

AUSTRALIAN
CENTRE
FOR INTERNATIONAL
JUSTICE



DOSSIER

Retired Major General Doron Almog

**Allegations of war crimes committed by Major
General Doron Almog in the Gaza Strip,
between December 2001 and March 2003**

2 March 2024

Contents

A.	INTRODUCTION	3
1.	SUMMARY.....	3
2.	DORON ALMOG	4
3.	ALMOG IN AUSTRALIA	5
4.	THE GAZA STRIP	5
	Israel's 'disengagement' in 2005	6
	Israel's illegal blockade and siege	6
	Gaza Genocide of 2024	7
5.	BELLIGERENT OCCUPATION OF GAZA DURING 2001-2003	8
B.	ALLEGATIONS AGAINST ALMOG.....	10
1.	MURDER OF THREE BOYS THROUGH THE USE OF FLECHETTE WEAPONRY IN DECEMBER 2001	10
	Factual background	10
	Grave breaches analysis.....	12
	Controversial Israeli use of flechette weaponry.....	13
2.	PUNITIVE HOME DEMOLITIONS OF BLOCK O, RAFAH REFUGEE CAMP IN JANUARY 2002	15
	Factual background	15
	Grave breaches analysis.....	17
	Wider Israeli policy of punitive home demolitions as 'clearing actions'	19
3.	EXTRAJUDICIAL ASSASSINATION OF SALAH SHEHADEH IN AL-DARAJ IN JULY 2002	20
	Factual background	20
	International outcry	23
	Grave breaches analysis.....	25
4.	PUNITIVE HOME DEMOLITIONS IN BLOCK 3 OF AL-BUREIJ REFUGEE CAMP IN MARCH 2003	27
	Factual background	27
	Grave breaches analysis.....	29
C.	ISRAEL'S UNWILLINGNESS TO PROSECUTE	30
1.	MURDER OF THREE BOYS THROUGH THE USE OF FLECHETTE WEAPONRY IN DECEMBER 2001	30
2.	PUNITIVE HOME DEMOLITIONS OF BLOCK O, RAFAH REFUGEE CAMP IN JANUARY 2002	32
3.	EXTRAJUDICIAL ASSASSINATION OF SALAH SHEHADEH IN AL-DARAJ IN JULY 2002	33
4.	PUNITIVE HOME DEMOLITIONS IN BLOCK 3 OF AL-BUREIJ REFUGEE CAMP IN MARCH 2003	35
D.	EVASION OF JUSTICE.....	36
1.	UNITED KINGDOM ARREST WARRANT	36
2.	AUDIENCIA NACIONAL (SPAIN NATIONAL COURT)	40
E.	INDIVIDUAL CRIMINAL RESPONSIBILITY - COMMAND RESPONSIBILITY. 41	

A. Introduction

1. Summary

The allegations concerning the commission of war crimes committed by Doron Almog (Israeli national) during four separate incidents occurred between December 2001 and March 2003 in the Gaza Strip (**Gaza**), the Occupied Palestinian Territory (**OPT**). Almog is accused of a series of war crimes resulting from his time as General Officer Commanding (**GOC**) of the Israeli military's Southern Command from 8 December 2000 to 7 July 2003. Almog is scheduled to speak at a number of events in cities across Australia between 3 and 7 March 2024.

Under his command, the Israeli military were responsible for extensive human rights violations and grave breaches of the Geneva Conventions inside the occupied Gaza Strip. The four incidents include the killing of civilians with indiscriminate flechette artillery shell weaponry; the punitive destruction of property in refugee camps which amounted to collective punishment; and the killing of civilians in indiscriminate aerial attacks. Almog held command responsibility for the planning and conduct of all military operations in Gaza at the time of the alleged crimes that are the subject of this Dossier, and as such bears individual criminal responsibility for any such crimes committed. In particular, Almog is accused of the following war crimes: wilful killing; wilfully causing serious injury to body or health; and destruction of property.¹

The Israeli authorities have failed to genuinely investigate these credible allegations, to prosecute Almog and/or any other individual responsible, or to provide justice and remedies to the Palestinian victims. Almog has further evaded arrest in other jurisdictions. On 10 September 2005, the Bow Street Magistrates' Court in London issued a warrant for the arrest of Almog who was due to arrive in London on 11 September 2005. Information about the arrest warrant was leaked to the Israeli Embassy and an Israeli military attaché was sent to Heathrow to warn Almog to remain on the plane. Almog refused to leave the plane, remaining onboard for two hours until it departed for a return flight to Tel Aviv.

Almog's successful evasion of justice represents continued impunity for the serious and credible allegations of crimes committed under his command in Gaza. Furthermore, Israel's use of collective punishment, punitive home demolitions, the use of destructive indiscriminate weaponry, such as one-tonne bombs, in attacks that violate fundamental IHL principles of distinction, precaution and military necessity, have been hallmarks of Israel's numerous military assaults on Gaza since that period, and in the current genocidal assault on Gaza today.

¹ *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949, (entered into force 21 October 1950), art 147

2. Doron Almog

Doron Almog was born in 1951 (also known as Doron Avrotzky, alternative spelling Avrutsky),² in Rishon LeZion, Israel.³ Almog, a former Major General, enlisted in the Israeli military in 1969 and served for approximately 34 years until his retirement in 2003.⁴ In 2005, he founded the investment group, Athlone Global Security.⁵ He is currently acting as Chairman of the Executive of The Jewish Agency for Israel as of August 2022.⁶

Almog was promoted to the position of GOC of the Southern Command of the Israeli military on 8 December 2000 and served in this role until 7 July 2003.⁷ In his capacity as GOC of the Israeli military's Southern Command, Almog had command responsibility for the planning and conduct of all military operations in Gaza at the time of the alleged crimes that are the subject of this Dossier.⁸ The Israeli military command structure sets out the level of responsibility for the senior position Almog held at the time of the alleged crimes.⁹



Figure 1 Photo of Doron Almog
Photo: Israeli military Spokesperson's Unit

² Doron Almog Avrutsky, LinkedIn profile, <<https://il.linkedin.com/in/doron-almog-avrutsky-641a125>>, accessed 27 February 2024.

