

# On prisoners, family life and collective punishment: The *Namnam* case

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## Abstract

*This article examines the 2019 decision by the Supreme Court of Israel (the Court) in the Namnam case, upholding a ban on family visits to Gaza prisoners incarcerated in Israel and affiliated with Hamas.<sup>1</sup> This ban was adopted as part of Israel's attempt to pressure Hamas into an exchange of Palestinian detainees and prisoners against missing Israeli civilians and the bodies of Israeli soldiers, apparently being held by Hamas in Gaza. The Court examined the measure primarily in light of Israeli administrative law, and held that it had no grounds to intervene. It held that an analysis under international law would have yielded the same result.*

*This article examines the decision of the Court in light of the applicable international law. It considers the Court's decision in terms of the permissible restrictions on the right to family life and draws on the Court's reasoning for an in-depth analysis of various unarticulated aspects of the prohibition on collective punishment. The article concludes that an international human rights law analysis might have led to a different outcome, and that had the Court applied the prohibition on collective punishment properly, it would have had to declare the measure unlawful. The article then places the decision in the broader context of the Court's engagement with international law in disputes relating to Palestinians residing in the West Bank and Gaza.*

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## Introduction

In the course of the Gaza War in the summer of 2014 (Operation “Protective Edge”), two Israeli soldiers went missing in action. While it was not clear whether the soldiers had been captured alive or killed in battle, within a few days both were declared by Israel to be “fallen soldiers whose place of burial is unknown”. Over the following four years, three Israeli civilians crossed the fence into the Gaza Strip.<sup>2</sup> All were reported to have been suffering from mental disabilities, and were declared missing by the Israeli authorities. To date, negotiations between Israel and Hamas on a return of the dead and missing in exchange for Gaza prisoners held in Israel have not come to fruition.<sup>3</sup>

In January 2017, the government of Israel decided on various measures intended to pressure the Hamas regime in Gaza into returning the missing Israeli civilians and the bodies of Israeli soldiers. One measure was the withholding and temporary burial of the bodies of “terrorists belonging to Hamas” and “terrorists who committed particularly exceptional terrorist incidents”.<sup>4</sup> Two other measures were the denial of entry into Israel to Hamas family members from Gaza seeking medical treatment, and the abolition of visits by Gaza residents to the Temple Mount (Haram a Sharif).<sup>5</sup> In a fourth measure, the government authorized a ministerial team headed by the prime minister to examine and decide on the conditions of incarceration in Israel of Hamas prisoners from Gaza, including in regard to receiving family visits. The ministerial team subsequently endorsed a ban on family visits to the said prisoners, including visits by immediate family members, for an unlimited period of time and subject to periodic review. This ban was the subject of the *Namnam* case.

January 2017 was not the first time that the government of Israel had adopted measures relating to Palestinian prisoners on a group basis in order to exert pressure on Palestinian militant groups. In 2011, following consultations on measures to expedite the release of an Israeli soldier taken captive by Hamas in

- 1 Supreme Court of Israel, *Namnam v. Government of Israel*, Case No. HCJ 6314/17, 4 June 2019.
- 2 Jack Khoury and Gili Cohen, “Israeli Who Jumped Border into Gaza Suffers from Mental Issues, Family Says”, *Haaretz*, 13 July 2018, available at: <https://tinyurl.com/57evfe5v> (all internet references were accessed in June 2021).
- 3 Hamas has generally refrained from confirming the situation with regard to the dead and missing. In April 2020, Hamas leader Ismail Haniye stated: “We have four prisoners and we are ready for indirect talks.” Daniel Siyoti, “Hamas Leader ‘Optimistic’ about Striking Prisoner Exchange Deal with Israel”, *Israel Hayom*, 19 April 2020, available at: [www.israelhayom.com/2020/04/19/hamas-leader-optimistic-about-striking-prisoner-exchange-deal-with-israel/](http://www.israelhayom.com/2020/04/19/hamas-leader-optimistic-about-striking-prisoner-exchange-deal-with-israel/). Hamas has not provided details as to the identity of the individuals in its hands.
- 4 Government Decision B/171 on “Uniform Policy in Treating Bodies of Terrorists”, 1 January 2017, reported in Supreme Court of Israel, *IDF Commander v. Alayan*, Case No. FHH CJ 10190/17, Opinion of Chief Justice Hayut, 9 September 2019, para. 1.
- 5 Government Decision B/172, reported in Supreme Court of Israel, *Namnam*, above note 1, para. 2.

2006, the government decided to withdraw various privileges accorded until that time to prisoners incarcerated in Israel following convictions for security offences.<sup>6</sup> One of these privileges was distance learning with the Open University. This measure was upheld by the Supreme Court of Israel (the Court) in 2013 (by which time the captured soldier had already been released).<sup>7</sup>

## The *Namnam* case

The petitioners in the *Namnam* case argued that the ban on family visits was contrary to both Israeli and international law. They claimed, *inter alia*, that it infringed disproportionately on their right to family life, violated the prohibition on collective punishment, and unlawfully used them as bargaining chips.<sup>8</sup>

The Supreme Court of Israel denied the petition. It held that under Israeli law, prisoners do not have a right to family visits, since imprisonment “inherently involves substantive limitations on the prisoner’s personal liberty, freedom of movement and scope of interaction with the outside world”.<sup>9</sup> The Court relied on its earlier case law to hold that visits “are not deemed part of the recognised rights of the prisoner”.<sup>10</sup> Hence, said the Court, family visits are a privilege. As such, they are not subject to a constitutional (human rights) review, and may be denied by executive action, provided that the executive authority’s decision is based on relevant considerations and is reasonable and proportionate.<sup>11</sup> The Court held that the ban on family visits to Gaza prisoners affiliated with Hamas complied with these requirements, noting that return of the missing individuals and the bodies was a legitimate State security interest, that only some 100 prisoners were affected by the ban, and that these prisoners had alternative means of contact with the outside world, such as correspondence and visits by legal counsel and clergy. Furthermore, the ban was subject to periodic review.<sup>12</sup> The Court further noted the authorities’ commitment to considering individual

6 The term “security offences” refers to offences under the Antiterrorism Law, offences under the Penal Code relating to treason, espionage, sedition and illegal association, offences under the 1945 Defence (Emergency) Regulations, and offences under the Penal Code committed on nationalist motives. Prison Service Commission Order 04.05.00, 1 May 2001.

7 Supreme Court of Israel, *Salah v. Prison Service*, Case No. FHH CJ 204/13, 14 April 2015.

8 Supreme Court of Israel, *Namnam v. Government of Israel*, Case No. HCJ 6314/17, Petition for Order Nisi (on file with author, undated).

9 Supreme Court of Israel, *Namnam*, above note 1, para. 6. The notion of “inherent limitations” is discussed below. One may ask whether the listing of all three limitations together is justified. The limitations on personal liberty and freedom of movement are not only inherent to imprisonment but are the very essence of it. Limitation on the scope of interaction with the outside world is not an intentional part of imprisonment, and therefore the analogy from the obviously inherent character of the former limitations to it is misleading.

