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عدالة المركز القانوني لحقوق الأقليات العربية في إسرائيل
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Adalah Briefing Paper

The Israeli Army's Exploitation of the "Absolute Military Necessity" Exception to Justify its Policy of Home Demolitions in the 1967 Occupied Palestinian Territories

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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 heavy 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.¹ 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 humanitarian 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, in cooperation with the Palestinian Centre for Human Rights – Gaza (PCHR), and Al-Haq, filed a petition to the Supreme Court of Israel² 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. In June 2004, ten individuals from the south of Rafah, Gaza joined the case as petitioners.

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 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

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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.³ 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.⁴ 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 an urgent hearing and 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. The request also included satellite photographs (obtained from UN OCHA) 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 creation of a buffer zone, 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 vast 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 June 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 Supreme Court's ruling in *Amer* delivered in 2002.⁵ *Amer* concerned the very limited right of an individual to be heard prior to the demolition of his home. Adalah argued in response that *Amer* bears no relevance to the petitioners' original request for the Court to define the legal scope of the term "absolute military necessity". Adalah further noted that *Amer* offered no protection to individuals 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 its obligations towards protected persons. Adalah further contended that the AG's claim 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 decided to cancel the injunction issued only hours earlier. On the days 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.⁶

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. In this new motion, the petitioners 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 in June. 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, as referenced above; and six homes in southern Rafah's al-Shaath refugee camp, as a result of which 50 people lost their homes.⁷

29 July 2004 – Attorney General responded that locating ten homes remains problematic for the Israeli army. Because the buildings in question are of average appearance and without remarkable attributes, the Israeli military cannot identify them, the AG stated, 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.

8 August 2004 – Adalah filed an urgent submission to 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 a letter to AG with detailed locations of, directions to and descriptions of the ten homes.

13 September 2004 – AG responded to Adalah's letter noting that the military has now located some but not all of the ten houses specified in the June motion. However, as a result of the ongoing military operations in Rafah, the AG argued that identifying the houses it had located to the petitioners 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

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.⁸ 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 issues a three-line decision announcing its rejection of the July motion for injunction and maintaining its decision to cancel the order issued on 21 July 2004.

25 October 2004 – Petitioners submit reply to AG's response to the petition to the Supreme Court

On 21 October 2004, the AG submitted his response to the petition to the Supreme Court. The two main arguments, among others, raised by the state were that homes had only been demolished only where there was military necessity, and that the military necessity exception did not require an "immediate" response to a threat.

In reply, the petitioners submitted numerous reports from UN and international human rights organizations, which support the argument that the Israeli military demolishes homes in the OPTs in the absence of an "absolute military necessity."⁹ For example, since the start of the Intifada in September 2000, 1,497 buildings have been demolished in Rafah, affecting over 15,000 people according to Professor John Dugard, the UN Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel in 1967. His August 2004 report noted that the Israeli military operation, code named "Operation Rainbow," which took place in Rafah between 18 and 24 May 2004, resulted in the demolition of 167 houses, rendering 2,066 individuals homeless. Professor Dugard made clear that the Israeli military's policy of home demolitions involved instances of "wanton destruction" and called on the international community

to "identify those responsible for this savage destruction of property and to take the necessary legal action against them."

The petitioners also countered the AG's claim that homes had only been demolished where there was "absolute military necessity." The AG cited, as an example, the military's hunt for weapons smuggling tunnels, which took place in Rafah between 18 and 24 May 2004. The petitioners argued that there was no need to enter the densely-populated areas of Rafah with heavy bulldozers at all. According to a recent Human Rights Watch report, which was submitted to the Court by the petitioners, several tunnel experts verified that, "A number of less destructive alternatives exist for the effective detection and destruction of smuggling tunnels," including the installation of underground seismic sensors. Moreover, the petitioners emphasized that the search for tunnels could have been conducted in the Israeli-controlled zone between the borders of Rafah and Egypt, thereby obviating the need to enter the densely-populated neighborhoods of Rafah. The petitioners also argued that the military's response was completely disproportionate, citing statements from an Israeli military press briefing noting that only three tunnels had been found during "Operation Rainbow," while 167 homes were demolished in the process.

The petitioners also refuted the AG's claim that "absolute military necessity" did not require "immediacy". The petitioners argued the military necessity exception must be limited to actions taken as a response to an immediate threat, relying on Article 53 of Geneva Convention IV and Art. 23 (g) of the Hague Regulations ("it is especially forbidden ... to destroy or seize the enemy's property, unless such destruction or seizure be *imperatively* demanded by the necessities of war").

