



**Briefing Paper**

**October 2004**

**The Israeli Army's Exploitation of the "Absolute Military Necessity" Exception to Justify its Policy of Home Demolitions in the Occupied Palestinian Territories**

**Introduction:** Since the outbreak of al-Aqsa Intifada in September 2000, the Israeli army has executed extensive home demolitions throughout the 1967 Occupied Palestinian Territories (OPTs). The Israeli army's policy of home demolitions was evidenced most recently during its military operations in the Gaza Strip, where an estimated 120 houses were razed each month between January and September 2004, rendering approximately 10,800 Palestinians homeless.<sup>1</sup> Hundreds more homes in Gaza have been partially destroyed. To justify its policy of home demolitions, the Israeli military has relied upon the "absolute military necessity" exception to the basic principle in international law prohibiting the destruction of civilian property during military operations. Adalah's position is that the Israeli military knowingly exploits the "absolute military necessity" exception, and that the scale of the demolitions constitutes a war crime.

**Supreme Court Petition Filed:** On 27 May 2004, Adalah – The Legal Center for Arab Minority Rights in Israel, in cooperation with the Palestinian Centre for Human Rights – Gaza (PCHR), and Al-Haq, filed a petition to the Supreme Court of Israel<sup>2</sup> asking the Court to define, for the first time, the legal parameters of the term "absolute military necessity," in accordance with international humanitarian law, the Rome Statute of the International Criminal Court (ICC), and recent decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in order to prevent any further illegal demolitions of Palestinian homes.

**The Petitioners' Arguments:** The petitioners argued that the Israeli military grossly violates the exception of "absolute military necessity," and invokes it as a pretext for executing large scale home demolitions in the OPTs. International law recognizes an exception to the basic principle prohibiting the destruction by an occupying power of civilian property belonging to the protected population of an occupied territory, in instances of "absolute military necessity", as stipulated in the latter parts of Article 53 of Geneva Convention IV and, similarly, Article 23(g) of the 1907 Hague Regulations. However, the circumstances in which civilian property may be destroyed during military operations under this exception are subject to many stringent limitations, *inter alia*:

1. A sharp distinction is drawn between civilians and civilian objects, and military objectives;
2. In cases of ambiguity as to whether a civilian property is being used for military purposes, an army is obliged to consider it as a civilian object, and accordingly not to demolish it;
3. A civilian property being used for military purposes can legitimately be demolished only when the military risk it presents is immediate and absolute;
4. The means used for civilian property demolition must not inflict damage disproportionate to the military advantage gained; and
5. Civilian property demolition must not be used at the army's convenience as a method of providing increased protection against potential attacks.

From the viewpoint of international law, therefore, the extensive scale and planned nature of the overwhelming majority of the Israeli army's home demolition operations clearly invalidate the military's recourse to the justification of "absolute military necessity." The petitioners further argued that, in implementing its policy of demolitions of civilian property on an extensive scale in the absence of "absolute military necessity," the Israeli army is committing a "grave breach" of the Geneva Convention IV, and as such a war crime under Article 8(2)(a)(iv) of the Rome Statute of the ICC. The petition cited three cases from the ICTY to support its stance, in which a politician and high-ranking military commanders were indicted and convicted, *inter alia*, for the extensive destruction and appropriation of property, and imprisoned for between fifteen and forty-five years.<sup>3</sup> In each of these cases, the accused's argument of "absolute military necessity" was rejected.

### **Case Developments:**

#### **30 June 2004 – Motion for injunction submitted to Supreme Court to prevent Israeli army from demolishing homes in Rafah**

During May 2004, the Israeli military escalated its home demolition operations in Rafah, Gaza, demolishing 298 civilian buildings and leaving approximately 3,800 people homeless.<sup>4</sup> In June 2004, the petitioners submitted a motion for an injunction to prevent the army from demolishing homes in Rafah and the vicinity of the border area between the Gaza Strip and Egypt (the "Philadelphi Road"), based on the pretext of "absolute military necessity," pending a final ruling on the petition. The motion included a request for a specific prohibition against the demolition of the homes of ten families from Blocks J, L, N and O, and the Brazil neighborhood in southern Rafah, as well as an urgent hearing on the petition. The request also included satellite photographs of southern Rafah, taken in June 2001 and May 2004, which clearly reveal the vast extent of home demolitions carried out by the Israeli military over this period.

