

Israel and the Culture of Impunity

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This month marks the 40th anniversary of Israel's entrenched occupation of the Palestinian Territories, an occupation which has been characterized by serious violations of international humanitarian law (IHL) and human rights law. These breaches include the building and the relentless expansion of Israeli settlements in the Occupied Palestinian Territories (OPT), and the construction of the Wall inside the territory of the West Bank by appropriating Palestinian land. These measures are intended to annex Palestinian territory by bringing about long-term demographic changes and fortifying the Israeli presence in the West Bank and East Jerusalem.

In addition to its frequent military incursions and the erection of over 500 checkpoints and roadblocks, Israel has carried out an unlawful policy of home demolitions unjustified by military necessity and indiscriminately used military power against Palestinian civilians and civilian targets, thereby perpetrating grave breaches of the Geneva Conventions of 12 August 1949, and other serious war crimes.²

Dozens of UN resolutions and calls by the international community to end Israel's prolonged occupation and to enable the Palestinian people to exercise their right of self-determination have fallen on deaf ears.

During forty years of occupation not only has the Israeli government systematically failed to comply with its most basic obligations, as an occupying power under IHL, to guarantee the wellbeing and security of the civilian population in the OPT, but it also fostered a culture of impunity among its military. As Human Rights Watch correctly stated in a report published in June 2005, Israel has failed to comply with its legal obligations under IHL and international human rights treaties that the government has ratified.³ These obligations include the duty to investigate in order to establish the truth regarding events relating to and prosecute and properly punish those responsible for the deaths and injury of several hundred civilians not involved in hostilities that result from Israel's use of lethal force in policing and law enforcement contexts in the OPT. This is particularly in case with prima facie evidence or plausible allegations that soldiers have intentionally injured Palestinian civilians or failed to take all feasible precautions to protect them from harm. Israel is also required to provide effective remedies for the victims and their relatives, such as fair and adequate compensation.

The heart of the problem lies precisely, as Human Rights Watch stated, in a military justice system that avoid serious and impartial inquiries by relying on the debriefing of soldiers, often misleadingly termed 'operational investigations,' to determine whether or not a Military Police investigation is warranted.⁴ These 'investigations'

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² See Report of John Dugard, the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, UN Doc A/HRC/4/17 (29 January 2007).

³ Such as under article 2(3) of the International Covenant on Civil and Political Rights (1966) that Israel ratified on 3 October 1991. See, Human Rights Watch, *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing*, June 2005.

⁴ H.C. 9594/03, *B'Tselem et al. v. The Military Judge Advocate General et al.* (still pending), in which B'Tselem and the Association for Civil Rights in Israel (ACRI) demanded the

may serve a useful military purpose, but they do not seek to establish the truth as they fail to consider testimony from victims or non-military witnesses, and do not attempt to reconcile discrepancies between soldiers' accounts and video, medical or eyewitness evidence. Even in the few instances in which military investigations were conducted in cases of civilian casualties, they were opened long after the incident occurred and once the evidence at the scene had disappeared. Clearly such investigations are a sham, initiated without the genuine intention of bringing those responsible to justice.⁵

A recent, illustrative case that conveys a message of impunity to soldiers in the field is the tragic incident of Beit Hanoun. In the early morning of 8 November 2006, Israeli tanks shelled the town of Beit Hanoun in the Gaza Strip, killing nineteen Palestinian civilians while they were sleeping. Most of the casualties were women and children, the members of an extended family. In addition, over forty people were wounded in the attack.⁶ This was the highest Palestinian civilian death toll in a single incident since the eruption of the current Intifada in September 2000. The deaths were caused by what witnesses described as a shower of tank shells that hit a built-up civilian area. Israel admitted that the shells that killed the family were fired in response to a Qassam rocket attack launched the day before from the vicinity of the area at which the shells were fired. The Israeli military claimed that their shells had been misaimed because a fault in the artillery radar system's co-ordinates for the missiles had altered the margin of error from 25m to 200m.⁷ This argument does not, however, explain why it decided to wait until the following day to return fire at a general area. Therefore, the fact that the artillery shelling was not a defensive action, i.e. that it was not in response to a Palestinian rocket-attack in progress, and without any apparent military advantage, provides evidence that the action constitutes a war crime. Moreover, when one considers the fact that artillery fire, which is inherently inaccurate, was used near a densely-populated residential area, in accordance with the new shelling policy that the Israeli military had applied at the time of the incident (which reduced the so-called 'safety range' that separate artillery targets from the built-up civilian areas of Gaza from a 300m to just 100m, within the kill radius of its 155mm high-explosive shells, generally considered as being between 50m and 150m), the army's contention that it did not intend to kill civilians in Beit Hanoun seems wholly disingenuous. Besides, Israeli human rights organizations had warned the army that the new policy risked increasing Palestinian civilian deaths and injuries, and petitioned the Israeli Supreme Court against the reduction of the 'safety range' for artillery shelling of the Gaza Strip. However, the Supreme Court avoided ruling in the case.⁸ Hence, all the factual circumstances surrounding the Beit Hanoun incident lead to the conclusion that the Israeli military committed a war crime by breaching fundamental principles of IHL: those of distinction (between civilian and military targets) and proportionality. Despite the calls for an immediate criminal investigation into the incident and for those responsible to be held accountable, Israeli Defense Minister Amir Peretz appointed Major General Meir Kalifi to head an operational

initiation of criminal investigations in all cases of Israeli soldiers killing Palestinian civilians not involved in hostilities.