26 October 2004 – Supreme Court hearing on the petition

The case was heard before Supreme Chief Justice Aharon Barak and Justices Eliahu Matza and Mishael Heshin. At the hearing, Chief Justice Barak emphasized the scathingly critical UN and international human rights organizations' reports on the Israeli military's home demolition practices provided to the Court by the petitioners in their legal filings. He stated that the entire world reads and relies on these reports, and that they amount to the existing facts available on this issue. He warned the AG that the practices and data provided in the reports must be thoroughly examined, even if a body needs to be established for this purpose and the process is costly, or history will be understood according to what is written in the reports. The Court expressed its disappointment with the insufficient detail provided by the state in its October response to the petition and in its response to questions at the hearing. For example, when asked by the Court about the scale of home demolitions in the OPTs, the AG's representative stated that he had no data, and that the soldiers were in tanks and did not count the number of homes destroyed.

The Court, like the AG, also questioned the relevancy of the three ICTY cases submitted to the Court by the petitioners - *The Prosecutor v. Blaskic*, 2000; *The Prosecutor v. Kordic*, 2001; and *The Prosecutor v. Naletilic*, 2003 - stating that the Israeli military was not "wiping out" whole villages. Adalah, on behalf of the petitioners argued that the ICTY cases were relevant for their legal discussion of the issue of extensive destruction of property in particular, and that such practices constitute a grave breach of Geneva Convention IV, regardless of whether or not ethnic cleansing is taking place.

The Supreme Court closed the hearing by requesting that the petitioners file an additional submission within 45 days focusing on specific patterns of home demolitions in specific locations; the respondents would then have 45 days to submit their response. The Court added orally that its ruling on the specific case would affect all military operations concerning home demolitions. The Supreme Court did not issue an injunction, as requested by the petitioners in May 2004, June 2004 and July 2004, or an *order nisi*.

10 January 2005 – Petitioners submit new legal filing identifying patterns of home demolitions

In this submission, the petitioners identified three patterns of home demolitions to illustrate how the Israeli army's extensive destruction of civilian property throughout the OPTs violates international humanitarian law and cannot be justified under the "absolute military necessity" exception:

(1) Home demolitions in densely populated areas in Rafah from 17-25 May 2004 (relying on reports of UN and international human rights organizations and Israeli military statements already submitted to the Court);

(2) Home demolitions in the south of Rafah in the area of the Philadelphi Road from 21 April 2000 – 29 May 2004 (relying on the state's contention that the purpose of this operation is to create a buffer zone in this area in order to control it; satellite photos obtained from Human Rights Watch, which show the extensive home demolition in this area during this period; the government's "Disengagement Plan for the Gaza Strip" - Article 7, Appendix A of the plan states that, "... in certain areas there may arise a need to physically broaden the areas where military activities can take place."; and statements of senior Israeli military officers describing the implementation of the government's plan for withdrawal from Gaza as the last opportunity for the Israeli military to put security facts on the ground);

(3) Home demolitions in the densely populated Jenin refugee camp in 2002 (relying on numerous reports of UN and international human rights organizations, and statements from an Israeli soldier, D-9 bulldozer operator reporting on how he used to demolish and "shave" even more homes than those that were ordered destroyed).

The petitioners requested that the Supreme Court issue an order nisi (an order to show cause). The state/army's response to the new submission is due in March 2005. No additional Court hearings have been scheduled.

The case is pending. *Adalah* Attorney Marwan Dalal is representing the petitioners.

Notes:

¹ 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>.

² 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."

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

⁴ 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>.

⁵ 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 individuals to be heard prior to demolitions of their property during a military operation, except in three instances: where there is a 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 obstruct a military operation. Due to these wide exceptions, the right to be heard is extremely limited.

⁶ 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/WV_report/English/2004/22-07-2004.htm>.

⁷ *Ibid.*

⁸ 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>.

⁹ Five reports were submitted to the Supreme Court: (i) UNRWA – "Humanitarian Assessment of Israel's Incursion into Northern Gaza," 20 October 2004; (ii) UN OCHA - "Gaza on the Edge: A Report on the Deteriorating Humanitarian Situation in the Gaza Strip," 1 October 2004; (iii) UN Special Rapporteur, Prof. John Dugard, "Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel in 1967," 12 August 2004; (iv) Human Rights Watch, "Razing Rafah: Mass Home Demolitions in the Gaza Strip," 18 October 2004; and (v) FIDH, "War Crimes in Rafah: Violations of International Humanitarian Law and Human Rights during 'Operation Rainbow' (13-25 May 2004)," 15 October 2004.