

execution of the action. According to them, the decision not to open a criminal investigation in this case, in which 14 innocent civilians lost their lives, many of them children, indicates selective enforcement on the part of the authorities, moral corruption and disrespect for human lives.

3. In response to the petition, the state declared its position of principle regarding the legality of pinpoint pre-emptive strikes, and also related specifically to the circumstances of the action which this petition addresses. It was emphasised that Shechade was the most senior activist in, and amongst the founders of, Hamas' military wing, and was responsible for many of the terrorist attacks against Israeli citizens and for the death of many, and was continuing to plan and prepare additional terrorist attacks. It was also argued that the decision to execute the action was taken after it became clear that an arrest was impossible, and after an in depth and comprehensive examination of the proportionality of the planned action. Regarding this latter, they argued that the decision makers were not indifferent regarding human lives and the possible injury of civilians, and so it was decided to execute the attack late at night, at a time when pedestrians are not expected to be found in the street adjacent to Shechade's house. The serious results were caused, so they stated, because of an intelligence gap, since according to the intelligence which had been gathered at the time of the action only Shechade, and an additional Hamas activist, and Shechade's wife were present in his house; and the house adjacent to Shechade's - which was also damaged in the action - was unoccupied. In fact, as it was discovered retrospectively, there were many people in that house, who were injured as a result of the action. The state also emphasised, that the debriefings carried out by the defense establishment in light of the event examined all the aspects of the action, including the intelligence failure which led to this serious result. As a result of the debriefings, they argued, operational lessons were made, primarily concerning intelligence, and it was found that the serious result was not anticipated by the decision makers, and certainly was not caused intentionally. These findings were examined by the JAG, who found that there was nothing which pointed to the suspicion of a criminal violation. The Attorney General adopted this position, and decided that there was no reason to order the opening of a criminal investigation regarding this action. According to the state, this decision was reasonable and worthy, and did not include any flaw which would justify judicial intervention.

4. On March 22, 2004 the court decided to delay dealing with this petition until a judgement was rendered in H CJ 769/02 **The Public Committee Against Torture in Israel v. the State of Israel** (henceforth: pinpoint pre-emptive strike H CJ), which related to the principle of the legality of the pinpoint pre-emptive strike policy. On September 5, 2005, as a result of the petitioners' request, a hearing was held, at the conclusion of which it was decided to unify this petition with that of the pinpoint pre-emptive strike H CJ. The determination of the question of the legality in principle of pinpoint pre-emptive strikes was necessary to the determination of the petition before us, in which the starting point of the petitioners' argument was that the pinpoint pre-emptive strike action, in the way that it was executed, raises the suspicion of the committing of criminal violations.

5. On December 14, 2006 a ruling was made on the H CJ pinpoint pre-emptive strike. In that decision the court ruling, as written by Chief Justice A. Barak, that it is

impossible to rule comprehensively whether the pinpoint pre-emptive strike policy is always forbidden:

"Examination of the "pinpoint pre-emptive strike"
- in our terminology a preventive strike which leads to the death of a terrorist, and also sometimes of innocent civilians – teaches us that the question of the legality of a preventive strike according to the customary international law is complex (for an analysis of the Israeli policy see: Shany "Israeli Counter – Terrorism Measures: Are They 'Kosher' Under International Law", M. Schmitt and G. Beruto (eds.), *Terrorism and International Law: Challenges and Responses*, p. 96 (2002); M. Gross, "Fighting By Other Means in the Mideast A Critical Analysis of Israel's Assassination Policy", *Political Studies* 51 p. 360 (2003); David, "Debate: Israel's Policy of Targeted Killing", *Ethics and International Affairs* 17 p. 111 (2003); Stein, "Response to Israel's Policy of Targeted Killing: By Any Name Illegal and Immoral", *Ethics and International Affairs* 17 p. 127 (2003); Guiro, "Symposium: Terrorism on Trial: Targeted Killing As Active Self-Defense" *Case Western Res. J. Int'l L* 36., 319; Bilsky, "Suicidal Terror, Radical Evil, And The Distortion of Politics And Law" *5 Theoretical Inquiries in Law* 131 (2004)).