10 Supreme Court of Israel, *Younes v. Prison Service*, Case No. ReqAp 6956/09, 7 October 2010, Concurring Opinion of Justice Procaccia, para. 7. Justice Procaccia herself expressed reservation as to the compatibility of the arrangement under Israeli law with constitutional law (para. 8). The Court in *Namnam* disregarded the lead opinion by Justice Danciger, which considered visits an element in exercising the right to family life: Supreme Court of Israel, *Younes*, Opinion of Justice Danciger, para. 43.

11 Supreme Court of Israel, *Namnam*, above note 1, para. 7.

12 *Ibid.*, paras 11, 12.

concrete requests for exemptions if those indicate “exceptional and special humanitarian grounds”.<sup>13</sup> Thus, the Court concluded, the denial of the privilege passed the tests of reasonableness and proportionality.<sup>14</sup>

The Court then turned to international law. It held that since there is no absolute prohibition under international law on denial of visits to prisoners (as the petitioners themselves had conceded), an international law analysis would have resulted in the same conclusion as the analysis under Israeli administrative law. With regard to the prohibition on collective punishment, the Court held that denial of privileges to convicted terrorists serving a prison sentence does not constitute collective punishment.<sup>15</sup> The Court did not directly address the argument relating to the use of the petitioners as bargaining chips.

## The applicable legal framework

In what follows, I address the Court’s analysis in light of the right to family life. I also examine it in light of the prohibition on collective punishment, which, in the present case, consisted of the prisoners’ family lives serving as “bargaining chips”. These norms are entrenched in two bodies of international law. One is international human rights law (IHRL), the applicability of which is beyond doubt in the present case, since at issue was a measure implemented within Israel.<sup>16</sup> Another relevant body of law is international humanitarian law (IHL). The applicability of this body of law to relations between Israel and Gaza is also not in dispute, although views differ on the specific rules of IHL that apply. One controversy is over whether Gaza prisoners are residents of an occupied territory. Over the years, the Court has aligned itself with the government’s position that Israel no longer occupies Gaza.<sup>17</sup> For present purposes it is unnecessary to take a position on the issue, since the law of occupation does not contain provisions that pertain directly to the question before the Court.<sup>18</sup> Views also differ on whether the ongoing armed conflict between Israel and Hamas is international or non-international. In 2006 the Court determined that the conflict was an international armed conflict due to its cross-border character.<sup>19</sup> The law of international armed

13 *Ibid.*, para. 12.

14 *Ibid.*, para. 12.

15 *Ibid.*, para. 15. The detailed argumentation on this issue is considered below.

16 This does not mean that the Court should have applied IHRL, but that its decision should have been in accordance with IHRL.

17 Starting with Supreme Court of Israel, *Al-Bassiouni Ahmed v. Prime Minister and Minister of Defence*, Case No. HCJ 9132/07, 30 January 2008, para. 12.

18 For a brief summary of the spectrum of views and related literature, see David Kretzmer and Yaël Ronen, *The Occupation of Justice*, 2nd ed., Oxford University Press, Oxford, 2021, pp. 164–168.

19 Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02, 14 December 2006 (*Targeted Killings*), para. 18. In subsequent cases the Court noted that the law of armed conflict applied without specifying which class of armed conflict. Supreme Court of Israel, *Al-Bassiouni Ahmed v. Prime Minister and Minister of Defence*, Case No. HCJ 9132/07, 30 January 2008, para. 12; Supreme Court of Israel, *Yesh Din v. IDF Chief of Staff*, Case No. HCJ 3003/18, 24 May 2018, Opinion of Justice Melcer, para. 51, and Concurring Opinion of Chief Justice Hayut, para. 2.

conflict includes provisions relating to protected persons, namely individuals finding themselves in the hands of a party to the conflict to which they do not belong. One of those provisions is the prohibition on collective punishment.<sup>20</sup> The government of Israel has refrained from taking a position on the characterization of the conflict,<sup>21</sup> and claims to be acting in accordance with rules applicable in both types of conflict.<sup>22</sup>

The *Namnam* petition was submitted on behalf of the prisoners themselves.<sup>23</sup> Since the Court may only deal with arguments presented to it, numerous issues have not been addressed. Had the petition concerned the rights of the family members who were themselves denied visits, the Court might have been required to decide on the legal status of Gaza, on the legality of incarcerating Gaza residents in Israel,<sup>24</sup> and on the rights of children. The present article focuses on the Court's engagement with the questions that did come before it. One of the issues raised by the petitioners was the claim of discrimination in the imposition of the ban. Since this article maintains that the ban on family visits constitutes unlawful collective punishment, it does not address the petitioners' additional claim of discrimination in determining the target population on which this measure was imposed.<sup>25</sup>

20 It is possible that the Court's position in the *Targeted Killings* case, above note 19, that the conflict was international was limited to issues relating to the conduct of hostilities (which was the issue before the Court). However, it is difficult to maintain that the conflict should be classified as international for the purpose of allowing targeted killings under the law of hostilities (which would be impermissible in a non-conflict situation) but should not be classified as international for the purpose of protecting individuals in the hands of the State party to the conflict. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 75, expands the protection from collective punishment, which this article addresses, from "protected persons" to all persons in the power of a party to a conflict. However, AP I is applicable only in international armed conflicts, and moreover, Israel is not party to it (although it is bound by its customary provisions). Supreme Court of Israel, *Targeted Killing*, above note 19, para. 19; State of Israel, *The 2014 Gaza Conflict, 7 July–26 August: Factual and Legal Aspects*, May 2015 (2014 Gaza Conflict Report), para. 234, available at: <https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

21 2014 Gaza Conflict Report, above note 20, para. 233.

22 *Ibid.* It notes specifically the rules on distinction, precautions and proportionality in hostilities, with which this article is not concerned.

23 The petitioners also invoked their relatives' right to family life but did not substantiate it. The Court did not address the matter. In 2008, a 2007 ban on family visits to Gaza prisoners held in Israel was challenged by family members residing in Gaza. The Court rejected the petition on the grounds that it would not intervene in the authorities' policy regarding entry from Gaza into Israel. In that case the Court did not directly address the rights of the prisoners. Supreme Court of Israel, *Anbar v. Commander of the Southern Command*, Case No. HCJ 5268/08, 9 December 2009. In 2012 the ban was lifted.

24 Previously considered by the Court in *Sajdiya v. Minister of Defence*, Case No. HCJ 253/88, 8 November 1988; and *Yesh Din v. IDF Commander in the West Bank*, Case No. HCJ 2690/09, 28 March 2010. Note, however, that the denial of visits would have been technically possible even if the prisoners were incarcerated in occupied territory, as the Court implies in *Namnam*, above note 1, para. 15.

25 For other cases raising this matter, see Supreme Court of Israel, *State of Israel v. Quntar*, Case No. ADA 1076/95, 13 November 1996; Supreme Court of Israel, *Salah*, above note 7.

## The right to family life

### Visits by immediate family members as a component of the right to life

Neither IHRL nor IHL contain express provisions relating to family visits for prisoners. Geneva Convention IV (GC IV) provides the right of internees (individuals detained on security grounds by a power involved in an international armed conflict) to receive “visitors, especially near relatives, at regular intervals and as frequently as possible”.<sup>26</sup> However, no equivalent right to visits is explicitly provided for persons imprisoned following a criminal conviction. GC IV Article 76, which addresses the conditions of detention and imprisonment on criminal offences specifically in occupied territory, stipulates the right of prisoners to receive visits by delegates of the Protecting Power and the International Committee of the Red Cross (and, implicitly, by clergy), but does not mention family visits.