⁵ The request made by B'Tselem and (ACRI) in H.C. 9594/03 that the Military Police immediately document the scene of an incident in which a Palestinian civilian is killed so that a future investigation, if ordered, would be effective, was rejected by the State Attorney's Office.

⁶ See, *Haaretz Online News*, 8 November 2006

⁷ See, Peter Beaumont, "How Israel put Gaza civilians in firing line," *The Observer*, 12 November 2006).

⁸ H.C. 3261/06, *Physicians for Human Rights et al. v. The Minister of Defense*.

investigation, which merely issued a recommendation that future artillery shelling in the Gaza Strip should be conducted only with the authorization of high-ranking generals.⁹

In this case justice was neither done nor seen to be done. Not only was the investigation seriously inadequate and biased, but none of the Israeli commanders responsible for the atrocious shelling policy that applied in the Gaza Strip at the time of the incident was forced to resign. Moreover, no one was held accountable for the killings of nineteen innocent civilians, which conveys a grave message to Israeli soldiers of contempt for the most basic of human rights, the right to life.

In what way, if at all, has the Israeli Supreme Court contributed to the culture of impunity in Israel?

The Supreme Court of Israel established its own jurisdiction to consider petitions submitted by Palestinians in the OPT shortly after the occupation in June 1967 (although Israeli law was not made to apply in these territories), and it ruled that the legal status of the West Bank and Gaza (excluding East Jerusalem) is that of occupied territory, to which the international law of belligerent occupation apply. Nevertheless, the court declined to apply the full body of international law that pertains to occupation, i.e. IHL and international human rights law. In particular, it refused to enforce the provisions of the Geneva Convention IV relative to the protection of civilians, which Israel has ratified, because it adopted the state's position that the Convention is not applicable *de jure* within the OPT, in contradiction of the prevailing view in international law and within the international community.¹⁰ However, this position has enabled the court to refrain from examining the legality of the Israeli settlements in the OPT in accordance with article 49, paragraph 6 of the Geneva Convention IV, which stipulates that, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". Moreover, it allowed the court to sanction the deportation to Lebanon of 415 Palestinians in 1992, in violation of article 49, paragraph 1 of the Geneva Convention IV, which prohibits the deportation of persons living in an occupied territory to any other territory for any reason.

In addition, enforcement of IHL norms in the OPT was the exception and not the rule. The rule was the dismissal of petitions challenging the legality of the Israeli military's practices in the OPT in violation of IHL and the sanctioning of the military's policies. An excellent example is the dismissal of a petition submitted to the court against the Israeli army's home demolition policy in the OPT, and seeking its cessation and the issuance of orders regarding the use of the "absolute military necessity" exception, in accordance with IHL.¹¹ The court in this case actually refrained from dealing with the difficult and valid questions that the petitioners raised. In fact, from the several hundred petitions that have been submitted to the court pertaining to breaches of IHL by the Israeli military in the OPT, only very few substantial cases have been accepted. These cases include the torture case from 1999, in which the court, after years of legitimizing the torture of Palestinian detainees and prisoners by the Israeli

⁹ See, *msn* Online News, 11 November 2006.

¹⁰ See the Advisory Opinion of the International Court of Justice in the case concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004).

¹¹ H.C. 4969/04, *Adalah et al. v. IDF Major General, Central Command, Moshe Kaplinski, et al.*

military, ruled that torture is prohibited as a means of interrogation¹²; the Beit Surik case from June 2004, in which the court decided that the route of the Wall should be changed near Beit Surik because it impinged disproportionately upon the lives of local residents, thus recognizing the humanitarian impact of the Wall on the population of Beit Surik, and highlighted the need to balance security concerns with the rights of local inhabitants¹³; the human shields case from October 2005, in which the Supreme Court banned the use of Palestinians as human shields by Israeli military¹⁴; and last but not least the compensation law case from December 2006, in which the court canceled the newly-amended racist Civil Wrongs (Liability of the State) Law – 1952 (also known as the “Intifada Law”), which exempts Israel from compensation claims for property damage and injury of Palestinians in the OPT, ruling that Palestinians harmed by Israeli military in the OPT are eligible for compensation from Israel.

These exceptional rulings were delivered in the era of the former Chief Justice, Prof. Aharon Barak. Barak was well aware of the global changes that had taken place after the adoption of the Rome Statute of the International Criminal Court (ICC) in July 1998, pertaining to the fight against impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which include genocide, crimes against humanity and war crimes. The preamble to the ICC's Statute affirms that these grave crimes must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level. Yet, the Supreme Court in Barak's era also applied human rights rhetoric to dismiss petitions relating to violations of IHL by the Israeli army in the OPT. By using a pragmatic tool such as the proportionality principle, the court has in most cases favored the interests of security over the interests of the civilian population, and in some of the Wall petitions it even preferred the interest of the settlers over the interest of the Palestinian population, although it is well aware of the illegality of the settlements under international law. The most recent example of the court's discourse is the targeted assassinations case, in which the court failed to rule such assassinations unlawful, but rather ruled that they might only be carried out as a last resort and within the bounds of proportionality.¹⁵

What, then, are the routes that remain through which to defy domestic impunity and hold Israel to account for war crimes?