The result arrived at is not that a pinpoint pre-emptive strike is always permitted nor is it always forbidden. The approach of customary international law regarding armed conflicts of an international nature is that civilians are protected from military attacks. However, this protection is not granted to those civilians "whom at that time were taking a direct part in enemy actions (article 51 (3) of the First Protocol). Harm to those civilians, even if the result is death, is permitted, provided that there is no other way in which the harm caused would be less, and provided that innocent civilians adjacent to them are not harmed. The harm done to them must be proportional. This proportionality is determined by an ethical test in which the balance between the military benefit and the civilian damage is weighed. So we find that we are not able to determine whether a pinpoint strike is always legal, just as we can not determine that it will always be illegal. Everything depends on the question of whether the criteria of the customary international law regarding international armed conflict allow pinpoint strikes or not." (Section 60 from that ruling)

In order to set criteria to evaluate the legality of the pinpoint pre-emptive strike in each and every case, the court set parameters by which in every case it will be decided, according to the specific circumstances, if a pinpoint pre-emptive strike was legal.

6. In the ruling regarding the pinpoint pre-emptive strikes it was also determined, that in addition to an evaluation in advance of the "the pinpoint pre-emptive strike" regarding the conditions for its execution, that it must also be taken into account that combatants or "civilians who take a direct part in enemy actions" should not be harmed, if the damage done to innocent civilians near them is not balanced by the expected military benefit from this action (for an in detail explanation see section 46 of the ruling by Chief Justice A. Barak in the pinpoint pre-emptive strike case). This principle of evaluation should be implemented on an individual basis regarding each and every incident.

7. Finally, it was ruled regarding the pinpoint pre-emptive strike case, that after an action of this type, in which civilians who were not involved in terrorist activities were harmed; there must be a thorough and independent investigation (*post factum*) regarding the accuracy of the identification and the circumstances of the strike. This was so stated by Chief Justice A. Barak:

"After an attack on a civilian whom is suspected of having taken part, at that time, in enemy actions, a thorough (*post factum*) investigation regarding the accuracy of the identification of the one attacked and the circumstances of the attack against him. This must be an independent investigation (See Watkin p. 23; Duffy p.310; Cassese p. 419; see also Warbrick, "The Principle of the European Convention on Human Rights and the Responses of the State to Terrorism", (2002) EHRLR 287, 292; The McCann Case, 161, 163; And also - McKerr v. United Kingdom (2001) E.H.H.R. 34, 553, 559). In appropriate cases there is also room to consider paying compensation for the harm to innocent civilians (see Cassese pp. 419, 423, and also Article 3 of the Hague Rules; Article 91 of the First Protocol)" (In section 40 of the ruling from December 14, 2006 (unpublished)).

8. As a result of the aforementioned, on June 17, 2007, we held a hearing regarding this petition, wherein was discussed the affect of that ruling in principle regarding pinpoint pre-emptive strikes on the petition before us. In the supplementary response, which was submitted in preparation to the hearing on June 14, 2007, the state detailed one by one the reasons why, according to them, the action was in accordance with all of the standards which were determined by the pinpoint pre-emptive strike ruling. According to the state, in the Shechade case all the preliminary conditions which establish the legitimacy of the action existed and the difficult and tragic result of the harm to innocent people was the result of the intelligence at the time of the action, and which proved to be *post factum* erroneous.

At the end of that hearing the state was asked to announce within 45 days if it is willing for their to be an investigation by an objective authority of the circumstances in which innocent people were harmed during the course of the action in the Shechade case, in the spirit of the ruling of principle in the pinpoint pre-emptive strike case. In our ruling we noted that that instruction does not require the retroactive examination of pinpoint pre-emptive strikes from the past. Despite that, we found that the case

