Case Review: The State's obligation to investigate suspected grave violations of international law committed in the Gaza Strip during the 2004 military Operations 'Rainbow' and 'Days of Penitence'

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Introduction

On 8 December 2011, the Israeli Supreme Court by a panel of three justices, Chief Justice Beinisch and Justices Rubinstein and Melcer, rejected a petition submitted by Adalah, in cooperation with the Palestinian Center for Human Rights (PCHR) and Al-Haq (jointly referred to as the "petitioners"). [1] The petition demanded that the Israeli authorities open a criminal investigation into the killings and injury of civilians and into the extensive damage to homes in the Gaza Strip in 2004. The loss of life and damage to property occurred during the Israeli army's military Operations 'Rainbow' and 'Days of Penitence', both of which took place before Israel's unilateral disengagement from the Gaza Strip. The Supreme Court rejected the case mainly on two grounds: generality of the petition; and delay in submission to the court.

Background on Operation 'Rainbow' and 'Days of Penitence' and the Subsequent Petition

From 18-24 May 2004, the Israeli military conducted an operation code named "Rainbow" in the southern Gaza Strip. The declared objective of the operation was to prevent the transfer of weapons via tunnels after Israeli soldiers were killed by rocket-propelled grenade fire. The operation resulted in the killing of a large number of civilians, including at least 19 children. Israeli forces also demolished 167 homes in the densely-populated area of Rafah and damaged hundreds of dwellings.

Testimonies from human rights organizations and journalists indicate the extensive scope of the loss of life and damage to property.. During and after the operation, international organizations, including the United Nations Relief and Works Agency (UNRWA), Human

[1] HCJ 3292/07, ***Adalah – The Legal Center for Arab Minority Rights in Israel v. Attorney General*** (decision delivered 8 December 2011) (hereinafter: "the **Adalah** case").

Rights Watch (HRW), the International Federation for Human Rights (FIDH), and the UN Special Rapporteurs on the situation of human rights on Palestinian territories occupied since 1967, on the Right to Adequate Housing and on the Right to Food, published reports describing the grave consequences for the Palestinian population.[2] Media reports detailed graphic descriptions of the panic that gripped the Palestinian residents, their rapid flight, and the Israeli military's home demolitions in the Brazil, Al-Salam and Tel al-Sultan neighborhoods in Gaza. [3]

According to reports, during a demonstration held in Tel al-Sultan on 19 May 2004, the Israeli military killed eight Palestinian civilians and injured 61 other civilians. Furthermore, over the course of the operation, the military killed at least 17 children under the age of 18. In the neighborhoods of Tel al-Sultan, Brazil and Al-Salam, the Israeli military destroyed 167 homes that housed 379 families or 2,066 people.

About five months later, in September 2004, the army launched a military operation code-named "Days of Penitence". The declared aim of this operation was to stop the firing of Qassam rockets from the Gaza Strip into the State of Israel. The operation, which lasted about three weeks, was conducted primarily in the northern Gaza Strip with severe consequences for civilians and civilian infrastructure. From the outset, it was severely criticized by the international community.

According to an UNRWA report, Operation "Days of Penitence" was responsible for the death of 27 minors, the complete destruction of 91 homes (housing 675 people) and serious damage to 101 homes (housing 833 people). Nineteen public buildings, including a mosque, were destroyed, and another 16 public buildings were damaged, including nine UNRWA schools. [4]

The media and reports of international and local human rights organizations were the only source of information for what occurred during the operations. However, a survey of the area after the end of the operation confirmed the severe nature of the destruction and the extent of the damage sustained by the Palestinian civilian population.

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[2] See, for example, "International Mission of Investigation: War Crimes in Rafah," FIDH, 2004. http://www.fidh.org/IMG/pdf/opt402a.pdf. "Razing Rafa: Mass Home Demolitions in the Gaza Strip." Human Rights Watch, 2004. http://www.hrw.org/en/reports/2004/10/17/razing-rafah-0. "Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 – Note by the Secretary-General," United Nations Economic and Social Council, August 2004, http://domino.un.org/UNISPAL.NSF/0/272369ce15d2e8c785256f1c0054a356?OpenDocument. Special Rapporteur Report, December 2004, http://www.adalah.org/features/rafah/dug-dec-04.pdf. "UNRWA Humanitarian Assessment of Israel's Incursion into Northern Gaza," October 2004, http://www.un.org/unrwa/news/incursion_oct04.pdf.