³ Families Album for Rishon LeZion, <<https://gen.rlzm.co.il/en/about-the-album/>>, accessed 27 February 2024.

⁴ Ibid.

⁵ Sharon Shpurer, 'Boom, Crash: The Bizarre Story of Athlone Global Security', *Haaretz*, 1 June 2012, <<https://www.haaretz.com/2012-06-01/ty-article/.premium/boom-crash-the-bizarre-story-of-athlone-global-security/0000017f-df95-d856-a37f-ffd5fad20000>>.

⁶ The Jewish Agency for Israel, 'Doron Almog Embarks on Chairmanship of The Jewish Agency, Visiting 180 Young New Olim on First Day', 21 August 2022, <<https://www.jewishagency.org/doron-almog-embarks-on-chairmanship-of-the-jewish-agency/>>.

⁷ Israel Defense Forces, 'Exchange of Command Ceremony for the GOC Southern Command', News, 7 July 2003, available on request.

⁸ Israel Defense Forces, Regional Commands: Southern Command, <<https://www.idf.il/en/mini-sites/regional-commands/southern-command/southern-command/>>.

⁹ Israel Defense Forces, 'IDF – Organizational Scheme', 16 May 2004, available on request.

3. Almog in Australia

Almog is due to travel to Australia. He will be hosted by the United Israel Appeal Australia (UIA).¹⁰ The UIA is a branch of Keren Hayesod-UAI, the official fundraising organisation for Israel with branches in 45 countries.¹¹ They work closely with The Jewish Agency for Israel, the World Zionist Organisation, the Jewish National Fund (KKL-JNF) and the government of Israel.¹² He is scheduled to speak as a ‘guest of honour’ at the UIA NSW Gala Event ‘Rebuilding the Dream: Uniting Hearts, Rehabilitating Israel’ in Sydney on Sunday 3 March 2024 5:30-8pm, in Melbourne on Wednesday 6 March 2024 7:15-10pm and in Perth on Thursday 7 March 2024 at 6:30pm-9:15pm.¹³

This is Almog’s second trip to Australia having visited in March 2016 for a similar tour, with suspected war criminal and chief architect of Israel’s 2014 military assault on Gaza, Benny Gantz, who is currently serving in the Israeli government’s war cabinet.

4. The Gaza Strip

Gaza is a narrow strip of land, bordered to the west by the Mediterranean Sea, to the south by Egypt and to the north and east by Israel. Together with the West Bank, including East Jerusalem, it is one of the two constituent territories of the OPT — occupied by Israel in 1967 — and of the State of Palestine, accorded non-member observer State status in the United Nations on 29 November 2012.¹⁴

Today’s population of Gaza consists of approximately 2.3 million people, over half of whom are children. 80 per cent of Palestinians in Gaza are refugees — and their descendants — from towns and villages in what is now the State of Israel,¹⁵ expelled or forced to flee during the mass displacement of over 750,000 Palestinians or ‘Nakba’ during the establishment of the State of Israel.¹⁶ The Nakba and the mass displacement associated with it therefore features prominently in the history and consciousness of Palestinians in Gaza, as it does for the wider Palestinian people.

¹⁰ United Israel Appeal Australia, ‘Upcoming Events’, <<https://www.uiaaustralia.org.au/upcoming-events>>, accessed 27 February 2024.

¹¹ Keren Hayesod-United Israel Appeal, ‘Who We Are’, <<https://www.kh-uia.org.il/about-us/>>, accessed 27 February 2024.

¹² United Israel Appeal Australia, ‘About Us’, <<https://www.uiaaustralia.org.au/keren-hayesod-uia>>, accessed 27 February 2024.

¹³ United Israel Appeal Australia, ‘Upcoming Events’, <<https://www.uiaaustralia.org.au/upcoming-events>>, accessed 27 February 2024.

¹⁴ General Assembly resolution 67/19, Status of Palestine in the United Nations, A/RES/67/19 (28 November 2012), <https://digitallibrary.un.org/record/739031/files/A_RES_67_19-EN.pdf>. 82 States had recognised the State of Palestine in 1988, following the transmission of a declaration on the establishment of the State of Palestine by the Palestine Liberation Organization (PLO) to the UN Secretary-General on behalf of the Arab League (Declaration of State of Palestine – Palestine National Council, Letter dated 18 November 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General (18 November 1988), <https://www.un.org/unispal/document/auto-insert-178680/>). The State of Palestine is now recognised by 138 States (Permanent Observer Mission of the State of Palestine to the United Nations New York, Diplomatic Relations, <http://palestineun.org/about-palestine/diplomatic-relations/>).

¹⁵ UNRWA, About UNRWA (2012), <<https://www.unrwa.org/userfiles/2012050753530.pd>>, p. 17.

¹⁶ UN OCHA, ‘Right of return of Palestinian refugees must be prioritised over political considerations: UN experts, Statement, 21 June 2023, <<https://www.ohchr.org/en/statements/2023/06/right-return-palestinian-refugees-must-be-prioritised-over-political>>.

Israel's 'disengagement' in 2005

Until 2005, Gaza was occupied by Israeli military forces on the ground. However, in 2005, Israel unilaterally 'disengaged' from Gaza, dismantling its military bases and relocating Israeli settlers from settlements in Gaza back to Israel and into the occupied West Bank.¹⁷ Notwithstanding its 'disengagement', Israel continues to exercise control over the airspace, territorial waters, land crossings, water, electricity, electromagnetic sphere and civilian infrastructure in Gaza,¹⁸ as well as over key governmental functions, such as the management of the Palestinian population registry for Gaza.¹⁹

Given the continuing effective control by Israel over the territory, Gaza is still considered by the international community to be under belligerent occupation by Israel.²⁰ Entry and exit by air and sea to Gaza has been prohibited since the early 1990s, with Israel operating only two crossing points – Erez (pedestrian) and Kerem Shalom (goods) – through which Palestinians in Gaza could access the West Bank, including East Jerusalem, for business, trade, healthcare and social and family functions.²¹

Israel's illegal blockade and siege

Israel imposed a stringent blockade of Gaza, following Hamas' electoral victory in 2006 that was followed by inter-Palestinian violence, declaring the entire territory to be a 'hostile territory'.²² Existing restrictions on the movement of persons were significantly tightened, with most Palestinians in Gaza being ineligible for permits to travel, leading to prolonged, indefinite separation for many Palestinian families.²³ The few who were eligible to travel did

¹⁷ Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/HRC/50/21, 9 May 2022, para. 16.