before us is worthy of such an independent investigation, in light of the extraordinary and exceptional circumstances of the event under discussion. Following this, On September 17, 2007 the state informed the court of its willingness to establish an independent and objection commission of inquiry, which will investigate the nature of the execution of the action and the factors which led to the tragic result. On February 4, 2008 the state submitted an update, in which it was stated that the said commission was appointed by the Prime Minister on January 23, 2008. It also detailed the composition and powers of the said commission. In response to this development, the petitioners informed the court that while the solution in principle of an independent commission of inquiry is acceptable to them, they object to the composition of the commission, in which its three members are from a decidedly military background and there is not amongst them a representative of the public or a judge. According to them such a commission can not be an objective commission but rather a secret and internal examination, which can not add anything to the military debriefings that have already been conducted in this affair and according to them this is an additional military debriefing. Under these circumstances, the petitioners reiterated their position that the opening of a criminal investigation be ordered.

9. As stated, this petition is directed against the decision by respondents 1-2 not to order the opening of a criminal investigation of the pinpoint pre-emptive strike that was executed on July 22, 2002. In light of the aforementioned developments, since it was filed until the present time the petition has undergone changes and vicissitudes. The disagreement between the parties has narrowed, and in fact the principle disagreement was settled after the ruling of principle regarding the legality of the pinpoint pre-emptive strikes, wherein it was determined that the pinpoint pre-emptive strikes can not be invalidated in a comprehensive manner, and that the legality of such actions will be examined on a case to case basis according to the circumstances, in accordance to the standards which were set by the court. Amongst other things, the court in its ruling regarding the pinpoint pre-emptive strikes, as detailed above, on the issue of the examination that should be carried out after the execution of an action such as this, and determined that the state must carry out a thorough and independent examination of the action, of the identity of those harmed and the circumstances of the harm done to them.

10. On February 4, 2008 the State apprised the court that the Prime Minister had appointed a commission, as the chairperson of the commission was appointed Brig. General (Res.) Zvi Inbar, formerly the Judge Advocate General and after that the Knesset Legal Counsel. Appointed as members of the commission were Maj. General (Res.) Iztchak Eitan, and Mr. Iztchak Dar, of the General Security Service (GSS). None of the three commission members presently holds any position in the defense establishment. The commission chairperson last held a position in the military establishment nearly thirty years ago.

This commission of inquiry had been designated to examine this exceptional case. Therefore, in the decision regarding its composition and authority, the exceptional circumstances of the event were taken into account. The commission was asked to submit a report including their findings and conclusions regarding the subjects they were asked to examine and if they deem it appropriate – to render an opinion as to whether there is room to draw operational lessons on the basis of the findings. The

commission is also permitted to recommend to the Chief-of-Staff or the director of the GSS to consider taking disciplinary action against any of those involved in the matter. If the inquiry carried out by the commission raises the suspicion of a criminal violation or a disciplinary violation, the commission will bring this to the attention of the relevant authority, according to the matter.

The commission will base its work, according to the matter on article 539A of the Military Justice Law – 1955, and article 17 of the General Security Service – 2002. The petitioners, on their part, submitted an additional announcement on February 20, 2008, in which they raised arguments against the nature of the commission, its composition being composed of "former" security personnel, which, according to them, casts a blemish on the nature of objectivity required of the commission, and also against the fact that the commission hearings are not open to the public. Therefore, they now ask to return to the original petition which requested that the court order the opening of a criminal investigation.

