Israel, Al Nawar v. Minister of Defence

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Domb, F., "Judgments of the Supreme Court of Israel", in *Israel Yearbook on Human Rights*, vol. 16, 1986, pp. 321-328; footnotes omitted.]

H.C. (High Court) 574/82
AL NAWAR
v.
MINISTER OF DEFENCE, *ET AL.*
[...]

This is a leading judgment – delivered by Shamgar J.P. – on the question of the treatment of enemy property situated either on the battlefield or on territory subject to military occupation.

The petition was filed by a Lebanese citizen, complaining that during the "Peace for Galilee" operation, in 1982, the IDF (Israel Defence Forces) had illegally seized the equipment machines and stock of an enterprise manufacturing plastic products, situated near the village of Damur in South Lebanon. While the IDF Commander in Lebanon (the third respondent) contended that the enterprise belonged to the PLO and had been seized as enemy property, the petitioner claimed that he had purchased the enterprise in June 1982, prior to its seizure, so that it was his private property.

On the basis of the evidence submitted to the High Court, Shamgar J.P. made the following findings:

a. The enterprise formed part of "Tzamd" enterprises, which constitute part of the economic infrastructure of the PLO.

b. The enterprise was situated together with an ammunition depot and a military shoe factory in a building occupied and controlled by PLO forces.
c. The IDF came upon the enterprise in July 1982; thereupon, it placed guards on the site for the purpose of declaring it seized.
d. The petitioner signed the purchase contract for the enterprise in August 1982, after its seizure by the IDF; thus, at the time of the alleged purchase, the enterprise's owner had no right of disposition with respect to the property.

Given these facts, the central legal issue raised in the petition was the authority of the respondents to seize an enterprise owned by the PLO.

The first question analyzed by Shamgar J.P. concerned the law that applied at the time of seizure to the region where the enterprise was situated (hereinafter: the Region) and to the movables seized thereon. On this question Shamgar J.P. ruled that

during the relevant period of June-September 1982, the international rules of war on land, as formulated in the third Section of the Hague Regulations annexed to the 1907 Hague Convention (No. IV) respecting the Laws and Customs of War on Land, and the 1949 Fourth Geneva Convention, applied to the Region where the enterprise was situated.

In reaching this conclusion, Shamgar J.P. relied principally on his judgment delivered in H.C. 593/82 (*Tzemel Adv. Case*), where he pointed out that the Hague Regulations and the Fourth Geneva Convention are applicable when (according to Article 42 of the Hague Regulations) a territory is "actually placed under the authority of the hostile army", thereby acquiring the status of an "occupied territory". Whether a given area is "actually placed under the authority of the hostile army" is a question of fact to be resolved along the lines of the two-part test proposed in the *British Manual of Military Law* (edited by H. Lauterpacht, 1958), according to which a belligerent occupation occurs when two conditions are fulfilled:

First, that the legitimate government should, by the act of the invader, be rendered incapable of publicly exercising its authority within the occupied territory; second, that the invader should be in a position to substitute his own authority for that of the legitimate government.

Applying this test, Shamgar J.P. rejected the petitioner's allegation that there was no actual military occupation by Israel in Lebanon because of the temporary and non-durable nature of the IDF presence there.

Relying on Dinstein's treatise *Laws of War*, Shamgar J.P. observed that the "Peace for Galilee" operation was not directed against the State of Lebanon. However, during the "Peace for Galilee" operation, the IDF had undisputedly controlled a part of Lebanon's territory.

Given this, there is no need to determine the question whether a state of war between Israel and Lebanon existed in June 1982, because as stated in Dinstein's treatise, even if it did not exist

as concerns operations between opposing armed forces, the fundamental laws of war (mainly on warfare)... shall apply.

Consequently, Shamgar J.P. held that during the “Peace for Galilee” operation, the activity of the IDF in Lebanon was initially subject to the international law of warfare and subsequently to the international law applicable to occupied territory. Shamgar J.P. therefore turned to an examination of the international law pertaining to enemy property on the battlefield (or in a combat zone) and in occupied territory.

a) Enemy Property on the Battlefield (or Combat Zone)

The starting point of this topic, as formulated by Shamgar J.P., is that under contemporary international law, the powers of a military force with respect to enemy property falling into its hands during or following combat are defined and restricted.

The main principle of international law in respect of enemy property was codified in Article 23 (g) of the Hague Regulations, which provides that

it is especially forbidden:

g. to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Further rules on this topic – as elucidated by Shamgar J.P. – may be summarized as follows:

a. All movable State property captured on the battlefield may be appropriated by the capturing belligerent State as booty of war. This is in accordance with Dinstein’s approach that all movable State property captured in a combat zone, such as arms and ammunition, depots of merchandise, machines, instruments and even cash, automatically become the property of the belligerent into whose hands it has fallen.
b. Further, all private property actually used for hostile purposes (or which may be useful for hostile purposes) found on the battlefield or in a combat zone may be appropriated by a belligerent State as booty of war.
c. As explained by Schwarzenberger, Article 23(g) of the Hague Regulations, while prohibiting the destruction or seizure of enemy property, does not accord protection to property used for hostile purposes. Such property enjoys protection from arbitrary destruction, but it is still subject to the enemy’s right of appropriation as booty.
d. Article 46(2) of the Hague Regulations, providing that private property cannot be confiscated applies only to private property within the ordinary meaning of the term “private” and does not extend to property “actually in use by the hostile army”.
e. State property includes not only property actually owned by the enemy State, but also property

controlled or administered by it, and even the property of companies, institutions or bodies in which the State has a substantial interest or over which it exercises substantial control. This broad definition of State property was adopted in the Governmental Property Order (Judea and Samaria) (No. 59), 1967.