¹⁸ GOV.UK Guidance, Overseas business risk: The Occupied Palestinian Territories, 22 February 2022, <<https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories>>, at para. 2.5.

¹⁹ Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/HRC/50/21, 9 May 2022, at para. 16.

²⁰ See e.g., Security Council resolution 1860, S/RES/1860 (2009), 8 January 2009, where the Security Council stressed "that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state," <<https://digitallibrary.un.org/record/645525?ln=en#record-files-collapse-header>> Recently reaffirmed in General Assembly Resolution 77/30, Assistance to the Palestinian People, A/RES/77/30, 6 December 2022, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/729/08/PDF/N2272908.pdf?OpenElement>>. See also, Human Rights Council, Human rights situation in Palestine and the other occupied Arab territories, Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2, 18 March 2019, <https://www.un.org/unispal/wp-content/uploads/2019/06/A.HRC_40.CRP_2.pdf> Security Council resolution 2720 (2023), adopted on 22 December 2023, stresses that "the Gaza Strip constitutes an integral part of the territory occupied in 1967" and reiterates "the vision of the two-State solution, with the Gaza Strip as part of the Palestinian State," <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/424/87/PDF/N2342487.pdf?OpenElement>>.

²¹ Egypt operates a third crossing – the Rafah Crossing – between Gaza and Egypt. UNCTAD, Economic costs of the Israeli occupation for the Palestinian people: the Gaza Strip under closure and restrictions, 13 August 2020, <https://unctad.org/system/files/official-document/a75d310_en_1.pdf>, at paras. 6, 8.

²² Israel Ministry of Foreign Affairs, Security Cabinet declares Gaza hostile territory, 19 September 2007, <<https://www.gov.il/en/Departments/General/security-cabinet-declares-gaza-hostile-territory>>.

²³ General Assembly, Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk A/HRC/49/87, 12 August 2022, <<https://www.un.org/unispal/document/report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territories-occupied-since-1967-report-a-hrc-49-87-advance-unedited-version/>>, para. 42; Norwegian Refugee Council, Legal Memo: Movement between the West Bank and the Gaza Strip, December 2016, <https://www.nrc.no/globalassets/pdf/legal-opinions/legal_memo_movement_between_wb_gaza.pdf>.

“not necessarily receive permits and almost always encounter[ed] delays and difficulties in the process”.²⁴

Between 2007 and 2010, Israel regulated food imports into Gaza in accordance with calories consumed per person, to limit the transfers of food to a ‘humanitarian minimum’, without causing hunger or malnutrition.²⁵ Israel thereafter applied a ‘dual use’ system to imports into Gaza, severely restricting the entry of goods by prohibiting goods considered to be capable of having a dual civilian/military use.²⁶ Israel’s parallel implementation of a wide buffer zone inside Gaza’s eastern border fence (estimated to restrict access to approximately 24 per cent of Gaza) severely impacts internal food supply, by reducing the main agricultural area for farming.²⁷

As long ago as 2015, the United Nations Conference on Trade and Development (UNCTAD) warned that the restrictive measures imposed by Israel risked Gaza becoming uninhabitable by 2020.²⁸

Gaza Genocide of 2024

Following an armed attack by Hamas across areas in the south of Israel on 7 October 2023 which included unlawful targeted attacks against hundreds of Israeli civilians and other nationals, and the unlawful taking of over 200 hostages by Hamas and other Palestinian armed groups, the Israeli military launched an unprecedented military assault against Gaza. In the 130-day period since Israel began its military operations against Gaza, it has killed more than 30,000 people, 70% of whom are women and children.²⁹ Gaza’s 2.3 million people have been subject to one of the most intense aerial bombardment campaigns in history, with no area in Gaza safe. In the first month alone, Israel dropped the equivalent of two nuclear bombs on Gaza.³⁰ Half of Gaza’s population are children and young people under the age of 18. Israel, despite being the Occupying Power in Gaza – which is obligated to provide for the welfare of the protected Palestinians under its control – has withheld, and/or obstructed, the supply of water, food, fuel, electricity, and life-saving humanitarian aid, which has caused catastrophic conditions. These conditions have left the Palestinian population without

²⁴ Human Rights Council, Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2, 18 March 2019, <https://www.un.org/unispal/wp-content/uploads/2019/06/A.HRC_40.CPR_2.pdf>, para 163.

²⁵ United Nations Economic and Social Commission for Western Asia (‘ESCWA’), Palestine Under Occupation III Mapping Israel’s Policies and Practices and their Economic Repercussions in the Occupied Palestinian Territory, E/ESCWA/CL6.GCP/2021/3 (2022), <https://www.un.org/unispal/wp-content/uploads/2022/07/E.ESCWA_CL6_GCP_2021.3_220722.pdf>, p. 38.

²⁶ The World Bank, Economic Monitoring Report to the Ad Hoc Liaison Committee (30 April 2019), <<https://documents1.worldbank.org/curated/en/942481555340123420/pdf/Economic-Monitoring-Report-to-the-Ad-Hoc-Liaison-Committee.pdf>>, p. 4.

²⁷ UNCTAD, Developments in the economy of the Occupied Palestinian Territory (2023), 11 September, TD/B/EX(74)/2, <https://unctad.org/system/files/official-document/tdbex74d2_en.pdf>, para 36; General Assembly, Report prepared by the secretariat of the United Nations Conference on Trade and Development on the economic costs of the Israeli occupation for the Palestinian people: the Gaza Strip under closure and restrictions, A/75/310, 13 August 2020; General Assembly, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/71/554 (19 October 2016), <<https://undocs.org/A/71/554>>.

