



UPDATE TO 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

**Case Developments from October 2004 to June 2005
Issued July 2005**

On 27 May 2004, Adalah, the Palestinian Center for Human Rights – Gaza (PCHR), Al-Haq and ten individuals from the south of Rafah (who joined the case one month later) submitted a petition to the Supreme Court of Israel concerning Israel's policy of home demolitions in the 1967 Occupied Palestinian Territories (OPTs). The petition asked the Court to define - for the first time - the legal parameters of the term "absolute military necessity," invoked by the Israeli military to justify its extensive home demolitions throughout the OPTs, 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). The named respondents are IDF Major General Central Command, IDF Major General Southern Command, the Chief of Staff, the Minister of Defense, and the Prime Minister. Adalah Attorney Marwan Dalal represented the petitioners.

According to UN reports, over 4,170 Palestinian homes in the OPTs have been demolished by Israel since the start of the Intifada in September 2000. As of December 2004, a total of 28,483 Palestinians in Gaza had been rendered homeless as a result of Israeli military operations and home demolitions conducted during the Intifada. In Rafah alone, 1,497 buildings were demolished between September 2000 and August 2004, affecting over 15,000 people.

Latest Developments – October 2004 to June 2005

26 October 2004 – Supreme Court hearing on the petition

The case was heard before Supreme Court 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 committee 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 21 October 2004 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 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 the Fourth Geneva Convention (1949), 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 focusing on specific patterns of home demolitions, and that the respondents reply to that filing. The Court added orally that its ruling on the specific case would affect all military operations concerning

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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, again requesting an *order nisi*, 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. The submission relied on and quoted from several highly critical reports on Israel's home demolition operations in the OPTs authored by individuals and organizations who had conducted research in the field, including UN Special Rapporteur Prof. John Dugard, Amnesty International, and Human Rights Watch (HRW). According to these reports, the specific home demolitions identified by the petitioners are not only illegal, but could well amount to grave breaches of the Fourth Geneva Convention.

The three patterns identified were: (1) home demolitions in densely populated areas in Rafah from 17-25 May 2004. According to UN reports, during this military operation, 167 buildings were destroyed, which housed 379 families (2,066 individuals); (2) home demolitions in the south of Rafah in the area of the Philadelphi Route from 21 April - 29 May 2004 (relying as well 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 HRW, which show the extensive home demolitions 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); and (3) home demolitions in the densely populated Jenin refugee camp in 2002 (relying also on statements made during a media interview by an Israeli soldier and D-9 bulldozer operator on how he used to demolish and "shave" homes in the refugee camp of Jenin). According to the UN Secretary-General's report, from 3-18 April 2002 the Israeli military destroyed approximately 150 buildings and rendered 450 families homeless in the city of Jenin and its adjacent refugee camp during "Operation Defensive Shield."

20 March 2005 – State's Response

The AG argued two main points in response to the petitioners' January 2005 submission: (i) that the legal filing identifying patterns of home demolitions by the Israeli military in the OPTs was not sufficiently detailed; and (ii) that the participation of Israel's Prime Minister Ariel Sharon and Palestinian President Mahmoud Abbas in the Sharm al-Sheikh summit on 8 February 2005 has led to a new era of calm in the Palestinian-Israeli conflict, which the respondents hope will render further home demolitions unnecessary. On the basis of these two arguments, the AG therefore requested that the Court either dismiss the case entirely, or suspend it.

2 May 2005 – Petitioners' Reply to the State's Response

In its reply, the petitioners argued that, contrary to the contention put forth by the AG, the filing submitted in January 2005 was very detailed. The three patterns of home demolitions were well-documented by UN and international human rights organizations, as well as by physical evidence and statements made by Israeli soldiers published in the Israeli press.

Countering the respondents' request that the Court dismiss or suspend consideration of this case, Adalah noted that the Court itself has emphasized that it usually considers cases relating to the actions of state agencies, including those of the military, after such actions have taken place. Adalah noted that when the petitioners submitted several motions for injunction during extensive home demolition operations in Rafah, Gaza in June and July 2004, the state had then argued that the Court should not rule on such matters while military operations were ongoing. By arguing that the Court should neither consider the case brought by the petitioners during the military operations nor in their aftermath, the state is clearly attempting to prevent the Court from considering the legality of these actions altogether. Such a position, Adalah argued, contradicts the decision of Supreme Court Justice Mishael Heshin in this case, when, on 29 September 2004, he stated that no injunction would be granted, but also affirmed that, "Nothing in this decision prevents the petitioners from presenting their arguments before a panel of judges due to hear their petition on its merits."