f. The distinction between State (governmental) property and private ordinary property should be based on the functional test applied in the 1921 Arbitral Award in the Cession of Vessels and Tugs for Navigation on the Danube Case, which determines the nature of the property in question according to its actual use. [...]

b) Enemy Property in an Occupied Territory

Regarding State movable property, Article 53 (first paragraph) of the Hague Regulations provides:

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

This comprehensive list of seizable movables, together with the sweeping reference to property which may be used for military operations, leads to the conclusion that – as pointed out by Dinstein – with the exception of movables not expressly enumerated in the Article and entirely beyond military use (like books and paintings), most of the governmental movables in an occupied territory may be lawfully seized.

Consequently, there is no practical difference between the status of movable governmental property captured on the battlefield and that seized in occupied territory: both constitute booty of war, so that the occupant acquires title to the property and may sell it in order to use the income for military purposes. Further, according to Article 53 (first paragraph), there is no duty of restoration or compensation for seizure of governmental property.

Regarding private property in occupied territory, Article 53 (second paragraph) provides that

Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, *all kinds of war material may be seized, even if they belong to private individuals*, but they must be restored at the conclusion of peace, and indemnities must be paid for them. (Emphases added)

It follows that all private property in actual hostile use, even if not enumerated in this provision, may be seized. Consequently, the status of private property used for military purposes is identical to that of governmental property: both may be seized by the occupant.

* * *

[...]

Applying the above-surveyed law to the facts as stated in the beginning of the judgment, Shamgar J.P. concluded that because the enterprise belonged to the PLO, the seizure in question was a lawful seizure effected on the battlefield and/or in occupied territory of movable enemy property which had been in actual hostile use and which was also useful for military purposes [...].

Shamgar J.P. also discussed the petitioner's contention that the international laws of war regarding enemy property are intended to apply to the property of a belligerent State and not to that of an organization, whose property should be regarded as purely private. Responding to this contention, Shamgar J.P. noted the modern tendency to extend the application of the international law of war beyond declared wars between States so as to include all armed conflicts, even those of a non-international character. Even independent of this tendency, however, the legal principles applying to this contention are as follows:

When a State acts in self-defence against terrorist organizations performing acts of murder and sabotage against its citizens, it is entitled to take towards such organizations and their property the same steps that it is entitled – according to the laws of war – to take against a hostile State army and its property. A comprehensive organization engaged in terrorist and military activity cannot expect to enjoy the immunities and protections granted by the laws of war to the property of civilians, who do not form part of enemy forces... Therefore the laws of war placed on an equal footing governmental property and private property in hostile or military enemy use; both constitute booty of war (*Cession of Vessels and Tugs for Navigation on the Danube*). The law governing enemy State property and private property in hostile or military use applies also – with due modifications – to the property of a terrorist organization. [...]

The ultimate operative conclusion reached by Shamgar J.P. was that

Given the particular political and military circumstances that existed in Lebanon, the IDF was authorized by the laws of war to act towards the property of the PLO economic arm as if it were a property of a belligerent enemy State, or a private property serving the enemy – namely, it could be treated either as booty of war on a battlefield, or seized as enemy State property in an occupied territory according to Regulation 53 (first paragraph).

Thus the High Court, sitting as a bench of five judges, unanimously dismissed the petition.

Discussion

1. Why did the Court rule that the Hague Regulations and Convention IV applied? And that the region concerned acquired the status of occupied territory? What makes this case distinct from those concerning the West Bank and Gaza Strip? Is it truly a matter of the status of the territory prior to conflict? Even though the Court here agrees with Dinstein's treatise that "as concerns operations of opposing armed forces, the fundamental laws of war ... shall apply"? Does the Court believe that a state of war must be declared between States for the territory in the enemy State's control to be considered occupied? [**See** Israel, Applicability of the Fourth Convention to Occupied Territories; Israel, Ayub v.

Minister of Defence; **and** Israel, Cases Concerning Deportation Orders]

2. Even if the Hague Regulations and Convention IV apply here, does the Court have competence to try this case, as Israel has not adopted implementing legislation concerning Convention IV? Why does the Court not discuss its competence to try this case? If the Court has competence to try this case, is that because both the Hague Regulations and Convention IV are customary law? Why is the conventional or customary status of these Conventions relevant to their applicability in this case? [**See** Israel, Ayub v. Minister of Defence]
3. a. According to IHL, when may private property be requisitioned in occupied territory? By whom? When may private property be confiscated? By whom? Which additional limitations does IHL impose both on requisition and confiscation? (HR, Arts 23(g), 46, 52 and 55; GC IV, Art. 55(2); CIHL, Rules 49-52) Do IHL provisions correspond to the rules elucidated by Shamgar J.P. (concerning property captured on the battlefield), which this Court considers applicable in occupied territory?
   b. Was the property in this case requisitioned for a military or security purpose? Or because it was not private property? Are these different questions? Of what significance are the answers to them?c. Do you agree that the PLO should be considered as a State for the purposes of classifying private property as State property? If the PLO was not considered a State, could the IDF have seized the property?