[3] "Israelis open fire on crowds in Gaza." BBC World News, 19 May 2004. http://news.bbc.co.uk/2/hi/middle_east/3728681.stm. See also paragraphs 19-24 of the petition in the **Adalah** case (hereinafter: "the petition").

[4] The petition, pp. 78-80.

In light of these reports and the excessive damage caused by the two operations, there was reasonable suspicion to believe that the Israeli army's conduct during these military operations was unlawful. Accordingly, in 2007, former Adalah Attorney Marwan Dalal, submitted a petition to the Israeli Supreme Court demanding that a criminal investigation be opened and that those responsible for the killing of civilians and the widespread destruction of homes and civilian property in the southern Gaza Strip during the "Rainbow" and "Days of Penitence" military operations be criminally indicted and prosecuted.

The Supreme Court's decision

As noted, the Supreme Court rejected the petition on two grounds: generality and delay.

First, the Supreme Court determined that the petition was too general. The justices ruled that the petition did not specify particular cases in which criminal offenses were committed, and instead complained about the attack against civilians and civilian targets in general. The court also ruled that the remedy itself was too general and not appropriate for this case. According to the Court, it can only order a criminal investigation if there appears to be a sufficient foundation for an investigation in a specific case. The Court ruled that such an analysis was not possible here because the events described were complex and large-scale operations. The Court concluded that in certain circumstances, criminal investigations are not the appropriate tool of review.

This ruling came despite the fact that the petitioners presented specific incidents in which the Israeli military was suspected of having severely violated the rules of warfare. In addition, the petitioners emphasized that shortly after the two operations concluded, PCHR in Gaza submitted dozens of complaints to the Israeli authorities demanding investigation of specific incidents. The authorities failed to respond to most of these complaints, and offered only brief or partial responses to a few others. Instead of clarifying for the respondents why the army did not address these complaints, the Court chose to disregard these facts and to reject the petition as too general.

Further, the Court ruled that even if the petition had focused on specific incidents, its ability to intervene in the army's decision not to investigate is, in any case, very limited:

> "As is well known, the principle of maximal restraint in judicial intervention in the decisions of the executive authority in regard to investigation and criminal indictment is deeply embedded in the judicial tradition of this court. Like the attorney general, the prerogative given to the chief military prosecutor on the question of whether to order the initiation of criminal proceedings is very broad… **In accordance with this view, intervention in the professional decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances**." (*Emphasis added*).

The Court's ruling indicates that petitions calling for investigations of suspected war crimes, even if they focus on specific incidents and are supported by a strong evidentiary foundation, are unlikely to go forward due to the court's policy of restraint when asked to intervene in the decisions of the heads of the prosecution in Israel.

The Court's second rationale for rejecting the petition is the delay in submission. The court ruled that the delay justifies its rejection and nullifies the ability to grant a remedy.

An examination of delay is conducted through a well-established test balancing three principles: the subjective delay – examining whether the passage of time indicates that the petitioners have conceded their rights; the objective delay – whether the delay in submitting the petition has objectively changed the situation for the worse and damaged the relevant interests of the respondents or third parties; and the severity of damage to the rule of law caused by the administrative act that is the subject of the petition.[5] The rule is that "in examining the argument of delay, the damage that is attributed to the delay should be weighed against the magnitude of the legal flaw that is claimed […] There is considerable weight to the fact that the claimed flaw in the authority's action is not a negligible or marginal flaw."[6] In this case, the Court rejected the petition because it was submitted approximately three years after the military operations were conducted. Not only did the Court fail to identify the damage suffered by the respondents as a result of the delay in submitting the petition, but it also failed to weigh this consideration against the other criteria in the test of delay. It did not examine the extent of damage to the rule of law resulting from the rejection of the petition at all.

The Supreme Court also ruled that the delay nullifies its ability to grant the requested remedy. Indeed, the passage of time between the occurrence of the event and the date of opening an investigation would have an impact on the results of the investigation and its effectiveness. However, the submission of the petition after three years should not nullify the state's obligation to investigate, or its duty to carry out this obligation. The obligation to investigate arises when it becomes known that there is a suspicion of a criminal offense.[7] While the passage of time may impact the effectiveness of the investigation and its results, it does not justify annulling the obligation to carry out the investigation.

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[5] Appeal of Administrative Petition 8723/03 **Herzliya Municipality v. Local Committee for Planning and Construction, Hof Hasharon**, PD 58(6) 728, 733-734 (2004).