²⁸ UN News, Global Perspectives and Stories, ‘Gaza could become uninhabitable in less than five years due to ongoing ‘development’’, UN Report, 1 September 2015), <<https://news.un.org/en/story/2015/09/507762>>.

²⁹ OCHA-OPT, ‘Hostilities in the Gaza Strip and Israel | Flash Update #130’, 1 March 2024, <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-130>>.

³⁰ Euro-Med Human Rights Monitor, ‘Israel hits Gaza Strip with the equivalent of two nuclear bombs’, 2 November 2023, <<https://euromedmonitor.org/en/article/5908/Israel-hits-Gaza-Strip-with-the-equivalent-of-two-nuclear-bombs>>.

adequate access to hygiene, sanitation or a functioning health system, which Israel has deliberately targeted and decimated. Palestinians in Gaza are now at serious risk of mass deaths from starvation, dehydration and disease. The UN Secretary-General has warned that “the people of Gaza have reached a breaking point of deprivation and despair. This must end.”³¹

In December 2023, South Africa brought an application at the International Court of Justice (ICJ) against Israel, alleging breaches of the *Convention on the Prevention and Punishment of the Crime of Genocide*³² laying out extensive evidence to support its claims, including in relation to: expulsions; mass displacements and large-scale destruction of homes and residential areas; deprivation of access to adequate food and water; deprivation of access to medical care; deprivation of access to adequate shelter, clothes, hygiene and sanitation; the destruction of the life of Palestinian people in Gaza; and imposing measures intended to prevent Palestinian births.³³ On 26 January 2024, the ICJ issued its decision in South Africa’s request for the indication of provisional measures, finding that there was a plausible case of genocide, and issued a series of orders intended to safeguard the rights of the Palestinian people in Gaza from further irreparable harm.³⁴

5. Belligerent Occupation of Gaza During 2001-2003

According to the eminent international law scholar, Professor Antonio Cassese, there is *no doubt* that Gaza was a territory under ‘belligerent occupation’ at the time the incidents that are the subject of this Dossier occurred. This classification is based on not only the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (the Fourth Geneva Convention) but also the strength of customary international law.³⁵ At the time of all four incidents the subject of this Dossier, the Israeli military were still physically occupying the territory and had not yet enacted their so-called ‘disengagement’, and so as a consequence there is no doubt that the “bulk” of international rules on *occupation bellica* applied.³⁶

The Israeli occupation of Gaza and the West Bank is distinguished from other occupations by its protracted nature. The drafters of the Fourth Convention had considered the protections contained within its provisions necessary to facilitate the short-term administration of a territory under belligerent occupation until the cessation of hostilities.³⁷ It was considered that belligerent occupation would only ever be a ‘temporary state of affairs’.³⁸ The simultaneous existence of armed violence within the OPT further distinguished the Israeli occupation, with, as Cassese explained, ‘Palestinians resorting to... armed action proper

³¹ UN Secretary General, *Letter to President of the UN Security Council, Report on the Implementation of UN Security Council Resolution 2712* (5 January 2024) (Unpublished).

³² *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 276 (entered into force 12 January 1951).

³³ ‘Application Instituting Proceedings and Request for the Indication of Provisional Measures,’ (*South Africa v State of Israel*) (International Court of Justice, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>>.

³⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) Order on Application by South Africa for Provisional Measures (Order on 26 January 2024)* [2024] ICJ Rep 1.

³⁵ Declaration of Professor Antonio Cassese, *Ra’ed Mohamad Ibrahim Matar et. al. v Avraham Dichter, former Director of Israel’s General Security Service*, United States District Court Southern District of New York, 05 Civ. 10270 (WHP), 21 April 2006, at para. 3.

³⁶ *Ibid.*

³⁷ Emily Crawford and Alison Pert, *International Humanitarian Law*, (Cambridge University Press, 2nd ed, 2020), pp. 174-5.

³⁸ *Ibid.*

(against the Israeli troops) and the Israeli army responding by extensively resorting to armed action.³⁹

Various statements made by Israel in September 2005, including by Prime Minister Ariel Sharon to the UN General Assembly, claimed that following the ‘withdrawal’ of the Israeli military, Gaza could *no longer* be considered as occupied territory.⁴⁰ The inference can then be made that even the State of Israel concedes that Gaza was subject to belligerent occupation prior to September 2005.⁴¹ Israeli case law supports this inference.⁴²

Therefore, it is clear that the incidents occurred during a time of armed conflict that is subject to the entire legal framework of IHL, in particular, the Fourth Geneva Convention.



Map 1 Occupied Gaza Strip, 2001 © Jan de Jong

³⁹ Cassese (n 35).

⁴⁰ Ibid, at para. 4.

⁴¹ Ibid.

⁴² See the decision of the Supreme Court of Israel sitting as High Court of 10 April 1988, on three cases of deportation from the Gaza Strip of the West Bank, HC 785/87, HC 845/87, HC 27/88, in 29 *International Legal Materials* (1990), 139-181, taken from Cassese (n 33) at para. 6.

B. Allegations Against Almog

1. Murder of Three Boys Through the Use of Flechette Weaponry in December 2001

Factual background

At 17:40 on 30 December 2001, an Israeli army tank positioned close to the ‘Elli Sinai’ settlement north of Beit Lahiya, fired four artillery shells into a Palestinian agricultural area under the control of the Palestinian National Authority (PNA) located approximately 1200m south of the Elli Sinai settlement.⁴³ Moments after the artillery shells were fired, the Israeli military opened fire with heavy and medium machine guns.⁴⁴ It was during this attack that the three victims, Mohamad Abd Elrahman Al Madhoun aged 16, Ahmad Mohammad Banat aged 15 and Mohamad Ahmad Lobad aged 17, were killed.⁴⁵

Approximately half an hour later, the Israeli military announced they had killed three ‘gunmen’ who were attempting to enter the Elli Sinai settlement.⁴⁶ The Israeli military then later claimed the three children were attempting to plant bombs in the vicinity of the settlement, and a further statement claimed that the children were armed with knives.⁴⁷ At the time, the Israeli authorities did not issue any further information regarding the ages or identity of the victims and did not release their bodies.⁴⁸

