In the Supreme Court
Sitting as a High Court of Justice

HCJ 4146/11

Before:	Her Honor, Judge E. Arbel His Honor, Judge H. Melcer His Honor, Judge Y. Danziger
The Petitioners:	Yoav Hess + 116 other Petitioners
	v.
The Respondent:	The Chief of General Staff
Petition for the grant of an *order nisi*	
Date of session:	Sivan 4, 5773 (May 13, 2013)
On Behalf of the Petitioners:	Adv. M. Sfard, Adv. E. Schaeffer
On Behalf of the Respondent:	Adv. Y. Roitman

Judgment

Judge E. Arbel:

1. In the petition before us, the petitioners petition the Court to order the introduction of a military command prohibiting the use of white phosphorus for any purpose in settled areas and other civilian sites, as well as any use of arms containing white phosphorus in any situation in which there is an alternative weapon that is less dangerous to humans and is capable of achieving an equal or similar military advantage.

2. The need for the petition arose, according to the petitioners, following the extensive and unethical use, according to them, of weapons containing white phosphorus by the IDF during Operation Cast Lead (December 2008 – January 2009). According to them, during the operation many bombs containing phosphorus were dropped, and by the nature of things, because the [Gaza] Strip is densely populated with civilians, the result was extensive injury to civilians, some of whom were injured when the bombs were dropped and some much later, when the incendiary effect of the phosphorus was still active. According to them, the use of phosphorus endangered the lives of civilians, humanitarian employees and medical personnel. The petitioners argue that this is a substance which has potential for serious injuries to those who come into contact with it, and that its harmful effect lasts long after it is launched. The

use thereof, it is argued, by its nature does not enable distinction between military and civilian targets, and thus even when it is aimed at legitimate targets, it might ultimately injure civilians. The petitioners' main legal argument is that the use of white phosphorus constitutes a violation of the international law.

3. The respondent argues that the petition is of a type that the Court does not usually consider, as it deals with the weapons to be used by the IDF. The respondent also claims that there is no impediment under the law of armed conflict to using artillery shells containing white phosphorus for camouflage purposes only, including in urban warfare. The respondent emphasized that on the professional orders of the chief artillery officer, the use made of the "white smoke" shell is for camouflage purposes only. The State's attorney, in the hearing before us, also gave notice that at this time the IDF has decided, even though it is not legally required, not to use shells containing white phosphorus in a built-up area, subject to two limited exceptions. The exceptions were presented to us *in camera*.

4. I will note that the petitioners motioned for the filing of expert opinions regarding the repercussions of the use of white phosphorus in a built-up area. The respondent objected to the motion and argued, *inter alia*, that the expertise of the opinion's authors in the architecture field is not relevant to deciding the question of the legality, in principle, of arms containing white phosphorus, from the legal and factual aspects. In light of our decision, as detailed below, we see no reason to allow the motion to file the opinion. Nonetheless, if the issue arises again in the future, there might be room to delve into it, and it will then be possible to consider the disagreement between the parties with regard to the relevancy of the expertise of the opinion' authors to the questions under discussion.

Discussion

5. The first issue that must be addressed concerns the justiciability of the issue before us. While the respondent argues that this issue is not justiciable and is one that the Court does not usually consider, the petitioners claim that nowadays there is no doubt that the war is subject to laws and that the laws are subject to judicial interpretation. On this I must agree with the petitioners, within the boundaries of the restraint that this Court has imposed on itself of course, especially with regard to quintessential military matters. I will explain.

As is known, the choice of weapons used by the Army is not generally a matter for this Court's consideration. Nonetheless, it cannot be said that in every case in which issues related to the use of these or other weapons arise the Court will refuse to consider the matter. Clearly, where arguments arise regarding the use of weapons in a manner that contradicts the law of armed conflict, the Court will have to "enter the battlefield" and consider the arguments raised before it. The boundaries of this Court's intervention in matters of this kind are extremely limited, but it is reserved and occurs in exceptional and special cases where there is concern of injury to established legal norms. This Court intervenes at times in petitions even if they have political or military implications, so long as the dominant aspect considered

therein is the legal aspect (see HCJ 3261/06, Physicians for Human Rights vs. The Ministry of Defense (January 31, 2011) (hereinafter: "in re Physicians for Human Rights"); HCJ 769/02, The Public Committee against Torture in Israel vs. The Government of Israel, IsrSC 62 (1) 507, paragraph 52 of the judgment of President Barak (2006)), and in the words of President Barak:

> " 'Israel is not a desert island. It is part of the international formation' … the Army's warfare operations do not take place in a legal vacuum. There are legal norms – some from the customary international law, some from the international law that is anchored in conventions to which Israel is a party, and some from the basic rules of the Israeli law – that determine rules regarding warfare management" (HCJ 4764/04, Doctors for Human Rights vs. The Commander of the IDF Forces in Gaza, HCJ 58 (5) 385, 391 (2004)).