While prisoners are not explicitly entitled to family visits as such, they do have a right to family life. Both the Hague Regulations and GC IV stipulate the obligation to respect “family rights”.<sup>27</sup> Under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), every person has the right to be protected against arbitrary interference with their family. The 1957 Standard Minimum Rules for the Treatment of Prisoners, widely regarded as reflecting customary standards, provide that “[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits”.<sup>28</sup> The same view is held by the United Nations Human Rights Committee.<sup>29</sup> The European Court of Human Rights (ECtHR) has held in a number of cases that restrictions on frequency, duration and forms of family visits to prisoners are an interference with the right to family life,<sup>30</sup> thereby confirming that such visits are a

26 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 116. This provision applies to internees both in the Detaining Power’s territory and in occupied territory.

27 Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, 205 CTS 277, 18 October 1907 (entered into force 26 January 1910) (Hague Regulations), Art. 46: “Family ... rights ... must be respected.” GC IV, Art. 27: “Protected persons are entitled, in all circumstances, to respect for their ... family rights.”

28 Standard Minimum Rules for the Treatment of Prisoners, adopted in ECOSOC Res. 663C(XXIV), 31 July 1957, and ECOSOC Res. 2076(LXII), 13 May 1977, Rule 37. Also see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UNGA Res. 43/173, 9 December 1988, Principle 19: “A detained or imprisoned person shall have the right to be visited by ... members of his family ... subject to reasonable conditions and restrictions as specified by law or lawful regulations.”

29 Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, UN Doc. CCPR/C/OP/2 93, 1990, para. 9.2. For the African Charter on Human and People’s Rights, Art. 18, see African Commission on Human and Peoples’ Rights, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication Nos 143/95, 150/96, 15 November 1999, para. 29.

30 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 4 November 1950 (entered into force 3 September 1953) (ECHR), Art. 8, considered in, e.g., ECtHR, *Messina v. Italy (No 2)*, Appl. No. 25498/94, Judgment, 28 September 2000, para. 61; ECtHR, *Klamecki*

component of the right to family life. Thus, the question that the Court should have asked itself is whether the right to family life encompasses in-person contact with immediate family members, and if so, whether a complete ban on visits by immediate family members was within the scope of permissible restrictions on rights under IHL and IHRL.

The view adopted by the Court, that the penalty of imprisonment inherently entails substantive limitations on the prisoner's interactions with the world and is thus exempt from a human rights analysis, was previously considered by the ECtHR in a number of cases involving European States. However, even the ECtHR ultimately rejected the argument that the (factually) inevitable consequences of imprisonment under a court conviction implicitly affect the scope of rights.<sup>31</sup> Rather, rights that are set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) but are not defined in it, as is the right to family life, may be subject to "limitations permitted by implication" through state regulation.<sup>32</sup> Such restrictions are not violations of the right so long as they do not "injure the substance of the right ... nor conflict with other rights enshrined in the Convention".<sup>33</sup> Thus, restrictions on the number of family visits constitute, according to the ECtHR, interferences with the right to family life.<sup>34</sup> Moreover, notwithstanding the inherent limitations that imprisonment entails, "it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family".<sup>35</sup> Similarly, according to the Human Rights Committee, "[p]ersons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment".<sup>36</sup> Hence, there is nothing in international law to support the Supreme Court of Israel's view that (lawful) imprisonment affects the very scope of the right rather than merely entailing (inevitable) practical obstacles to exercising the right. Such obstacles to family life must be in accordance with the law, necessary and proportionate, and must remain subject to judicial review. Their being "unavoidable" in a prison environment fulfils the requirement of "necessity", but they must still pass the proportionality test. Nor is the Court's view defensible. Holding that the rights of any category of persons are from the outset narrower than those of others would

*v. Poland (No 2)*, Appl. No. 31583/96, Judgment, 3 April 2003, para. 144; ECtHR, *Chaldayev v. Russia*, Appl. No. 33172/16, 28 May 2019, para. 59.

31 ECtHR, *Golder v. United Kingdom*, Judgment, 21 February 1975, para. 44; ECtHR, *Messina*, above note 30, para. 61.

32 ECtHR, *Golder*, above note 31, para. 38.

33 *Ibid.*, para. 38.

34 ECtHR, *Klamecki*, above note 30, para. 144.

35 ECtHR, *Messina*, above note 30, para. 61; ECtHR, *Klamecki*, above note 30, para. 144. Also see ECtHR, *Vintman v. Ukraine*, Appl. No. 28403/05, Judgment, 23 January 2015, para. 78; ECtHR, *Khoroshenko v. Russia*, Appl. No. 41418/04 [GC], Judgment, 30 June 2015, para. 134.

36 Human Rights Committee, General Comment No. 21, "Humane Treatment of Persons Deprived of Their Liberty (Article 10)", 1992, para. 3.

allow the authorities to impose restrictions on such persons without a specific legal basis while denying those persons the right to judicial review over those restrictions.<sup>37</sup>

## Restrictions on the right to visits by immediate family members

### *General*

The right of prisoners to family life, including the right to visits by immediate family members, is not absolute and may be restricted. Under ICCPR Article 17, restrictions on the right to family life must not be arbitrary. The Human Rights Committee has interpreted “arbitrariness” to include elements of inappropriateness, injustice, lack of predictability and lack of due process of law. Non-arbitrary restrictions must be reasonable, necessary and proportionate.<sup>38</sup>

Since the Court maintained that prisoners are not entitled to family visits as of right,<sup>39</sup> it did not conduct an enquiry framed in human rights terms. However, the Court did examine the ban on visits in light of Israeli administrative law, which, it acknowledged, required that the measure pursue a legitimate purpose, be reasonable and not arbitrary, and be proportionate. Given the similarity between these administrative standards and those of IHRL, a consideration of the Court’s reasoning can indicate whether, as the Court claimed, it would have reached the same conclusion had it applied international law.

One implication of the characterization of family visits as a right is that they may be restricted only by specific law. However, unlike written correspondence and visits by legal counsel and clergy, which are guaranteed as rights, with regard to visits the Israeli Prison Service Ordinance provides only that they may be permitted.<sup>40</sup> Such visits are regulated only in secondary legislation and in internal Prison Service orders.<sup>41</sup> In the *Namnam* case, the Court held that the minister’s

37 Yutaka Arai, “The System of Restrictions”, in Pieter Van Dijk *et al.* (eds), *Theory and Practice of the European Convention on Human Rights*, 4th ed., Intersentia, Cambridge, 2006, p. 346.

38 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 17; Human Rights Committee, General Comment No. 16, “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies”, UN Doc. HRI/GEN/1/Rev.1, 1994, p. 21, para. 4; Human Rights Committee, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, part VII, para. 3. Article 8 of the ECHR contains an exhaustive list of specific grounds that may allow restrictions on the right; since Israel is not party to the ECHR, these will not be discussed in detail. American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 (entered into force 18 July 1978), Art. 11(2); Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990), Art. 16.