11. In light of the aforementioned regarding the developments in the examination of the matters that were raised in the petition before us, we are of the opinion that the petition has been exhausted. It appears that the petitioners were not able to carry the burden allotted to them, to point out a flaw in the judgment of the JAG and the Attorney General, not to open a criminal investigation. This also takes into account the wide scope of judgment accorded to the Attorney General in decisions of this sort. It was certainly so at the time that commission of inquiry was established to examine the matter, and before the results and findings of the commission's examination are published. As aforementioned, it is acceptable to us, and also to the petitioners, that extraordinary and difficult results of the action necessitate an independent *post factum* investigation, according to the instrument which we recommended in the pinpoint pre-emptive strike case ruling. Despite the fact that the ruling does not apply to the action discussed in this petition, which was executed a number of years before the pinpoint pre-emptive strike case ruling was handed down, it is our opinion that an investigation by an independent commission of inquiry is the appropriate manner in which to examine the nature of the execution of this action. The use of the means which was recommended in the pinpoint pre-emptive strike case ruling is also suitable to the matter before us and it is certainly so until it can be determined that there is a *prima facie* foundation which justifies a criminal investigation. With that, the establishment of the commission of inquiry, its composition and the nature of its operations, are accorded to the discretion of the executive branch. In this matter, a commission was appointed according to the inherent authority of the government to appoint a commission to examine matters that are within the realm of its responsibility. As this refers to the examination of a specific event, we found no flaw in the State's decision to establish a commission of inquiry of this type. Certainly there is no flaw which justifies the court's intervention into the broad discretionary powers like this that are accorded to the government (For a distinction of the various types of commissions of inquiry see: HCJ 6728/06 "Ometz" Association (Citizens for Good Governance and Social Justice) v. the Prime Minister of Israel (unpublished, November 30, 2006, henceforth the Ometz case), in sections 28-32 of the ruling by Justice A. Proccacia).

12. As to the composition of the commission – we deem it noteworthy that despite the general rule, that the way in which the executive branch applies its discretion is

subject to judicial review of this court, on the face of things we have not found that the petitioners have pointed out that there was a flaw in the composition of the commission, of the sort that justifies our intervention to alter that composition. The question of the composition of a commission of inquiry is in the hands of the government and falls within the broad discretionary scope of the government or of the nominating echelon. In the *Ometz* case the Supreme Court ruled in this connection, by majority, that:

"There can be no difference of opinion that the government has the ability and the authority to investigate that which needs to be examined and investigated, and to do such in various ways. This is an inherent authority; it is also the residual authority of the government, as the executive branch (and see: Article 32 of the Basic Law: The Government). Indeed, the ability to critique governmental activity and to draw lessons afterwards is a supplementary and necessary element of the activity itself. It does not nullify the judicial review in appropriate cases, but rather alongside the judicial review, the importance of the government initiated examination should not be underestimated. This is the required action, which makes up an integral part of the responsibility of ruling, especially when referring to matters of cardinal importance. **The examination can be carried out in various ways, in accordance with the issue and the essence of the matter.**" [The emphasis was added – D. B.]
(Section 7 of Justice Rivlin's ruling)

In H CJ 7232/01 *Yusuf v. The Government of Israel*, Court Rulings 57(5), 561 (2003) the court related to the extent of its intervention regarding the government's decision to investigate a certain matter in a certain way, noting that:

"The government's discretion is very broad and applies not only to the decision to investigate but also as to the way of investigating"
(p. 572 of the court ruling)

(See also: H CJ 6001/97 *Amitai v. the Prime Minister* (unpublished, Nov. 10,1997)).

13. In the matter at hand, the commission appointed by the Prime Minister is composed of members whose security experience was given weight, as well as the legal background of the chairperson. The displeasure and principally the lack of faith which the petitioners have expressed regarding the commission's composition, are unfounded and do not constitute a reason for our intervention. Certainly it is such at this early stage, when the commission has not yet completed its workings and no conclusions have been made. It should be assumed, that when the commission of inquiry's conclusions or recommendations are submitted, these will be examined by the certified authorities, and amongst others, and will relate to their possible ramifications on taking additional legal actions regarding affair which is the subject of this petition. Therefore, we have reached the conclusion that at this time there is no

reason to return to the original *order nisi* requested by the petitioners before the ruling of principle in the pinpoint pre-emptive strike case, and that there is no reason to cancel the procedure decided upon to examine the circumstances of the event which is the subject of this petition.

As such is the case, the petition is rejected.

The Chief Justice

The Deputy-Chief Justice E. Rivlin

I agree.

The Deputy-Chief Justice

Justice A. Proccacia:

I agree.

Judge

The decision is that stated in the Honourable Chief Justice D. Beinisch's ruling.

Given today, 26 Kislev 5769 (December 23, 2008)

The Chief Justice

The Deputy-Chief Justice

Judge