President Beinish has also referred to the matter:

> "We have not said and are still not saying that determining the legality of the IDF's acts vis-à-vis the residents of the area is not at all subject to judicial review, and on various occasions we have rejected the sweeping argument that these acts are not justiciable. Accordingly, this Court has, on many occasions in the past, been required to consider matters that in certain ways touch upon professional-operational aspects, at times related to acts of warfare, where they gave rise to legal questions concerning the Army's powers during warfare – in accordance with the law of armed conflict – and the limitations imposed on it by the international humanitarian law" (in re Physicians for Human Rights, paragraph 10)."

6. In order to maintain the balance between the restraint required in this Court's intervention in quintessential military matters and the operational and professional discretion of the Army Command, and the need to protect and safeguard human rights and honor the international law, we believe that a multi-stage review is required in petitions of this kind. First of all, it is necessary to consider whether the petitions, *ex facie,* raise arguments of a legal nature that allow the Court to consider them, without such consideration amounting to intervention in the quintessential professional discretion of the military entities. A negative answer will result in the petition's summary dismissal. A positive answer will require another *prima facie* review of the basis for the petition, and if it justifies, *ex facie,* a more in-depth review of the violation of the military means or military course of action of the law of armed conflict or the basic principles of Israeli law. At this stage, it is also necessary to consider the practical implications of the petition. There is no room for a more in-depth examination by the Court where the use of the weapons that are the subject of the petition has been ceased on Army orders. If there are still orders permitting the use, and there is a *prima facie* basis substantiating any legal injury, there is room for the Court to proceed to the third stage, which involves an in-depth review of the arguments raised, and obtaining extensive answers to these arguments on behalf of the State. At this stage, the Court will examine the legal and factual arguments of the petitioners on their merits, and

a determination will be made with regard to the legality of the use of the weapons which are the subject of the petition.

7. The petition before us raises, *prima facie,* serious arguments against the use made by the IDF of shells containing white phosphorus. From the petition it emerges that this is a substance that might cause serious injuries to human beings, and that there are humanitarian, ethical and legal difficulties in its use in a built-up area, since it is not possible to distinguish between military and civil targets in the course of its use. These arguments, *ex facie*, oblige another in-depth examination. The arguments raised by the petitioners are of a dominant legal nature. Accordingly, these arguments justify proceeding to the second stage of review required by the Court. However, at this stage we believe that we must stop the judicial review, in light of the State's declarations regarding the binding orders imposed on the Army with regard to the use of white phosphorus in a built-up area *at this time*. As aforesaid, the State's attorney declared that it has been decided not to allow the use of shells containing white phosphorus in a built-up area. Although we were presented with two exceptions to this order, we were persuaded that these exceptions are very limited and leave the prohibition of use effective and very wide, such that it is doubtful whether this matter will realistically arise again. In these circumstances, we believe that there is no room to continue reviewing the matter beyond that. Of course, if the Army's orders change in the future it will be possible to petition this Court again.

8. It should be emphasized that we have not overlooked the position of the petitioners' attorney that the orders to limit the use do not resolve the matter. Nonetheless, even the petitioners' attorney stated that the central difficulties in the current state of affairs are that the respondent has not undertaken that the orders are final, and that the nature of the exceptions are unknown to him. With regard to the nature of the exceptions, as has been noted, they were presented to us with the consent of the petitioners' attorney "in camera," and we were persuaded that these exceptions make the use of white phosphorus an extreme exception in the most unique circumstances. With regard to the concern regarding a change in the Army's orders in such regard, I have two comments. Firstly, since the State has not declared before us that the orders are permanent orders that prohibit the use of the substance, in the current circumstances the IDF should engage in a comprehensive and in-depth review of the use of white phosphorus in the Army, and of its risks and harms, and primarily, it should review the possible alternatives for the use of this substance. Such a review will serve either to make the current orders permanent or to substantiate a position justifying a change in the orders. In any event, it would not be suitable to wait to review the matter in an emergency. Secondly, the State should notify the petitioners' attorney in the event of a change in the orders, so that he may once again raise his arguments before this Court.

Subject to the aforesaid, the petition is dismissed without an order for costs.

Given today, July 9, 2013.

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Judge	Judge	Judge