39 For a critique of this view as inconsistent with existing Israeli constitutional law, see Yaël Ronen, Session 10, 15th Annual Conference on International Humanitarian Law, “Indirect Victims of Conflict: IHL Protections of the Rights and Interests of Relatives”, 9–11 November 2020, available at: <https://en.minervacenter.huji.ac.il/2020-previous-events/>.

40 Prison Service Ordinance (New Version), 1971, Art. 47(b).

41 Prison Service Commission Order 03.02.00, 15 March 2002, on the rules regarding “security prisoners”, stipulates (section 17) that “in accordance with Article 116 of GC IV, in general, prisoners will be allowed to receive visits by immediate family only, in accordance with the rules stipulated in this section”. As noted earlier, Article 116 does not concern prisoners. Israel maintains that as a matter of policy it acts in accordance with this provision: see 2014 Gaza Conflict Report, above note 20, para. 371.



instruction to the Prison Service to impose a ban on visits lay within his authority to instruct the Prison Service on matters of security.<sup>42</sup> This non-specific authorization, which the Court found to be sufficient for denying family visits as a matter of privilege, would probably not have sufficed had the ban been considered a restriction on a human right.<sup>43</sup>

Other implications of family visits being a right rather than a privilege concern the substantive limitations on the authorities' power to restrict such visits. First, while rights may be restricted, they may not be nullified.<sup>44</sup> The measure upheld by the Court consists of a complete ban on visits (as opposed, for example, to allowing them on rarer occasions) for an indefinite period of time. Formally this restriction is temporary (until the bodies and missing persons are returned to Israel), and it may also end following the periodic review to which it is subject (although it is not clear what the review should examine and what the criteria are for discontinuing the measure). Nonetheless, a measure that does not have an expiration date is effectively indefinite, and experience indicates that the matter at hand—negotiations over repatriating captured soldiers—can last for years on end.<sup>45</sup> Accordingly, the complete and indefinite ban on family visits may be said to exceed the permissible limits of the authority to restrict rights.<sup>46</sup>

### *Purpose: Repatriation as security*

While the legitimate grounds for limiting the right to family life under general IHRL are not specifically enumerated, they must be interpreted according to the relevant provisions of IHL, which is *lex specialis* in situations of armed conflict.<sup>47</sup> The Hague Regulations do not contain any specific rules or standards regarding restrictions on family life. GC IV Article 27(4) stipulates that notwithstanding the entitlement of protected persons to respect for their family rights in all circumstances, parties to the conflict “may take measures of control and security in regard to protected persons as may be necessary as a result of the war”. This

42 Supreme Court of Israel, *Namnam*, above note 1, para. 8.

43 Human Rights Committee, General Comment No. 16, “Article 17 (Right to Privacy)”, 1988, para. 8.

44 Universal Declaration of Human Rights, UNGA Res. 217A(III), UN Doc. A/810, 10 December 1948, Art. 30; ECHR, Art. 17.

45 The 2011 Shalit exchange took place five years after his capture. The bodies of three soldiers killed in 2000 in a capture operation on the Lebanon border were repatriated four years later. In 1996, Israel carried out an exchange deal for the return of the bodies of two soldiers captured in 1986 (and declared dead in 1991).

46 A related doctrine, adopted by the ECtHR, is that of absolute protection for the “core”, “essence” or “substance” of rights. Contact with the family is at the core of the right to family life, but the denial of visits does not destroy that core, so long as written communication continues. Given the specificities of the permissible restrictions on the right to family life under the ECHR, this matter will not be discussed in detail here. For a critique of the “essence of rights” doctrine, see Sébastien Van Drooghenbroeck and Cecilia Rizcallah, “The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?”, *German Law Journal*, Vol. 20, No. 6, 2019.

47 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, *ICJ Reports* 1996, para. 25. For a view that restrictions would only be permitted due to practical difficulties or a concrete security risk created by or during the visits, see Alon Margalit, “Accounting for Those in the Hands of the Belligerent: Security Detainees, the Missing and the Dead in the Israeli–Hammas Conflict”, *Journal of Conflict and Security Law*, Vol. 25, No. 3, 2020, p. 586.

narrow scope for limiting rights calls for a closer consideration of the purpose underlying the ban on family visits.

According to the Court, the direct purpose of the measure is “to pressure Hamas, in an attempt to further the return of Israeli nationals and the bodies of IDF soldiers held for years by the organisation – while lowering the price that Israel would be required to pay for them”.<sup>48</sup> The Court characterized the measure as required for the “maintenance of state security”.<sup>49</sup>

Furthering the prospects of a prisoner exchange is a legitimate purpose. However, its connection to security as required under GC IV Article 27(4) is tenuous at best. First, the examples in the 1958 Commentary on GC IV of measures envisaged under the provision – movement restrictions in occupied territory, a requirement to carry identifying documents, and, in extreme cases, internment and assigned residence – suggest that the provision assumes a security risk emanating from the protected persons themselves.<sup>50</sup> The ban on visits has no pretension of addressing such a risk. If it pursues security, it does so only in the broadest sense of the word.

The question of whether the term “security” should be interpreted broadly or narrowly arose before the Supreme Court of Israel in the *Bargaining Chips* case in 2000. It, too, concerned measures adopted in order to facilitate a prisoner exchange. Petitioners were prominent members of the Lebanese armed group Hezbollah who had completed their prison sentences and were held under administrative detention in Israel in order to exert pressure on Hezbollah to release missing Israeli soldiers or provide information about them.<sup>51</sup> Views in the Court differed on whether the term “security reasons” in the legislation authorizing administrative detention should be interpreted narrowly, so as to mean a security reason emanating from the individual being detained, or broadly, encompassing security interests external to the detainees. The majority among the Court did not dispute that a prisoner exchange was a security interest, but held that in light of the right to liberty under Israeli constitutional law, the term “security reasons” should be interpreted narrowly and, unless specifically stipulated otherwise, could not extend to security risks that are external to the individual. Accordingly, the legislation did not allow detention for the purpose of maintaining leverage in negotiating a prisoner exchange.

While GC IV Article 27(4) and domestic Israeli legislation seem to raise the same question, the answer might differ between them. The rationale for the narrow interpretation adopted in the *Bargaining Chips* case was that the deprivation of liberty is a harsh measure and should therefore be available only rarely. Article 27(4) concerns a host of measures that are less injurious than

48 Supreme Court of Israel, *Namnam*, above note 1, para. 11.

49 *Ibid.*, para. 8.

50 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958 (Commentary on GC IV), p. 206.

51 Supreme Court of Israel, *A v. Minister of Defence*, Case No. FHCr 7048/ 97, 12 April 2000 (*Bargaining Chips*).

deprivation of liberty. A broader interpretation of “security” might therefore be plausible, including one that encompasses risks external to the individuals directly affected by the measures. The Gaza prisoners are a case in point. For example, allowing them family visits requires letting foreign nationals into the territory of Israel.<sup>52</sup> It stands to reason that such visits would be restricted in various ways, even though the risk emanating from them is not from the prisoners themselves.