On the evening of 30 December 2001, three families from the Sheikh Radwan neighbourhood contacted the Palestinian Centre for Human Rights (PCHR), regarding the disappearance of three of their children as they were returning home from visiting friends in Beit Lahiya.⁴⁹ As there were fears that the three children may have been the victims of the Israeli military attack near Beit Lahiya, PCHR contacted the Israeli military legal adviser through an Israeli lawyer.⁵⁰ PCHR requested the release of the three bodies to the PNA for their immediate identification, and demanded that the Israeli military investigate the incident.⁵¹

There was no immediate investigation conducted by the Israeli military, however the bodies were initially taken by the Israeli military to the L. Greenberg National Institute of Forensic Medicine (also known as the Abu Kabir Forensic Institute)⁵² where they conducted post mortems without the approval of the family or a court order.⁵³ The bodies of the three boys were eventually released to the PNA. An autopsy conducted by Palestinian officials indicated that the bodies had been mutilated by flechettes (pointed, fin-stabilized steel projectiles

⁴³ Palestinian Centre for Human Rights, ‘New evidence in case of three Palestinian children unlawfully killed by Israeli forces’, Press Release Ref: 11/2002, 30 January 2002, <<https://pchrgaza.org/en/new-evidence-in-case-of-three-palestinian-children-unlawfully-killed-by-israeli-forces/>>.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid, p.120.

⁵³ Ibid.

contained inside the artillery shells)⁵⁴ and that one of the bodies had been trampled by a large vehicle.⁵⁵ In the post mortem reports, the flechette arrows are described as having the form of a black metal arrow with one end sharpened, and at the other end, four metal flanges.⁵⁶ The post mortem reports show that the three boys were hit by many dozens of arrows on various parts of their bodies. There were entrance wounds in the backs of all three boys, suggesting they were fired upon while walking away from the direction of the tank.⁵⁷

The Public Committee against Torture in Israel (**PCATI**) and Physicians for Human Rights – Israel (**PHR**) advocated on behalf of PCHR within Israel, applying pressure internally for an investigation. As a result of this pressure, the Israeli Parliamentary Foreign Affairs and Defense Committee, a permanent Knesset committee, held a session on 22 January 2002 to address the incident, with members of PCATI and PHR in attendance.⁵⁸

The Director of the Abu Kabir Forensic Institute stated before the Committee that the victims died from injuries inflicted by the flechettes and confirmed that one of the bodies had been run over by a tank.⁵⁹ Colonel Ghannem (also known as Rannam) Hamada, Commander of the Northern Gaza Strip District Brigade responsible for the attack, also spoke before the Committee, and confirmed that the officer in command of the tank fired four artillery shells at the three children, after which one of the bodies was run over by a tank. The artillery shells contained flechettes which were found scattered as far as 100m away from the point of impact of the shells.⁶⁰

In video footage presented to the Committee by the Israeli military, it was clear that the children were positioned at a significant distance from the position of the Israeli army tanks. Dr Ruhama Marton, President of PHR, attended the session and has given evidence in a sworn statement that the video footage screened at the session showed the three boys walking away from the army tank when it fired the four artillery shells at them.⁶¹ This evidence aligns with the post mortem reports which found numerous entry wounds in the backs of all three boys caused by the flechettes contained in the artillery shells. PCHR also noted that as the children were fired on from such a notable distance, they could not have posed any threat to the Israeli military at that time.⁶² There were no attempts by the Israeli military to arrest the children before firing artillery shells at them, nor to use less lethal force.⁶³

The Israeli military claimed the three children were armed with knives, however the video footage showed to the Committee reaffirmed that the children were unarmed, and there

⁵⁴ Amnesty International, 'Israeli army used flechettes against Gaza civilians', 27 January 2009, <<https://www.amnesty.org/en/latest/news/2009/01/israeli-army-used-flechettes-against-gaza-civilians-20090127/>>; Eitan Barak, 'Deadly Metal Rain: The Legality of Flechette Weapons in International Law', *International Humanitarian Law Series*, Volume: 32, Brill Nijhoff Publishers, pp. 121,129.

⁵⁵ Ibid; Palestinian Centre for Human Rights (n 43).

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid pp. 121,129.

⁵⁹ Palestinian Centre for Human Rights (n 43).

⁶⁰ Ibid.

⁶¹ Witness Statement of Dr Ruhama Marton, President of Physicians for Human Rights Israel, available on request; Barak (n 54).

⁶² Palestinian Centre for Human Rights (n 38).

⁶³ Ibid.

were only one or possibly two knives found near their bodies.⁶⁴ Their families believe these knives to have been fruit knives, not weapons.⁶⁵

Grave breaches analysis

While there is no evidence that Almog was present, or that he ordered the brigade to shoot at the three boys, Almog undeniably held command responsibility for all military operations in Gaza as GOC of the Israeli military's Southern Command at the time of the incident. In fact, Colonel Ghannem Hamada attended the Israeli Parliamentary Foreign Affairs and Defense Committee session on 22 January 2002 as a representative of Almog.⁶⁶ Some members of the Committee had never heard of flechette weapons, referring to them as "winged nails".⁶⁷ As a result, Hamada was motivated to explain flechette weaponry to the Committee, and publicly admitted to the Committee that the artillery shells used in the attack were indeed flechette shells.⁶⁸ This was the first time a senior Israeli military member publicly confirmed the Israeli military's use of this weapon.⁶⁹ It was Almog, as GOC of the Southern Command, who bore ultimate responsibility for the decision as to which weapons were used by the Israeli military in Gaza.⁷⁰

Following media coverage of the Committee meeting, an in-depth Israeli investigative news article included testimony from Israeli tank crews active in Gaza that, "flechette is quite broadly used in the Gaza Strip."⁷¹

On 23 October 2002, the PCHR and PHR filed a petition (the **Petition**) with the Israeli Supreme Court sitting as a High Court of Justice (the **Israeli Supreme Court**) against Almog and the State of Israel, Minister of Defense.⁷² The Petition requested an order to prohibit the Israeli military's use of flechette shells during military operations in Gaza.⁷³ The Petition noted that:

unchallenged publications state that at the beginning of 2001, as the conflict intensified, the decision was made by the Southern Command to recommence use of the Flechettes. The Central Command, by contrast, decided that the use of the Flechette shells in a densely-populated area such as the West Bank was dangerous.⁷⁴

This statement was not denied by the lawyer for the State of Israel.