[6] Civil Appeal 2962/97 **Artists-Tenants Council in Old Jaffa v. Tel Aviv Local Council for Planning and Construction**, PD 52(2) 362, 377 (1998). See also in this matter: HCJ 170/87 **David Asoulin v. Mayor of Kiryat Gat, Ze'ev Boim**, PD 42(1) 678, para. 8 of the ruling by Judge Netanyahu (1988). ("In my view, delay in submitting a petition does not need to disqualify a petition that claims the clear unlawfulness of the authority's action. In fact, I see no reason why an administrative action, conducted without authority, should be treated differently than a judicial proceeding that is conducted without relevant authority and is invalid. Even if the party was late in arguing lack of authority, and even if the party failed to raise this at all, the court would raise this on its own initiative. My conclusion is, therefore, that a delay in submitting a petition against imposing and collecting unauthorized local taxes should not serve as a consideration for rejecting the petition, unless there are extraordinary reasons.")

[7] On the obligation of commanders to report suspicions and promptly investigate them, see: Michael N. Schmitt, **Investigating Violations of International Law in Armed Conflict,** Harvard National Security Journal 2, 31 (2011).

This Court's stance is peculiar. No statute of limitation applies to serious criminal offenses and a State's obligation to investigate the perpetrators as derived from customary and treaty law is not limited in time and is always valid. By annulling the duty to investigate because of a delay that supposedly makes it impossible to fulfill this obligation, the Court strips all content from the iron rule that no statute of limitation applies for war crimes. In this regard, a study published by the International Committee of the Red Cross (ICRC) on customary international law states:

> "The recent trend to pursue war crimes more vigorously in national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes into customary law. In addition, the operation of statutory limitations could prevent the investigation of war crimes and the prosecution of the suspects and would constitute a violation of the obligation to do so."[8]

Indeed, many states are currently engaged in investigating and indicting those persons suspected of committing war crimes decades ago, as far back as World War II. By accepting the argument of delay, the court is creating a *de facto* statute of limitation for war crimes.

When does a suspected serious violation of international law justify initiating a criminal investigation?

Beyond the broad discussion of these threshold arguments, the Court's ruling lacks a practical discussion of the duty of a state party engaged in armed conflict to investigate serious allegations of harm to civilians, and an analysis of when such allegations justify the opening of a criminal investigation in accordance with the laws of warfare. The Court's treatment of these questions is superficial and evasive. The court explained that:

> "the sides before us are divided on the question of what constitutes an indication that a suspicion exists that justifies opening a criminal investigation of a particular incident … we addressed the question of whether a criminal investigation should automatically be initiated in every incident in which a civilian dies as a result of activity by the security forces in a parallel petition submitted to the court on this subject, HCJ 9594/03 **B'Tselem v. Chief Military Prosecutor** (decision delivered 21 August 2011), and we do not deem it necessary to elaborate on this issue here…"[9]

However, a review of the Court's ruling in HCJ 9594/03, **B'Tselem v. Chief Military Prosecutor** indicates that in regard to situations of armed conflict, as opposed to a situation of occupation (although the definition of incidents "of a real belligerent nature"

[8] See Rule 158 of the ICRC's Rules of Customary International Law.
[9] ICRC's Rules of Customary International Law, paragraph 25.

is unclear and requires study), this question was not resolved at all. In the B'Tselem case, the court ruled:

> "13 … However, in regard to this region, in the absence of control in the Gaza Strip and in light of the armed conflict, it cannot be determined that every incident of death of a civilian uninvolved in warfare raises – in itself – a suspicion of criminal conduct that justifies initiating an investigation…"

Therefore, when the Court was presented with a petition demanding a ruling on the specific question of what indications for suspicion of criminal conduct during an armed conflict justify initiating an investigation, the Court chose to evade any discussion of the issue. However, the Court did state that:

> "The very fact that civilians were harmed is not sufficient to constitute a real suspicion that criminal offenses were committed in violation of the laws of warfare. In the absence of evidence that criminal offenses were committed, there is also no obligation to conduct a criminal investigation of the incidents."[10]

This ruling is problematic for several reasons. Firstly, from the state's perspective only the intentional killing of civilians constitutes a war crime. Accordingly, as long as the harm to civilians is not intentional and therefore does not constitute a war crime as defined by the state, there is no obligation to investigate. This is how the state expressed its position in its response to the petition in HCJ 9594/03, **B'Tselem v. Chief Military Prosecutor**, to which the court referred in its ruling:

> "Article 8 of the [Rome] Statute [of the International Criminal Court] stipulates the war crimes that fall under the court's jurisdiction. The crimes relevant to our case are the crimes pertaining to the killing or attacking of 'protected persons.' As the Court's Statute indicates, international law assigns blame only when the harm to innocents is accompanied by a mental element of intention or willfulness, and not when the harm to innocents is unintentional." [11]

First, intent can only be determined in the course of investigation. Second, the state's stance is inconsistent with international law. Contrary to the state's interpretation of Article 30 of the Rome Statute, the article itself suffices with "awareness" as a mental element [*mens rea*] for applying the directives of the Statute. Moreover, the Rome Statute and its official interpretation indicate that many offenses constitute war crimes even if the mental element does not amount to "intention." In the official interpretation of the mental element required for an offense listed in Article 8(2)(a)(i) in the Rome Statute as a war crime of willful killing, "recklessness" is also considered a sufficient mental element for constituting a crime.[12]

[10] The **Adalah** case, footnote 1, para. 13 of Justice Beinisch's decision.
[11] Section 89 of the state's response.
12 Knut Dormann, "Elements of War Crimes under the Rome Statute of the International Criminal Court," ICRC 2003, p. 42, 43.

In Article 8 of the Rome Statute of the International Criminal Court, the severity of the consequence of attacks constitutes an element of some of the crimes listed. One such example is Article 8(2)(b)(iv), which refers to the crime of launching an attack with the knowledge that it will cause excessive injury to the lives of civilians. Even though international law recognizes the possibility of incidental injury to civilians, it stipulates that this does not necessarily justify causing foreseeable harm to civilians or civilian property that is excessive relative to the concrete and direct military advantage anticipated from the attack. Therefore, excessive damage to civilians constitutes one of the elements of the crime.[13] Notably, there is unanimous agreement that this definition of a crime applies to a reckless perpetrator who was aware of the danger involved in an action but chose to proceed with the act.[14]

Moreover, in Article 8(2)(b)(i), which deals with the crime of an intentional attack against a civilian population or individual civilians who are not taking a direct part in hostilities, the fact that not all possible measures of caution are taken to prevent harm to civilians is also sufficient to constitute a foundation of the crime. [15]

In addition, and relevant to the case at hand, repeated unintentional harm to civilians during the course of military activity directed against a legitimate target constitutes a pattern of conduct that endangers the lives of innocent civilians, and may constitute a violation of the laws of the International Criminal Court.[16]

Therefore, international criminal law recognizes many crimes in which disproportional damage constitutes an element of the crime. The existence of disproportional damage itself creates suspicion that criminal acts were committed and as such, mandates an investigation of the incident. Hence, according to international law, it should not be the question of "whether a war crime was committed intentionally" that determines whether or not to open a criminal investigation. In addition, under Israeli law, the test of whether to investigate is whether there is a suspicion of a crime. This test applies to many types of criminal offenses that do not amount to war crimes.

The army refused to release any details concerning its conduct in these two operations, such as the relevant information about the choice of targets, the decision to attack the targets, the means of attacks selected, the timing of the attacks, and the measures of caution that were taken to prevent harm to civilians and civilian property. This information and other data relevant for examining the legality of the attacks are exclusively in the army's possession. This data is needed to assess the legality of the attacks, the way they were carried out, the consequences in terms of the harm to civilians and civilian property, the scope of the damage caused, the circumstances of the attacks, and if there was a

13 Dormann, p. 161. See also p. 163 on the conditions for the legality of attacking.
14 The reference is to comment 36 in the text, which was adopted by the Preparatory Committee of the International Criminal Court, Dormann, p. 165.
15 See Dormann, p. 131-132.
16 Dormann, p, 169.

justification for denying the protections granted to civilians or civilian property from attacks. The more severe the consequences of a military attack are to civilians and civilian property, without any known or apparent grounds for denying their protection, the greater the suspicion that the criteria of proper conduct were violated and that reckless, negligent, or even intentional criminal acts were committed. In this situation, there is a duty to investigate these allegations. The Court should have ordered the state to respond to the crux of these suspicions and to demonstrate whether and how the army investigated these suspicions in order to confirm or refute them.