A second question is whether repatriation of the dead soldiers and missing civilians is a matter of “security” in the broader sense. While generally speaking, the welfare and safety of soldiers themselves is a military (and security) interest, it is not obvious that the same can be said for the repatriation of captured soldiers.<sup>53</sup> In the Court’s case law, the welfare of captured and missing soldiers, including their repatriation, has been cited as a security interest,<sup>54</sup> with some judges noting the importance of the State’s commitment to repatriating soldiers or their remains for military morale<sup>55</sup> and others highlighting the State’s moral obligation towards its soldiers.<sup>56</sup> The difference between security interests and other interests has therefore been somewhat glossed over. Indeed, in the *Namnam* case the respondent authorities did not claim that at issue was a security interest. Rather, the purpose of the ban, according to them, was “the repatriation of the sons”. It was only the Court that reframed the matter as one of security. In addition, a distinction is required between the release of soldiers and the release of civilians. Repatriating civilians is a legitimate purpose, but not a military or a security interest. In the circumstances of the *Namnam* case, the two categories of persons are indistinguishable. The Court, for its part, made no mention of this difference.<sup>57</sup>

### *Means: Instrumentalization of individuals*

The ban on visits to the Gaza prisoners is, as the Court candidly stated, a bargaining tactic. The expectation is (presumably) that the prisoners or their family members will pressure Hamas leaders to strike a deal with Israel for the return of the missing and dead in exchange for the reinstatement of visits, and for the withdrawal of the other measures adopted by the government. In addition, if such a deal includes the release of prisoners, those will number fewer than if the various measures had not been adopted.

52 Those who maintain that Gaza is occupied would point to GC IV Article 76, which provides that protected persons convicted of offences shall serve their sentences in the occupied territory.

53 See, for example, the view of the district court reported in Supreme Court of Israel, *A v. Minister of Defence*, Case No. ADA 10/94, 13 November 1997, para. 3. This issue is even less clear with regard to the repatriation of the bodies of soldiers.

54 *Ibid.*, para. 10; Supreme Court of Israel, *Alayan*, above note 4, Opinion of Chief Justice Hayut, para. 21.

55 Supreme Court of Israel, *Bargaining Chips*, above note 51, Dissenting Opinion of Justice Cheshin, para. 3, and Dissenting Opinion of Justice Kedmi, para. 1.

56 *Ibid.*, Dissenting Opinion of Justice Cheshin, para. 10, and Dissenting Opinion of Justice Tirkel, para. 3.

57 See, for example, Justice Elron, stating: “In the same manner that protection of the state’s residents and soldiers is a supreme security interest – so the state must act for their return after falling into the hands of the enemy.” Supreme Court of Israel, *Namnam*, above note 1, Concurring Opinion of Justice Elron, para. 2.

Restricting an individual's rights in order to induce a third party to act in a particular manner runs contrary to the very foundation of human rights law, which postulates, based on the inherent human dignity of the individual, that persons should never be treated as means to an end.<sup>58</sup> However, IHRL does not explicitly prohibit measures that instrumentalize individuals. Moreover, most human rights may be subject to restrictions. It therefore stands to reason that the rejection of the instrumentalization of individuals, too, is not an absolute rule, and that there may be circumstances, albeit exceptional, in which it could be set aside in order to realize a legitimate purpose of supreme importance. Indeed, the Court noted that even if the ban on family visits had constituted a restriction on a right, the case at hand would have been different from the *Bargaining Chips* case, because of the different severity of the restrictions that each case concerned.<sup>59</sup> Thus, by implication the Court conceded that instrumentalization of the individual is not categorically prohibited, but is subject to a proportionality test.

According to the Court, the ban on visits for the purpose of advancing a prisoner exchange passed the proportionality test (while detention could not<sup>60</sup>). First, the Court found that in the circumstances it had no grounds to intervene in the authorities' assessment as to the potential effectiveness of the ban (addressing the question of whether the choice of measure was rational). Second, in a bizarre application of the "least intrusive measure" requirement, the Court held that the prisoners had alternative means to family visits for communicating with the outside world.<sup>61</sup> It further noted that only 100 prisoners were affected by the measure. This reasoning turns the requirement on its head: rather than being satisfied that the authorities had no alternative means at their disposal to achieve their purpose but to restrict the right, the Court examined whether the prisoners had alternative means to exercise their right (glossing over the character of the right itself – clergy and lawyers are no substitute for family). Moreover, the share of prisoners affected by the measure is irrelevant to the extent of harm caused to each of them individually.<sup>62</sup>

While instrumentalization as such is not categorically prohibited,<sup>63</sup> in some instances it may violate specific prohibitions such as the prohibition on cruel, inhuman and degrading treatment.<sup>64</sup> This would depend, *inter alia*, on the

58 Kant's Formula of Humanity states: "So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means." Cited in Samuel Kerstein, "Treating Persons as Means", in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Summer 2019, available at: <https://plato.stanford.edu/archives/sum2019/entries/persons-means/>.

59 Supreme Court of Israel, *Namnam*, above note 1, para. 10.

60 In the *Bargaining Chips* case, above note 51, the majority opinion noted that even if the legislation had contained explicit authorization for detaining a person for purposes external to him, the order in question would not have passed the proportionality test due to its severity in the circumstances.

61 See the main text at above note 12.

62 Supreme Court of Israel, *Namnam*, above note 1, paras 11–12.

63 On the inadequacy of IHRL to address collective punishment as a specific form of instrumentalization, see Cornelia Klocker, *Collective Punishment and Human Rights Law: Addressing Gaps in International Law*, Routledge, London and New York, 2020; Liron A. Libman, *Will you Sweep Away the Righteous with the Wicked? Security Measures and Collective Punishment*, Israel Democracy Institute Policy Paper 125, April 2019, pp. 23–24.

64 ICCPR, Art. 7.

nature, purpose and severity of the treatment applied.<sup>65</sup> Instrumentalizing measures may also be regarded as unjust and lacking due process of law, and therefore arbitrary. Thus, a ban on family visits that may be legitimate in some circumstances may constitute a violation of rights by virtue of its imposition in order to affect a third party's conduct.<sup>66</sup>

Unlike IHRL, the rules of IHL leave explicit room for instrumentalization. This is demonstrable, for example, in the legality of incidental injury to civilians and civilian objects. However, certain instances of instrumentalization are absolutely prohibited. Specifically, IHL prohibits the meting out of collective punishment on protected persons.<sup>67</sup> This prohibition applies both directly and, as *lex specialis*, as a factor in the interpretation of what constitutes a lawful restriction on a human right. If a measure is unlawful in itself, the questions of its purpose, necessity and proportionality become immaterial. Thus, if the ban on family visits constitutes collective punishment, it is prohibited directly under IHL, and in addition it is an unlawful interference as a matter of IHRL. Hence, the next section examines whether the denial of visits by immediate family members constitutes collective punishment.