⁶⁴ Ibid.

⁶⁵ Witness Statement of Dr Ruhama Marton (n 61).

⁶⁶ Barak (n 54) p. 121.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Meron Rapoport, "They Walked in the Fields", *Yedioth Ahronoth*, (Weekend Magazine), 8 March 2002, at 2 (in Heb.): "A tank crewman testified that during his three-month tour of duty in the Southern Gaza Strip, he fired only three flechette rounds, as opposed to 30 "regular" rounds. However, he stated that "tanks stationed closer to the Strip demarcation fence fired many more."

⁷² Barak (n 54) p.129.

⁷³ Ibid.

⁷⁴ *Physicians for Human Rights and The Palestinian Center for Human Rights v Doron Almog – OC Southern Command and The State of Israel – Minister of Defence*, Supreme Court of Israel sitting as the High Court of Justice, HCJ 8990/02, 27 April 2003 (PHR and PCHR v Doron Almog), available in English here: <<https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Physicians%20for%20Human%20Rights%20v.%20Almog.pdf>>.

Almog was directly named as respondent to the Petition which specifically addressed the killing of the three boys with flechette shells, due to his command responsibility over Israeli military operations inside Gaza, as GOC of the Southern Command.

It is alleged that as a result of the above evidence, Almog held command responsibility for the wilful killing of Mohamad Abd Elrahman Al Madhoun aged 16, Ahmad Mohammad Banat aged 15 and Mohamad Ahmad Lobad aged 17, who were killed with flechette artillery shells while walking home from Beit Lahiya on 30 December 2001. The decision of Almog as GOC of the Israeli military's Southern Command to use flechette weaponry during Israeli military operations in Gaza is in direct breach of the fundamental IHL principles of distinction and the prohibition on causing unnecessary suffering and superfluous injury through the use of indiscriminate means and methods of warfare.

Controversial Israeli use of flechette weaponry

Both Amnesty International and Human Rights Watch have described flechette artillery shells as a type of anti-personnel weapon that is generally fired from a tank and is designed to penetrate dense vegetation.⁷⁵ Once the shell explodes in the air it releases a spray of thousands of razor-sharp metal darts 37.5mm in length, which disperse in a conical arch 300 metres long and about 90 metres wide.⁷⁶

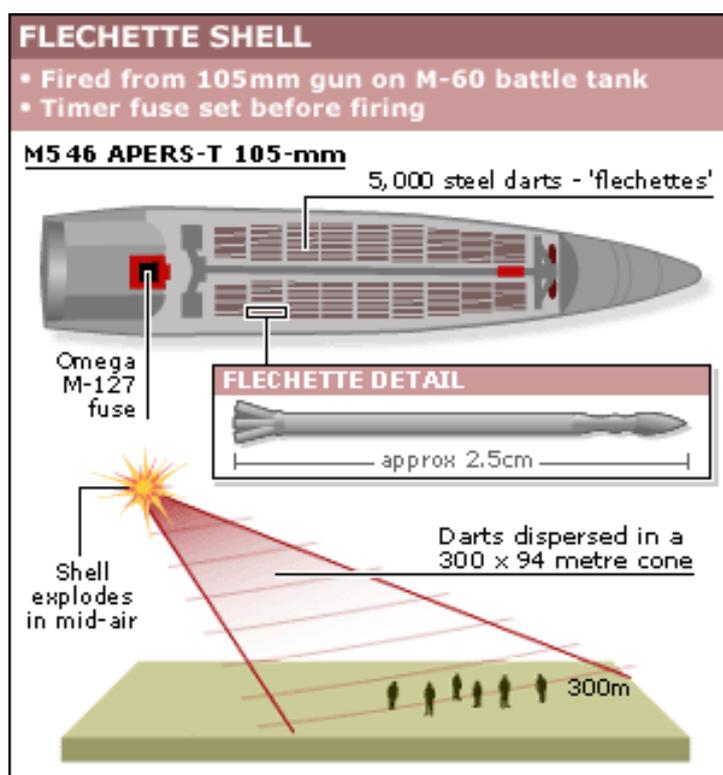


Figure 2 Impact of Flechette Shell and 5,000 Steel Darts (Source: BBC News, 2002)

⁷⁵ Amnesty International, 'Israeli army used flechettes against Gaza civilians', 27 January 2009, <<https://www.amnesty.org/en/latest/news/2009/01/israeli-army-used-flechettes-against-gaza-civilians-20090127/>>.

⁷⁶ Human Rights Watch, 'Israel: Stop Using Flechettes in Gaza', Press Release, 28 April 2003, <<https://www.hrw.org/news/2003/04/28/israel-stop-using-flechettes-gaza#:~:text=The%20Israeli%20army%20should%20immediately,intolerably%20high%20under%20international%20law.>>; Harriet Sherwood, 'Israel using flechette shells in Gaza', *The Guardian*, 20 July 2014, <<https://www.theguardian.com/world/2014/jul/20/israel-using-flechette-shells-in-gaza>>.

While flechette munitions are not specifically prohibited under IHL, it is clear that fundamental principles of IHL render their use in a densely civilian populated area such as Gaza, illegal. One of the most fundamental principles of IHL is the obligation to distinguish between civilians and combatants.⁷⁷ This fundamental principle of distinction is extended into a prohibition against indiscriminate attacks, meaning armed forces cannot use weapons that do not (or are unable to) distinguish between civilians (who have protected status) and legitimate military objectives. In addition, armed forces are required to take *all feasible precaution* to minimise harm to civilians when choosing method and means of attack, to the furthest extent possible.⁷⁸

PCHR, B'tselem, Human Rights Watch, Amnesty International and other organisations have documented multiple civilian deaths in Gaza as a result of Israeli army use of flechette artillery shells.⁷⁹ While documenting these incidents, human rights organisations have recognised a sustained Israeli military policy of continued use of this weapon in a context inconsistent with the prohibition of indiscriminate attacks.⁸⁰ The number of darts contained inside an individual shell, combined with the large 90-metre-wide 'kill radius', make flechettes a particularly deadly weapon and furthermore, make it impossible to ensure their precise and discriminate, targeted use as required by customary law.