The motion argued that recent statements and actions by the Israeli military constitute solid grounds for fears that further home demolitions will be carried out in Rafah in the near future. The motion included quotations from interviews conducted in May and June 2004 by Israeli newspapers *Ha'aretz* and *Yediot Ahronot*, in which senior military figures, including the Chief of Staff and the commanding officer of the southern Gaza zone, indicated the Israeli military's readiness to execute further home demolitions in southern Rafah. In addition, the motion cited a section of the government's "Disengagement Plan for the Gaza Strip," discussing the planned broadening of military zones, and a tender released by the Ministry of Defense for the construction of a massive trench south of Rafah, both of which are liable to involve the destruction of nearby homes.

#### **21-22 July 2004 – Supreme Court issued, then revoked, injunction preventing Israeli military from demolishing ten buildings in southern Rafah**

On 21 July 2004, the Supreme Court issued an injunction against the demolition of the ten houses specified in the 30 June 2004 motion. Later the same day, the Attorney General (AG) submitted a motion to revoke the order, claiming that the Israeli army was unable to identify the exact location of the ten homes. The AG added that the army was engaged in military operations in Rafah, and therefore Israeli soldiers' lives were under threat in the area. The AG emphasized that the military would be bound by the ruling of the Supreme Court in the *Amer* case delivered in 2002.<sup>5</sup>

Adalah argued in response that *Amer* bears no relevance to the petitioners' original request for the Court to define the legal parameters of the term "absolute military necessity". Adalah further noted that *Amer* offered no protection to homeowners who happened to be absent from their homes prior to their demolition by the military.

The petitioners also stated that the ten homes had been adequately described in the motion for injunction. Adalah argued that the AG's claim that the army cannot locate them is unconvincing, particularly as it is being raised in the context of the Israeli military's duty under international law to fulfill some of its obligations towards protected persons. Adalah further contended that the AG's claim that the Israeli military is unable to locate the ten homes is undermined by the military's capabilities in pinpointing individuals and homes when it has an interest in doing so (e.g., for carrying out assassinations and arrests).

On 22 July 2004, the Supreme Court announced its decision to cancel the injunction issued only hours earlier.

*On the day of these proceedings, the Israeli military demolished 18 homes completely and four others partially in the Brazil and al-Salam neighborhoods of southern Rafah, rendering 292 people homeless.<sup>6</sup>*

**27 July 2004 – Second motion for injunction submitted to Supreme Court to prevent Israeli army from demolishing homes in southern Rafah and vicinity of Philadelphi Road**

This motion contained another request for a specific prohibition against the demolition of the ten homes specified in the earlier motion. Photographs of nine of the homes and details of the street on which the tenth home stands were included, in order to further facilitate their identification. The new motion argued that homes in southern Rafah remain vulnerable to the risk of being demolished by the Israeli army and provided statistics on home demolitions in the area carried out by the army since the submission of the first motion for injunction on 30 June 2004. Included in the statistics of demolished homes were four buildings in the Brazil neighborhood, belonging to ten families made up of 84 individuals, which were bulldozed on 6 July 2004; a further 18 homes in the Brazil and al-Salam neighborhoods, which resulted in 292 people being made homeless, as referenced above; and six homes in southern Rafah's al-Shaath refugee camp, as a result of which 50 people lost their homes.<sup>7</sup>

**29 July 2004 – Attorney General responded that locating ten homes remains problematic for the Israeli army**

The AG responded that, because the buildings in question are of average appearance and without remarkable attributes, the Israeli military cannot identify them, even with the assistance of the photographs and additional information included in the motion. The AG also requested an additional seven days to respond to the motion, which was granted by the Court on the same day.

*Adalah also learned that one of the ten houses specified in the motion for injunction had been seriously damaged during the demolition of a nearby building on this day.*

**8 August 2004 – Adalah filed an urgent submission to Court announcing destruction of one of the houses and serious damage inflicted to another by the Israeli army**

Adalah filed an urgent submission to the Court announcing that on 4 August 2004 a home in Block J, one of the ten houses specified in the motion for injunction, was demolished by the Israeli army. Adalah also noted that another home specified in the motion for injunction, located in Block O, had been seriously damaged by an operation to demolish a nearby building on 29 July 2004.