## The prohibition on collective punishment under IHL

Collective punishment is prohibited under GC IV Article 33, which stipulates that “[n]o protected person may be punished for an offence he or she has not personally committed”.<sup>68</sup> The Supreme Court of Israel developed its jurisprudence on the prohibition on collective punishment largely in the context of punitive house demolitions. The Court rejected the argument that such demolitions constitute collective punishment. Its primary reasoning was that such demolitions do not constitute “punishment” because they are a preventive deterrent. It further held that they could not be regarded as “collective”, by

65 Human Rights Committee, General Comment No 20, “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 1992, para. 4.

66 A specific norm that is grounded in the rejection of instrumentalization but that does not apply in the present case is the prohibition on the taking of hostages, defined as “seiz[ing] or detain[ing] and threaten[ing] to kill, to injure or to continue to detain another person ... in order to compel a third party ... to do or abstain from doing any act”. International Convention Against the Taking of Hostages, 1316 UNTS 205, 17 December 1979 (entered into force 3 June 1983), Art. 1(1). Hostage-taking is prohibited at all times, including specifically in situations of armed conflict. GC IV, Art. 3: “To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities, including those placed *hors de combat*]: ... (b) taking of hostages”; GC IV, Art. 34: “The taking of hostages is prohibited.” The definition of hostage-taking by reference exclusively to security of the person rather than to other characteristics and aspects of humanity reinforces the view that instrumentalization is not unlawful in itself.

67 Further support for the view that instrumentalization of individuals is not absolutely prohibited is the fact that GC IV Articles 33(1) and 33(3) only refer to protected persons, suggesting that similar measures towards non-protected persons may be lawful. The difference between GC IV Article 33(3) and AP I Article 20 highlights this further.

68 Also see Hague Regulations, Art. 50.

drawing a (flawed) analogy between the detriment that is caused to innocent persons dependent on a person who is imprisoned following a conviction in a criminal offence, and the detriment that is caused to innocent persons related to an alleged perpetrator of a security offence whose house is demolished.<sup>69</sup> The Court disregarded the difference between the unintentional and incidental causing of detriment in the former case and the intentional and direct causing of detriment in the latter.

The non-persuasiveness of these arguments has been discussed elsewhere.<sup>70</sup> Moreover, in the *Namnam* case, neither was directly applicable. There was no claim that the ban on visits was intended to serve as a deterrent,<sup>71</sup> nor were the prisoners claimed to be directly linked to the capture of the soldiers or civilians. The Court nonetheless rejected the collective punishment claim, drawing on numerous problematic arguments. First, the Court held that the denial of visits is not punitive because it is “an administrative measure in nature” rather than being judicially imposed.<sup>72</sup> However, it has long been established, including by explicit stipulation, that GC IV Article 33 (and later Additional Protocol I Article 75) refers not only to judicial sentencing but to sanctions of any kind.<sup>73</sup> More generally, the nature of a sanction is not determined by the type of State organ authorized to impose it. The type of authority imposing the sanction is therefore beside the point.<sup>74</sup>

Second, the Court stated that the ban was a “legitimate” measure “for security purposes”.<sup>75</sup> Yet it was not the purpose of the measure that was

69 See Supreme Court of Israel, *Shukri v. Minister of Defence*, Case No. HCJ 798/89, 10 January 1990, para. 6 (on deterrence); Supreme Court of Israel, *Dajlas v. IDF Commander in Judea and Samaria*, Case No. HCJ 698/85, 24 March 1986, para. 3; and most recently Supreme Court of Israel, *Kabha v. Military Commander of the West Bank*, Case No. HCJ 480/21, 3 February 2021 (on collective character); as well as the cases discussed in D. Kretzmer and Y. Ronen, above note 18, pp. 384–391.

70 See, for example, Shane Darcy, “Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel”, *Penn State International Law Review*, Vol. 21, No. 3, 2003; Mordechai Kremnitzer and Lina Saba-Habesch, “House Demolitions”, *Laws*, Vol. 4, No. 2, 2015; D. Kretzmer and Y. Ronen, above note 18, pp. 384–391.

71 Arguably, a measure intended to induce action by a third party may be comparable to a measure intended to deter action by a third party. They may differ in that evaluating the effectiveness of a measure ought to be easier in the former case, as whether action took place is clearer than whether action that would have taken place did not. However, despite the occasional engagement of the Supreme Court with it in the context of punitive house demolitions, the effectiveness of collective punishment is immaterial to its illegality.

72 Supreme Court of Israel, *Namnam*, above note 1, para. 15, perhaps echoing the *Shukri* case, where the Court said that “[t]he authority is administrative, and its exercise is designed to deter and thereby to maintain public order”. Supreme Court of Israel, *Shukri*, above note 69, para. 6.

73 Commentary on GC IV, above note 50, p. 225. On the AP I replacement of “penalties” with “punishment”, see Shane Darcy, *Collective Responsibility and Accountability under International Law*, Brill, Leiden, 2007, p. 67.

74 For IHRL, see Human Rights Committee, General Comment 32, “Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial”, UN Doc. CCPR/C/GC/32, 23 August 2007, section III, para. 2. With regard to GC IV Article 33, see Commentary on GC IV, above note 50, p. 225; D. Kretzmer and Y. Ronen, above note 18, p. 391.

75 Supreme Court of Israel, *Namnam*, above note 1, para. 15. It is interesting that the Court took a position on the matter rather than refusing to intervene in a political-security matter. See D. Kretzmer and Y. Ronen, above note 18, p. 491. For a different approach in similar circumstances, see Supreme Court of Israel, *Anbar*, above note 23, para. 4.

challenged before the Court, but the means of pursuing it. Since the end does not always justify the means, the Court's statement merely begged the question of whether the measure was legitimate.

Third, the Court relied heavily on its classification of family visits as a privilege rather than a right. According to the Court, a withdrawal of a privilege does not constitute "punishment".<sup>76</sup> The fallacy of this premise – that family visits are only a privilege – has been discussed above. The logic of the conclusion is also questionable. Granted, the suffering caused to the individual by measures that restrict rights is assumed to be greater than the suffering caused by measures that restrict mere privileges; indeed, historically the debate over the permissibility of collective punishment has concerned egregious violations of rights, such as mass killings, the taking of hostages, torture, and the destruction of whole villages.<sup>77</sup> However, the psychological and social significance of punishment lies not in the formal, legal classification of the detriment it causes, but in the pain, suffering, loss or unpleasantness caused by the intentional imposition of some burden or deprivation of some benefit.<sup>78</sup> These depend on factors such as the severity of the measure, the purpose that it seeks to serve, its expected effectiveness, and the affected population.<sup>79</sup> In fact, the Court itself noted the rule that even long-standing privileges cannot be denied without relevant justification, and must be reasonable and proportionate. This rule reflects the need to respect legitimate expectations, even when those are not grounded in rights.<sup>80</sup> Classifying family visits as a privilege therefore does not detract from the painful effect of their denial. Indeed, if the authorities did not claim that the ban on visits had a painful or unpleasant effect that might prompt action by Hamas, they would not have imposed it in the first place. Equally, the Court could not have upheld the ban on visits as potentially effective (and therefore, according to its view, reasonable) without acknowledging that it caused suffering and deprivation. How, then, when considering the legality of the ban under a norm that prohibits the causing of certain forms of suffering and deprivation, could the Court dismiss those as falling below a significant threshold because at issue was merely a privilege? Just as the suffering that a measure causes does not depend solely on whether it concerns a right or a privilege, neither does its legality.