On 28 April 2003, in a press release, Hanny Megally, former executive director of the Middle East and North Africa Division of Human Rights Watch, stated:

Flechettes may not be banned outright, but they should never be used in areas where there are large numbers of civilians. The Israeli Army doesn't use them in the West Bank because of potential risks to civilians. It makes no sense to keep using them in Gaza, one of the most densely-populated areas on earth.⁸¹

At the time of the incident, Gaza had a population density of some 3,273 persons per square kilometre – eleven times that of the West Bank, with Palestinian residential areas, Israeli settlements, and Israeli military installations existing in close proximity.⁸²

⁷⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 48. Note that while Israel has not signed the First Additional Protocol, these fundamental principles form the basis of customary international humanitarian law, see Henckaerts, J.M., *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, IRRC, Volume 87, No. 857, March 2005, pp.198-212, Annex: List of Customary Rules of International Humanitarian Law, CIHL Rules 1 and 7.

⁷⁸ Ibid.

⁷⁹ PCHR and PHR v Almog (n 74); Amnesty International (n 75); Human Rights Watch (n 76).

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

2. Punitive Home Demolitions of Block O, Rafah Refugee Camp in January 2002

Factual background

In the late evening of 10 January 2002, two Israeli military bulldozers accompanied by several Armoured Personnel Carriers and tanks⁸³, demolished 59 homes in Block O of the Rafah Refugee Camp, located just outside of Rafah City, Gaza, without giving the occupants any prior warning, with no chance to appeal the demolition order, and no chance to properly evacuate.⁸⁴

Abdul Salam Mahmoud Dhib Matar testified that at approximately 01:30 on 10 January 2002, he woke up to hear neighbours banging on his door to alert him of the approaching tanks and bulldozers.⁸⁵ There was no warning given by the Israeli military to the occupants of the homes and there was nothing to indicate that house demolitions were imminent. Mr Matar and his family, along with their neighbours, evacuated their homes after which the buildings were immediately levelled.⁸⁶ Mr Matar and his family had lived at the site since 1948 following their displacement during the Nakba.⁸⁷ The original house was built of mud and was subsequently rebuilt from brick and concrete in 1974. This house was completely destroyed during the demolitions along with all of its contents.⁸⁸

Mr Matar testified that after taking his family to a safe location, he returned to Block O where he saw several Israeli bulldozers demolishing different homes at the same time.⁸⁹ UNRWA provided emergency assistance to 450 refugees who were made homeless by the demolitions.⁹⁰ An ICRC press release published on the 24 January 2002, confirmed that up to 100 families were made homeless by the demolitions.⁹¹

It is alleged that the homes were demolished as a form of collective punishment, for the death of one Israeli military captain and three Israeli soldiers during an attack on a military post on 9 January 2002.⁹² On 11 January 2002, the Israeli military announced that their actions in Rafah were in response to a 'terrorist attack that killed an IDF officer and three soldiers' and

⁸³ UNRWA Press Release, 'Occupied Palestinian territory: IDF demolitions at Rafah – UNRWA assistance to homeless refugees', 14 January 2002, <<https://reliefweb.int/report/occupied-palestinian-territory/occupied-palestinian-territory-idf-demolitions-rafah-unrwa>>.

⁸⁴ Ibid.

⁸⁵ Palestinian Centre for Human Rights and Hickman Rose, 'British police failed to arrest Israeli war criminal', *The Electronic Intifada*, 21 February 2008, <<https://electronicintifada.net/content/british-police-failed-arrest-israeli-war-criminal/3321>>; Sworn Statement of Abdul Salam Mahmoud Dhib Matar, 29 April 2002, available on request.

⁸⁶ ICRC News Release, 'Israel and the autonomous/occupied territories: Aftermath of the recent destruction of homes in Rafah', Release 02/04, 24 January 2002, <<https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/57jrkk.htm>>; UNRWA Press Release (n 78).

⁸⁷ Sworn Statement of Abdul Salam Mahmoud Dhib Matar, 29 April 2002, available on request.

⁸⁸ Ibid.

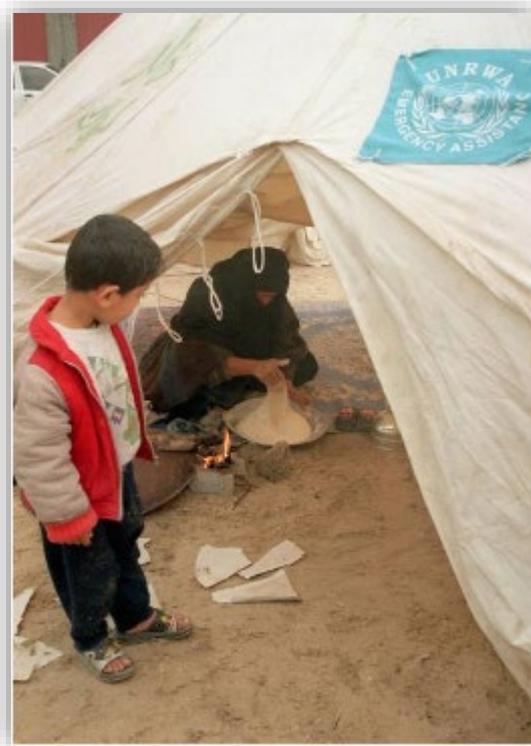
⁸⁹ Ibid.

⁹⁰ UNRWA Press Release (n 83).

⁹¹ ICRC News Release (n 86).