Adalah further emphasized that the AG's argument that the military hopes additional demolitions will be unnecessary following the Sharm al-Sheikh summit not only diverts attention away from the important question of whether or not the military's policy of home demolitions involved illegal actions, but provides little assurance that Palestinians' rights as protected persons under the Geneva Conventions will now be respected in this regard. This is a particular concern in light of the Israeli government's intention to disengage from the Gaza Strip this year. The government's "Over-All Concept of the Disengagement Plan" states that, "At certain locations [along the Philadelphi Route] security considerations may require some widening of the area in which the military activity is conducted. Subsequently, the evacuation [in Hebrew "linakot" which means "cleaning"] of this area will be considered." Such actions are liable to result in the wide-scale razing of further Palestinian homes, as Prof. Dugard acknowledged in his "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967" of March 2005, quoted in Adalah's submission to the Court.

Adalah also quoted Prof. Dugard's remarks on Israel's operations in the Gaza Strip in 2004, from his December 2004 report, in which he notes that the Israeli military has "frequently destroyed houses, roads and agricultural land in order to expand the buffer zone at the Rafah border zone or to inflict damage for punitive reasons unconnected with military combat." Prof. Dugard states that, "[T]hese operations have been conducted without regard for two of the most fundamental principles of international humanitarian law - the principle of distinguishing at all times between civilian objects and military objectives [article 48 of Protocol I to the Geneva Conventions] and the principle of proportionality." In the same report, Prof. Dugard cites the Israeli military's offensive of October 2004 in the Jabaliya refugee camp as one of "the most severe" in the Gaza Strip. In that offensive, 91 homes were demolished, rendering 675 Palestinians homeless, and 101 houses, home to 833 people, sustained damage.

The petitioners' position that Israel exploits the "absolute military necessity" exception in its home demolitions is further supported by quotations from military officers published in the Hebrew daily *Ha'aretz* on 24 January and 15 March 2005, in which the officers acknowledged that the home demolitions carried out by the military in Gaza during "Operation Rainbow" in May 2004 were undertaken as acts of vengeance in response to Palestinian actions. The stated purpose of this operation was a search for weapons smuggling-tunnels, although the military later admitted that only three such tunnels had been found.

Adalah also noted that, thus far, the state has not related to the Court's request to establish a committee that would provide alternative data on the scale of home demolitions undertaken by the Israeli military so as to counter the wealth of independent human rights reports that contradict the state's claim to only demolish civilian homes in circumstances where there exists "absolute military necessity." The petitioners requested that the Court hold an urgent hearing and rule on the petition.

14 June 2005 – Supreme Court hearing on the petition

The presiding justices at the hearing were Supreme Court Chief Justice Aharon Barak and Justices Mishael Heshin and Dorit Beinisch. The respondents argued throughout the hearing that the petition was too general, and should therefore be dismissed by the Court.

Attorney Dalal argued before the Court that the threat of further home demolitions in the OPTs by the Israeli military remains very real and requested that the Court compel the respondents to produce a legal justification for a number of specific home demolitions identified by the petitioners in their January 2005 submission. Adalah further argued that the Court should decide on this matter in order to protect further Palestinian civilians from being rendered homeless as a result of illegal home demolitions, and contended that a decision would also be in the interests of the state itself, as the growing trend toward enforcing the principles of international humanitarian law through universal jurisdiction is unlikely to work in the state's favor in this regard.

During the hearing, Justice Barak asked the AG's legal representative about recent declarations made by the Israeli military that it is stopping home demolitions in the OPTs. The AG responded that the decision to cease home demolition operations is made in the context of Regulation 119 of the Emergency Defense Regulations - 1945, which the Israeli military invokes to justify the home demolitions as "deterrence". As Adalah argued, however, it is important to note that this petition did not relate to Regulation 119.

Attorney Dalal responded that the Israeli military cannot claim to be ceasing home demolitions in the case at hand, as the home demolitions challenged in this petition are those allegedly undertaken during military operations for “absolute military necessity.” Thus, it is impossible and illogical for the military to be able to commit to stopping these home demolitions, because it amounts to agreeing to cease military operations.

It should also be emphasized that Prof. John Dugard, in his testimony on home demolitions before the Knesset’s Constitution, Law and Justice Committee on 16 February 2005, noted that the majority of home demolitions are allegedly carried out for “military necessity,” while Palestinian homes demolished for purposes of “deterrence” account for only 15% of total home demolitions.

The Court closed the hearing by deciding to remand the case for further consideration.

H.C. 4969/04, *Adalah, et. al. v. IDF Major General, Central Command, Moshe Kaplinski, et. al.* (case pending).

For further information, please see: Adalah's Briefing Paper: The Israeli Army's Exploitation of the "Absolute Military Necessity" Exception to Justify its Policy of Home Demolitions in the Occupied Palestinian Territories - February 2005.