Fourth, the Court classified the ban on family visits as a denial or prevention of privileges "where the prisoner does not fulfill the conditions to receive them".<sup>81</sup> The Court did not indicate which conditions the Hamas prisoners had failed to fulfil. In fact, it candidly acknowledged that the ban has

76 Supreme Court of Israel, *Namnam*, above note 1, paras 6, 15.

77 Paul Rabbat and Sigrid Mehring, "Collective Punishment", in *Max Planck Encyclopedia of International Law*, Oxford University Press, Oxford, 2015, para. 1.

78 Hugo Adam Bedau and Erin Kelly, "Punishment", in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Winter 2019, available at: <https://plato.stanford.edu/archives/win2019/entries/punishment/>. The prohibition on collective punishment assumes that the punishment is imposed in reaction to the violation of some norm. For more on this, see below.

79 L. A. Libman, above note 63, pp. 46–61.

80 Supreme Court of Israel, *Namnam*, above note 1, para. 6.

81 *Ibid.*, para. 15.

nothing to do with the conduct of the petitioners. The “condition” that they failed to fulfil was not to belong to Hamas. All they “did” was be members of a group from which they could not exclude themselves once captured.

A final argument of the Court concerns the collective element in the denial of family visits. The Court sought to distinguish the ban on family visits from punitive house demolitions by reference to the “double effect” doctrine. This doctrine maintains that sometimes it is permissible to cause a harm as a side effect (or “double effect”) of bringing about a good outcome, when it would not be permissible to cause such a harm intentionally as a means of bringing about the same good outcome.<sup>82</sup> The Court was responding to the critique that punitive house demolitions are collective punishment since they fail to fulfil the doctrine’s requirements, because the outcome itself – the demolition – infringes on the right to property (among others) of third parties and is thus “wrong”. Relying on its own view that the ban on family visits “does not infringe on a vested right”, the Court concluded that such denial “raises no difficulty even at the level of the outcome”.<sup>83</sup> However, even if the denial of visits had not infringed on a right, exercising it as leverage in negotiating with Hamas fails a separate condition of the double effect doctrine: just like punitive house demolitions,<sup>84</sup> the detriment caused by denial of visits is not a side effect of the act, but an intentional and direct effect that the authorities seek to obtain. The intentional causing of detriment to persons who bear no legal or moral responsibility is “wrong” in itself. The double effect doctrine therefore does not suffice to overcome the wrong in the instrumentalization of the prisoners.

The Court’s use of an *a fortiori* argumentation from punitive house demolitions is disappointing, not least because punitive house demolitions present the Court with two impediments to intervention in government action that do not arise with regard to denial of family visits. One is that the authorities seek to justify punitive house demolitions as vital for security.<sup>85</sup> The other is the concern that declaring punitive house demolitions to be collective punishment would imply admission that for many years the Court has allowed the use of an unlawful measure (which may amount to a war crime).<sup>86</sup> Neither impediment would have arisen in the context of the ban on family visits. No immediate security concern was claimed to be at stake, nor was there previous practice on

82 Alison McIntyre, “Doctrine of Double Effect”, in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Spring 2019, available at: <https://plato.stanford.edu/archives/spr2019/entries/double-effect/>.

83 Supreme Court of Israel, *Namnam*, above note 1, para. 15. The Court was responding to an argument by Harpaz and Cohen regarding the double effect doctrine. Harpaz and Cohen refer to the Court’s reasoning in upholding punitive house demolitions as non-collective on the grounds that the act itself is good or at least not wrong, and that the harm caused to non-perpetrators is incidental rather than intended. As Harpaz and Cohen note, this reasoning does not bear scrutiny, because punitive house demolitions are “wrong” in themselves, being an infringement on the right to property that is not justified by military operations; and because the harm caused to non-perpetrators is intended rather than incidental. Guy Harpaz and Amichai Cohen, “On Dynamic Interpretations and Stagnant Rulings: Reassessing the Israeli Supreme Court’s Jurisprudence on House Demolitions” *Bar-Ilan Law Studies*, Vol. 31, No. 3, 2018, p. 1012.

84 *Ibid.*, p. 1012.

85 D. Kretzmer and Y. Ronen, above note 18, pp. 314–318, 496–504.

86 *Ibid.*, 416–417.



the matter that would obviously constitute a war crime. Nonetheless, rather than taking the opportunity to reduce the harmful consequences of its existing case law on collective punishment, the Court opted to interpret the prohibition on collective punishment restrictively so as to allow the practice more broadly.

In considering the Court's playing down of the legal significance of banning the visits as "punishment", it is important to note that the measure was not a response to *any* alleged wrongdoing by the prisoners.<sup>87</sup> Ostensibly this excludes the matter altogether from the purview of the prohibition on collective punishment, since GC IV Article 33 prohibits the punishment of a person "for an offence" that they have not personally committed, as well as pre-emptive measures "to forestall breaches of the law".<sup>88</sup> In contrast to these, the ban on visits was imposed in order to induce lawful action. However, the reason that the prohibition explicitly addresses reactions to unlawful conduct is that at the time of its adoption, it was already agreed that collective measures other than in reaction to unlawful conduct were prohibited, following the *nullum poena sine crimen* principle.<sup>89</sup> The debate concerned only the differentiation of collective responsibility from individual responsibility when *some* illegal conduct had taken place.<sup>90</sup> Thus, the fact that no blame is attached to the prisoners and that the matter is technically outside the scope of "punishment", as the Court says,<sup>91</sup> exacerbates the illegitimacy of the measure rather than licenses it.

One may argue that the ban on family visits is a reaction to Hamas' violation of IHL when it refuses to repatriate the bodies and the missing. Israel has not made this argument, possibly because Israel itself is keeping bodies of Hamas fighters as a negotiating tool. In the 2019 *'Alayan* case, the Supreme Court held that this practice is not contrary to international law.<sup>92</sup> The situation regarding the Israeli soldiers in Hamas hands is somewhat different in that Hamas has deliberately refused to provide information as to the fate of the soldiers, including whether they are alive or not. This refusal itself may qualify as hostage-taking since it puts the safety of the soldiers at risk.<sup>93</sup> At the same time,

87 The denial of visits concerns prisoners convicted of security offences, but it is not imposed as a reaction to those offences.

88 Commentary on GC IV, above note 50, pp. 225–226.

89 In this vein, Garner notes an instance in the South African War in which measures were taken against communities for damages committed upon railway and telegraph lines by "small parties of raiders". He points out that it is not clear whether the offenders were lawful belligerents or non-combatants; in the former case, he notes, "their acts were not violations of the laws of war and therefore they were not legally punishable", even if actual violations could be punishable collectively. James W. Garner, "Community Fines and Collective Responsibility", *American Journal of International Law*, Vol. 11, No. 3, 1917, p. 514. See also p. 532: "If the act was committed by a person belonging to the Belgian military forces, it was a lawful belligerent act for which the community was not liable to punishment." Also see S. Darcy, above note 73, pp. 26–27, noting that under Hague Regulations Article 50, collective measures were permitted in a limited manner, provided they responded to conduct that was at least in violation of an occupying army's law, if not of the laws of war.