Moreover, in its decision, the Court mixed two separate issues: the question of when the duty arises to open an investigation regarding suspected war crimes and the question of whether sufficient evidence exists for determining that war crimes were indeed committed. The Court ruled that, "the petition, as noted, is based on interviews and media reports that cannot constitute evidence in a criminal proceeding, and on the reports of international organizations… this meager evidentiary infrastructure cannot stand as the basis for a criminal conviction, in light of the high threshold of proof required in a trial of this sort."[17]

Besides the fact that the petition included evidence beyond what the Court noted in its ruling, the Court should have examined the evidence provided in order to check whether a basis was established for suspicion that crimes were committed, and thus to clarify what the state did in order to investigate these suspicions. Instead, the Court examined whether there is sufficient evidence for a criminal conviction. There is an obvious and substantial difference between the two tests: Article 59 of the Israeli Criminal Procedure Law [Consolidated Version] - 1982 stipulates that in the event of a complaint of a criminal offense, the police authorities are obligated to open an investigation; thus, the law does not permit the police any prerogative or option to refuse. This standard is not the same vis-à-vis indictment. The law demands that there be "sufficient evidence" for the filing of an indictment, which is a test of whether there is a reasonable possibility of conviction. [18]The same applies to the Court's comment about the protections in criminal law; without an investigation, it is impossible to know whether or not the suspect is entitled to the protections of criminal law. These protections should apply when considering the question of prosecution and not at the stage of determining whether to initiate an investigation.

The Supreme Court's decision not to issue an order nisi (order to show cause) and its rejection of the petition based on threshold reasons without examining the matter itself, effectively grants the state and the army an exemption from explaining the severe consequences stemming from the military activity in the framework of these two operations. Moreover, and perhaps more alarmingly, setting a strict evidentiary standard, as in this case, will lead to a situation in which it is impossible to substantially examine the lawfulness of any military action, including whether severe consequences are a result of genuine military need or constitute a deviation from the law.

[17] Dormann, paragraph 11.
[18] HCJ 5675/04 **Movement for Quality Government in Israel v. Attorney General et al**., PD 59(1) 199 (2004).

This is not the first time that the Israeli Supreme Court has refrained from engaging in questions that directly pertain to international law and the obligations it imposes on the Israeli authorities, by adopting various excuses and arguments. Prof. Eyal Benvenisti of Tel Aviv University Faculty of Law has analyzed the various techniques used by the court to avoid the precise application of international law.[19] The threshold arguments in this ruling comprise yet another one of these techniques.

Extra-legal comment

A fundamental normative question must be noted concerning the Court's remarks about the petitioners' attitude toward universal jurisdiction as well as Justice Rubinstein's comments regarding the petitioners' motives in submitting the case. The petitioners brought this case before the Israeli Supreme Court to defend the human rights of Palestinian civilians who were severely harmed by the Israeli armed forces' actions during the two military operations and to uphold the rule of law in the state. They pursued this case through the appropriate legal channels and before the state's Supreme Court. Nevertheless, the Court accused the petitioners of threatening it and Justice Rubenstein alleged that the petitioners' real aim was to delegitimize the state. The justices' remarks and questions to the petitioners' legal representatives during the hearings on the case were of a political and defiant nature. [20]Furthermore, Justice Rubinstein took upon himself the unauthorized liberty of testifying, in his own words, "from first-hand experience" as an attorney general and as a cabinet secretary, about the caution that the state exercises in order to avoid harming civilians in order to fend off the suspicions on which the petition is based.

This case review is not the place to analyze the repercussions of statements such as these or of the chilling effect of this attitude on the future submission of petitions dealing with similar questions. Nonetheless, it is clear from Justice Rubinstein's comments and his accusations about the petitioners malicious intentions that it is unreasonable to expect that Israeli courts – as a party to the conflict – are able to rule impartially on legal issues that arise during the conflict, at least while that conflict is still ongoing. On this subject, the words of Prof. David Kretzmer are apt:

> "In democratic countries, courts enjoy varying degrees of independence. This independence ensures that the judges' decisions are based on their conscience and are not dictated by other branches of government. It should not conceal the fact, however, that courts 'are part of the machinery of authority within the State and as such cannot avoid the making of political decisions.' Judges may be independent, but they are not neutral."[21]

[19] Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts," 4 EUR. J. INT'L L. 159, pp. 181-182 (1993).
[20] See the protocol of the discussion from May 6, 2009.
[21] David Kretzmer, **The Occupation of Justice** - The Supreme Court of Israel and the Occupied Territories, State University of New York Press, (2002), p. 191.

The Court's ruling and attitude indicates, yet again, that effective remedies for Palestinian victims from the OPT are not available in Israeli courts.