**11 August 2004 – Supreme Court decided that the petitioners and the AG should liaise to identify the location of the ten homes specified in the motion for injunction**

**23 August 2004 – Adalah sent letter to Attorney General with detailed locations of, directions to and descriptions of the ten homes**

**13 September 2004 – Attorney General responded that the state has now located some houses, but will not identify them to Adalah**

In response to Adalah's letter, the AG announced on 13 September that the military had successfully located some, but not all of the houses specified in the motion. However, as a result of the ongoing military operations in Rafah, the state argued that sharing the identities of the houses it had located would place the military at risk of attacks, as Palestinian militants could seek shelter in the protected buildings. The state argued further that the Court should not intervene in military matters while the army is engaged in dangerous operations.

**27 September 2004 – Adalah countered that recent demolitions prove gravity of threat to Rafah homes**

On 27 September, the petitioners informed the Court of the scale of recent demolitions that the Israeli army had carried out in Gaza generally and in Rafah specifically.<sup>8</sup> Adalah argued that the state's response to the motion of injunction submitted to the Supreme Court to prevent the Israeli army from demolishing homes in Rafah proves that the homes are in danger of being illegally demolished. Adalah further argued that the state had failed to provide details of why each of the specified homes should be subject to the threat of being demolished by the army.

**28 September 2004 – Supreme Court decided on motion for injunction**

On 28 September, the Supreme Court issued a three-line decision announcing its rejection of the motion for injunction and maintaining its decision to cancel the order issued on 22 July 2004.

**26 October 2004 – Supreme Court hearing on the petition**

At 8 am on 26 October, the case will be heard before Chief Justice Aharon Barak, Justice Eliahu Matza and Justice Mishael Heshin in the Supreme Court. Adalah Attorney Marwan Dalal will represent the petitioners, arguing that the Israeli military authorities knowingly exploit the "absolute military necessity" exception, and that the policy of home demolitions in the OPTs is illegal and often amounts to a war crime.

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<sup>1</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA) occupied Palestinian territory, "Gaza on the Edge: A Report on the Deteriorating Humanitarian Situation in the Gaza Strip," 1 October, 2004. <[http://www.reliefweb.int/hic-opt/docs/UN/OCHA/GazaonEdge\\_Eng.pdf](http://www.reliefweb.int/hic-opt/docs/UN/OCHA/GazaonEdge_Eng.pdf)>.

<sup>2</sup> See H.C. 4969/04, *Adalah, et. al. v. Moshe Kaplinski, IDF Major General Central Command, et. al.* (case pending). The named respondents are IDF Major General Central Command (Moshe Kaplinski), IDF Major General Southern Command (Dan Harel), the Chief of Staff (Moshe Ya'alon), the Minister of Defense (Shaul Mofaz) and the Prime Minister (Ariel Sharon). The petition draws on extensive fieldwork and case studies detailed in reports from local and international human rights organizations and the United Nations, which demonstrate that the Israeli army's home demolitions operations are based on an untenably broad definition of "absolute military necessity."

<sup>3</sup> *The Prosecutor v. Blaskic*, 2000, *The Prosecutor v. Kordic*, 2001, and *The Prosecutor v. Naletilic*, 2003. <<http://www.un.org/icty>>.

<sup>4</sup> United Nations Relief and Works Agency (UNRWA) and the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), "Rafah Humanitarian Needs Assessment," 6 June 2004. <[http://www.un.org/unrwa/news/unrwa\\_ocha\\_report.pdf](http://www.un.org/unrwa/news/unrwa_ocha_report.pdf)>.

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<sup>5</sup> H.C. 6696/02, *Amer v. IDF Commander in the West Bank*, PD 110 (6) 1 (decision delivered 5 August 2002). This ruling grants the right to homeowners to be heard prior to demolitions of their property during a military operation, except in three instances: where there is an absolute military necessity for a demolition to be carried out; where not carrying out a demolition would present an immediate danger to soldiers' lives; and where not carrying out a demolition would cause a military operation to end in failure.

<sup>6</sup> Palestinian Centre for Human Rights, "Weekly Report on Israeli Human Rights Violations in the Occupied Palestinian Territories", 15-21 July 2004. <[http://www.pchrgaza.org/files/W\\_report/English/2004/22-07-2004.htm](http://www.pchrgaza.org/files/W_report/English/2004/22-07-2004.htm)>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Using figures based on recent PCHR reports, Adalah informed the court that since 30 June 2004, the military has demolished 220 homes in the Gaza Strip, most of which were located in the south of Rafah. <[http://www.pchrgaza.org/files/Reports/English/full\\_index.htm#Weekly%20Reports](http://www.pchrgaza.org/files/Reports/English/full_index.htm#Weekly%20Reports)>.