Since IHL has long been lacking effective enforcement mechanisms, and given that the establishment of *ad hoc* international criminal tribunals to prosecute those responsible for breaches of IHL has been the exception and not the rule, the adoption of the Rome Statute of the ICC in 1998 fuelled hopes for the eventual establishment of an effective enforcement mechanism of peremptory norms of international law, banning the commission of aggression, genocide, crimes against humanity and war crimes. However, Israel has not ratified the Rome Statute and even withdrew its signature, nullifying its obligation to refrain from acts which would defeat the statute's purpose – to end impunity. Israel thereby diminished the already slight possibility of the ICC acquiring jurisdiction over Israeli violations of IHL in the OPT. The UN Security Council, which has enforcement powers under Chapter VII of

¹² H.C. 5100/94, *The Public Committee Against Torture v. The State of Israel*.

¹³ H.C. 2056/04. *Beit Sourik Village Council v. The Government of Israel*.

¹⁴ H.C. 3799/02, *Adalah, et al. v. Yitzhak Eitan, Commander of the Israeli Army in the West Bank, et al.*

¹⁵ H.C. 769/02, *The Public Committee against Torture in Israel, et al. v. The Government of Israel, et al.*

the UN Charter, could in theory have stopped the breaches of IHL in the OPT, and can in fact accord the ICC jurisdiction over the OPT, but has thus far refrained from taking either step. The scores of condemnations of the IHL violations in the OPT by the UN General Assembly and its subsidiary organs, in addition to the findings of the International Court of Justice in its Advisory Opinion on the Wall, have practically had no effect on Israel's conduct in the OPT.

This apparent lack of enforcement of IHL on the part of the international community has forced individual Palestinians and international human rights organizations to examine alternative methods of privately enforcing IHL in the OPT in foreign domestic courts. Criminal investigations of Israeli officials were initiated under domestic criminal laws based on the doctrine of universal jurisdiction, which allows national courts to judge grave breaches of IHL committed outside the national territory, by a foreigner, against a foreigner, and where the interests of the state in question are not directly at stake. The suit brought in Belgium against Ariel Sharon in 2001, under the Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law – 1999; the case of General Doron Almog, for whom an arrest warrant was issued in the United Kingdom in September 2005 under the Geneva Conventions Act 1957; and the case of General Moshe Ya'alon, for whom an arrest warrant was issued in New Zealand in November 2006, under the Geneva Conventions Act 1958 and International Crimes and International Criminal Court Act 2000, serve as pertinent examples. Such criminal proceedings could also be initiated in other countries that have implemented the obligation of parties to the Geneva Convention IV "to enact any legislation necessary to provide effective penal sanctions" for persons who commit, or order the commission of, grave breaches of the Convention.¹⁶

Despite Israel's vehement campaign against universal jurisdiction and its use in the fight against impunity, Israel was in fact one of the first countries to enact domestic legislation to adopt this doctrine in relation to the crime of genocide and crimes perpetrated against the Jewish people, which include crimes against humanity and war crimes.¹⁷ Israel was also one of the first countries to invoke the doctrine of universal jurisdiction, when in 1961 it tried and convicted Adolf Eichmann of crimes against humanity committed in Germany during the Second World War. In this case the District Court of Jerusalem ruled that:

The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source ...¹⁸

The Israeli Supreme Court, in rejecting Eichmann's appeal, also emphasized the universal aspect: the right and duty of any state to punish the perpetrators of genocide, whether that state had any direct connection to the case or not.¹⁹

The cases brought against the Israeli officials in third-party jurisdictions were instigated as a last resort in the battle against the endemic impunity in Israel, and

¹⁶ See, e.g., the German Code of Crimes against International Law of 2002.

¹⁷ See the Law on the Crime of Genocide of 1950, and The Nazis and Nazi Collaborators Punishment Law of 1950.

¹⁸ D.C. (Jerusalem) 40/61, *The Attorney General of Israel v. Eichmann*.

¹⁹ H.C. 336/61, *Eichmann v. The Attorney General of Israel*.

only after individual Palestinians and human rights groups had exhausted the local remedies. Hence, Israel has only itself to blame. Besides, as long as the Israeli authorities refrain from ordering the genuine investigation of alleged violations of IHL and from providing effective civil remedies, it will remain necessary to employ all the feasible means offered by international law to combat such impunity and seek international justice. These actions could also include bringing civil tort claims for violations of IHL against Israeli officials in courts in the United States under the Alien Tort Claims Act or the Torture Victim Protection Act. This possibility may be imminent due to the recent initiative of Justice Minister Daniel Friedmann to re-legislate the so-called "Intifada Law," which was invalidated by the Supreme Court half a year ago.