very nature matters appropriate for the Administrative Affairs Court, inasmuch as they are discussed within Israel. Israel's political interests, which are contrary to the interests of the Palestinian population, shape the use of this administrative tool. A Palestinian family harmed has no other outlet aside from appealing to a court for protection. The court is required to examine the matter based on an understanding that its role is to provide special protection to the Palestinian population, and that every decision may have extensive political and humane implications.

Right of appeal to the Supreme Court

14. At face value, an essential advantage of the legal memorandums is the opportunity to appeal to the Supreme Court, namely the right to challenge a court decision, which does not currently exist as petitions are filed directly to the HCJ. The importance of this matter for the petitioners should not be underestimated, as they will be able to voice their arguments before another court and perhaps even win their case.

15. However, in practice this right may remain solely on paper when it comes to Palestinian petitioners. Appeals to the Supreme Court entail deposits that may reach tens of thousands of shekels. Minimum wage in the Palestinian Authority is NIS 1,450, the unemployment rate is 18 percent, and the per capita GDP in the West Bank stands at \$2,267 compared with \$34,054 in Israel - 15 times more. Given the vast economic gaps between Israelis and Palestinians, it is plausible that such sums will not be found in the hands of Palestinian petitioners, and in the event of a loss, they will not be able to appeal to the Supreme Court. This injury will be felt especially in the case of very poor petitioners, such as residents of small isolated villages who have been contending with attempts to dispossess them of their land through use of planning and building laws for years.

16. This will create another significant gap between legal accessibility of Palestinians versus settlers. Settlers earn, on average, the same as people living in Israel, and therefore there is a greater chance that their economic situation will enable them to appeal to the Supreme Court, with its advantages as a supreme authority that determines law. In contrast, there is a great chance that Palestinian petitioners - the protected population - will not submit appeals due to financial difficulty, and therefore their case will be heard only in the lower court. This, despite the fact that their status is much more vulnerable, military policies systematically discriminate against them, and administrative procedures applied to them are significantly more difficult and draconian.

Transfer of authority to the Court for Administrative Affairs in Jerusalem

17. Regarding section C of the legal memorandum, "A special authority will be established for the Court for Administrative Affairs in Jerusalem to discuss these matters" - it should be noted that

while the private bill submitted to the Knesset on this topic sought to apply the Courts for Administrative Affairs Law 5760-2000 to the occupied territories, the legal memorandum reduces its application to a single court.

18. The initiators of the bill emphasized that one of its aims is to reduce the vast burden on the Supreme Court. This is indeed a considerable issue, for which we too believe there is vast importance in finding a solution.
19. However, it is inconceivable that to correct and improve the court system in Israel it would be deemed necessary to reduce the legal protection provided to the Palestinian population - which is neither Israeli nor resides within Israel, thus weakening the judicial review over the military authorities. The military authorities retain unprecedented and draconian powers and operate in a highly complex security and political context. Moreover, the legal memorandum adds a sole court, the Court of Administrative Affairs in Jerusalem, as an additional court alongside the HCJ to hear petitions from the territories, thus maintaining immense burden though on two courts rather than one.

The principled issue: The nature of Israel's control over the West Bank

20. Before concluding, we would like to refer to the broad political process that this bill is part of - annexation aspirations advanced through increasingly blurring the principled distinction between sovereign Israel, in which a democratic regime applies, and the occupied territories, in which a military regime applies.
21. Questions relating to the legal systems applicable in the occupied territories, to legislative powers, local enforcement, and the involvement of the courts in what takes place in the territories, are fundamental questions whose answers not only shape the actual means of control exercised by Israel in these territories, but also shape the essence of Israel's control over the West Bank. All of these have far-reaching ramifications regarding human rights.
22. It is hard not to notice the growing rift between the State of Israel's official position since June 1967 regarding the nature of Israeli control over the West Bank, and the position of the current political majority in the government and the parliament. Israel's official position is that the military commander's control over the West Bank is within the framework of belligerent occupation, which relies on temporary military control subject to the rules of International Humanitarian Law. Yet various government ministers and parliament members request, each in their own fashion, to advance a series of steps designed to bring about permanent full or partial annexation of the territories to the State of Israel, inter alia by canceling the legal and judicial distinction between the two regions.
23. We will not present here the entire range of steps and proposals that are being promoted. Examples of these are the Land Regularization/Expropriation Law, a bill calling for the direct

annexation of settlements such as Ma'aleh Adumim, and the process lead by the Ministry of Justice to compare the laws applicable to settlers to those that apply to citizens living in Israel. Also in the case of this legal memorandum there is a direct link between the political interests of those advancing it and the proposal itself, **which leads to the annulment of the distinction that exists today between the judicial review in sovereign Israel and that in the occupied territories.**

24. ACRI has often expressed strong opposition to legal and judicial proceedings seeking to blur the distinctions between Israel and the occupied territories. Over the course of our many years of work in the West Bank, we have seen time and again how the combination of various processes intended to advance the annexation of the territories to Israel has led to disastrous consequences for Palestinians' human rights. Examples include military legislation designed to entrench the two legal systems and the discrimination between Palestinians and settlers, creating a network of roads connecting the settlements to Israel and restricting Palestinians' freedom of movement, the route of the separation barrier that annexes large parts of the West Bank to Israel, the consistent result of these and other steps toward annexation is the extreme preference for Israeli interests at the expense of the interests, needs, and rights of the Palestinian population living under Israeli military occupation.
25. The combination of multiple steps taken, both small and large, to blur the borders and to advance annexation, has led to a reality in which systematic violation of Palestinian human rights is the norm of Israeli civil and military control. In the context of these processes, a reality was created in which Palestinians do not receive the protections and rights of protected persons living under foreign military occupation, as required by International Humanitarian Law. Of course, they are not privy to the defenses and rights granted within the framework of Israeli law, as they are not Israeli citizens.
26. Attempts to erase the distinction between the occupied territories and sovereign Israel in all matters relating to law and order are invalid, as they contribute to entrenching this distorted discriminatory reality, systemic harm of the Palestinian population, and disregard for the principles of humanitarian law that are meant to apply in a territory subject to belligerent occupation.

For all the reasons detailed above, we believe that the proposed law should not be advanced.

Sincerely,

Ronit Sela
Director of the Human Rights in the Occupied Territories Unit