90 Issues of controversy were the interpretation of requirements such as *mens rea* and proportionality. J. W. Garner, above note 89, pp. 529–531.

91 Supreme Court of Israel, *Namnam*, above note 1, para. 10.

92 Supreme Court of Israel, *'Alayan*, above note 4. For a similar view, see A. Margalit, above note 47, pp. 589–591.

93 A. Margalit, above note 47, p. 587.

Israel's declaration of the soldiers as fallen may preclude it from claiming violation of the law in this regard. The holding by Hamas of Israeli civilians, who do not present a serious risk to its security, is clearly an arbitrary deprivation of liberty, and therefore a violation of international law. To the extent that release of these civilians is contingent upon the release of Palestinian detainees or prisoners held by Israel, it constitutes hostage-taking and thus a war crime.<sup>94</sup> However, characterizing Hamas' conduct as criminal would simply render the ban on visits a "classic" case of collective punishment, falling within the purview of the prohibition in GC IV Article 33.

## Conclusion

A thorough examination under international law of the ban on family visits would have led the Court to a different conclusion from the one that it reached. The Court would have found that the right to family life, guaranteed under both IHRL and IHL, encompasses visits by immediate family members. As with most rights, the right to family visits may be subject to restrictions, but it may not be nullified, nor may it be restricted in a manner which violates the prohibition on collective punishment. The Court would have further found that the ban on visits by immediate family members to Palestinian prisoners affiliated with Hamas and serving sentences for security offences, imposed in anticipation of negotiating a prisoner exchange, nullified the right to family visits, violated the right to family life more broadly, and constituted collective punishment.

The Court's light and problematic treatment of international law is not surprising. As a political organ of the State, it is reluctant to intervene in policies of the executive branch. As a court of a State involved in armed conflict, the Court is particularly reluctant to intervene in policies and actions relating to enemy individuals and dealing with matters perceived as relating to security. The *Namnam* case concerns an issue that has furthermore always been emotionally charged among the Israeli public, namely negotiations over the repatriation of dead and captured soldiers and civilians. It involves a controversy over the legitimacy and terms of prisoner exchanges, and, in the present case, also over the unsettled circumstances in which the soldiers were killed and the manner in which they or their bodies came into the possession of Hamas.<sup>95</sup> The matter having been addressed by the highest political echelons, the Court's scope for intervention in the matter was extremely limited. There is therefore constant tension between the Court's innate commitment to the national audience and its

94 *Ibid.*, 582–587. In 2016, Hamas published doctored photos of two of the missing civilians dressed in military uniform, and referred to them as "prisoners of war". Fateh Voice, "Al-Qassam Publishes Photos of Four Captured Israeli Soldiers in the Gaza Strip", *YouTube*, 1 April 2016, available at: [www.youtube.com/watch?v=7K5dVM3I-DQ](http://www.youtube.com/watch?v=7K5dVM3I-DQ).

95 Hilly Moodrick-Even Khen, "Reaffirming the Distinction between Combatants and Civilians: The Cases of the Israeli Army's 'Hannibal Directive' and the United States' Drone Airstrikes against ISIS", *Arizona Journal of International and Comparative Law*, Vol. 33, No. 3, 2016, pp. 786–788.

interests, and to its commitment to a rigorous enforcement of the law in order to protect individual rights.<sup>96</sup> Examination of the *Namnam* case against the decisions on the other measures adopted by the government in order to apply leverage on Hamas illustrates this tension and the manner in which the Court deals with it.

As mentioned, in the *Alayan* case the Court upheld the policy of holding the bodies of dead Hamas fighters, noting, *inter alia*, that the practice is not prohibited under international law.<sup>97</sup> Petitioners in that case were family members of dead Hamas fighters, who invoked their right to dignity and the right of the deceased to dignity. The 2018 *Chiam* case concerned the denial of entry by Hamas family members from Gaza into Israel for the purpose of medical treatment. This measure was challenged by five individuals, relatives of Hamas members, who needed life-saving treatment that was not available in Gaza. The Court held that the refusal of entry, not grounded in security considerations and adopted on the basis of a general policy without regard to the specific circumstances, was highly unreasonable. It ordered the authorities to allow the individuals entry into Israel for the treatment.<sup>98</sup> This rare instance of intervention by the Court in policy adopted by the authorities may be explained by the exceptional circumstances: at issue were the very lives of specific individuals. Moreover, the Court did not challenge the policy as a matter of principle, but only its implementation in the circumstances. Its decision did not have principled implications.

Like the *Alayan* case, the *Namnam* case called for a principled decision on general policy. Yet unlike in *Alayan*, in *Namnam* the petitioners' lives were directly affected by the disputed measure, and at issue was a recognized human right. The *Namnam* case therefore presented a greater challenge for the Court to navigate between government policy and the protection of individual rights than did the *Alayan* case. In contrast, the right at stake in the *Namnam* case was to family life, which, notwithstanding the absence of any strict hierarchy among rights, ranks lower than the right to life on which revolved the *Chiam* case. Another difference from the *Chiam* case is that in the *Namnam* case the Court was presented with no individual cases but only with a question of principle. It was therefore easier for the Court to uphold the policy. Nonetheless, by leaving the door open to exemptions on "exceptional and special humanitarian grounds",<sup>99</sup> the Court avoided—at least formally—categorically denying a right from any individual.

A review of the Court's case law relating to the West Bank and Gaza and their residents reveals the range of means by which the Court evades confrontation with the authorities, especially in matters relating to security. These means include disregard of international law, substitution of international law by

96 D. Kretzmer and Y. Ronen, above note 18, pp. 500–501; Meir Shamgar, *Meir Shamgar: An Autobiography*, Miskal – Yedioth Ahronoth and Chemed Books, Tel Aviv, 2015, p. 156.

97 Supreme Court of Israel, *Alayan*, above note 4, Opinion of Chief Justice Hayut, paras 30–34.

98 Supreme Court of Israel, *Chiam v. Prime Minister*, Case No. HCJ 5693/18, 26 August 2018.

99 Supreme Court of Israel, *Namnam*, above note 1, para. 12.

domestic law, and the contrived interpretation of international law.<sup>100</sup> All are evident in the *Namnam* case: from the dismissal of international law as irrelevant, through the resort to administrative law rather than to the constitutional guarantees of human rights, through the characterization of the measure as one of security, to the adoption of a forced interpretation of the prohibition on collective punishment that is in line with neither the letter nor the spirit of the law.<sup>101</sup> At the end of the day, the *Namnam* case illustrates well the broader pattern in the Court's exercise of judicial review over government conduct relating to the West Bank and Gaza and their residents: its attempt to avoid intervention in policy and action, without appearing to abdicate its obligation and commitment to protect individual rights.

100 D. Kretzmer and Y. Ronen, above note 18, pp. 492–494.

101 *Ibid.*; Tamar Hostovsky Brandes, “The Diminishing Status of International Law in the Decisions of the Israel Supreme Court Concerning the Occupied Territories”, *International Journal of Constitutional Law*, Vol. 18, No. 3, 2020; Adam Shinar, “Israel’s External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction”, *Virginia Journal of International Law*, Vol. 57, No. 3, 2018.