⁹² Israel Defense Forces, 'An IDF Officer and three soldiers were killed on an attack on an IDF position in the South Gaza Strip', Announcements, 9 January 2002, available on request; Vikram Dodd and Conal Urquhart, 'Israeli evades arrest at Heathrow over army war crime allegations', *The Guardian*, 12 September 2005, <<https://www.theguardian.com/uk/2005/sep/12/israelandthepalestinians.warcrimes>>; BBC, 'Israel general avoids UK arrest', 12 September 2005, <http://news.bbc.co.uk/2/hi/uk_news/4237620.stm>.

in response, 'the IDF forces operated in a number of sites in the south of the Gaza strip.'⁹³ Almog is alleged to have personally ordered the demolition of 59 civilian Palestinian homes in Block O of the Rafah Refugee Camp.



*Figure 3 Palestinians made homeless following the destruction of their homes, living in tents provided by UNRWA
Photo: Mohammed Abed/AFP via Getty Images*

On 12 January 2002, during an interview on Israeli television program 'Meet the Press', Almog confirmed that he ordered the home demolitions as a punitive measure in response to the death of the four Israeli soldiers on 9 January 2002 after he was directly asked by the interviewer to discuss the so-called 'retaliations' (the home demolitions).⁹⁴ In the interview, Almog further confirms his responsibility for the demolitions:

I want to say that we are aware of international law. As a military commander I am faced with security needs when I have to decide on a demolition of this sort. The military necessity is paramount. The necessity to provide defense and security to the IDF soldiers operating in this area is my responsibility.⁹⁵

In several press releases, the Israeli military spokesperson also claimed the demolished homes were uninhabited at the time of their destruction.⁹⁶ During his appearance on 'Meet the Press', Almog repeated the Israeli military's false claim that the demolished houses had

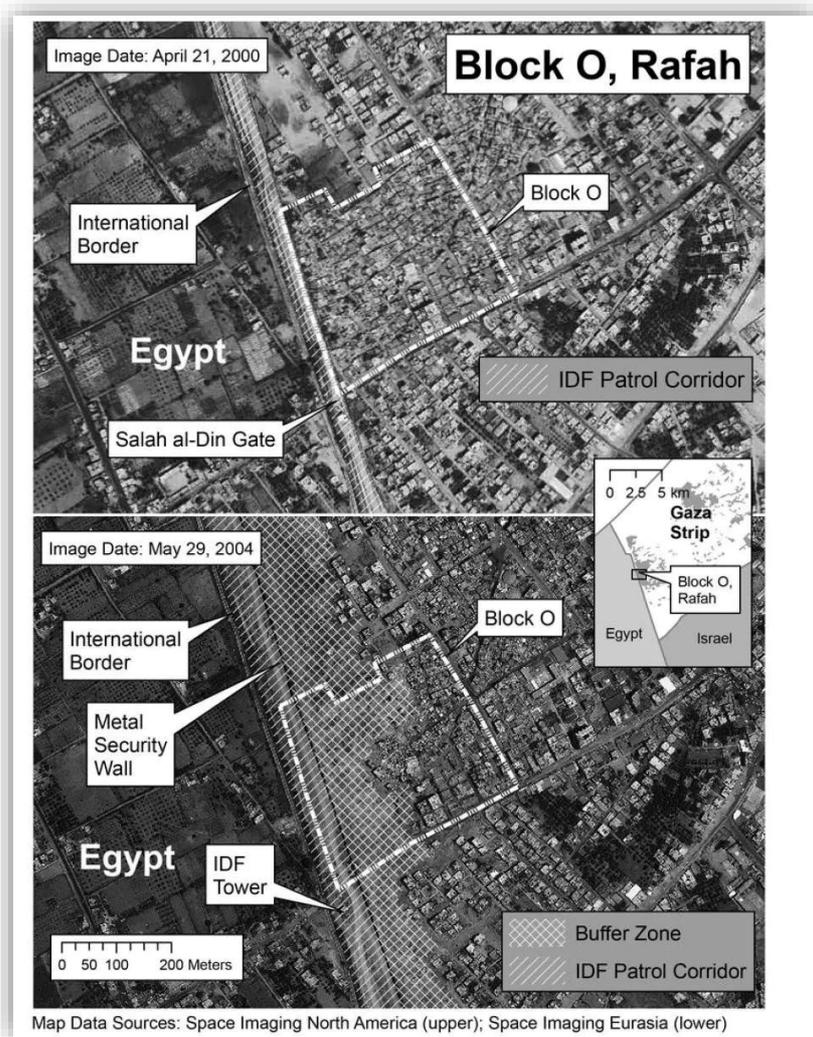
⁹³ Israel Defense Forces, 'IDF activity in Rafah last night', Announcements, 11 January 2002, available on request.

⁹⁴ Rough Transcript of Israeli Television Program 'Meet the Press', Interviewee: Doron Almog, Commander of Southern Command, 12 January 2002, available on request.

⁹⁵ Ibid.

⁹⁶ Sara Leibovich-Dar, 'Half-truths and Double-talk', *Haaretz*, 23 January 2002, <<https://www.haaretz.com/2002-01-23/ty-article/half-truths-and-double-talk/0000017f-e28d-d75c-a7ff-fe8d953b0000>>.

been abandoned for three months at the time of their destruction.⁹⁷ However, the above-mentioned press releases from the ICRC and UNRWA clearly repudiate this claim. Additionally, the Israeli newspaper *Ha'aretz* published first-hand accounts from Danish and Swedish journalists who witnessed the immediate destruction of the demolitions and saw civilians searching through the rubble of their homes in an attempt to salvage their possessions.⁹⁸



Map 2 Block O, Rafah Refugee Camp Source: Human Rights Watch

Grave breaches analysis

The demolition of homes located at Block O, Rafah Refugee Camp clearly constituted a grave breach of the Fourth Geneva Convention according to Article 147, that is, the demolitions were an *extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly*.⁹⁹ The ICRC Commentary of the Fourth Geneva Convention discusses this specific grave breach and points to Article 53 for further guidance with respect to the destruction of property by Occupying Powers.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Fourth Geneva Convention (n 1) art 147.

According to Article 53, it is not permitted for Occupying Powers to destroy real or personal property belonging individually or collectively to private persons in occupied territory, except in cases where the destruction is ‘rendered absolutely necessary by military operations’.¹⁰⁰ According to the ICRC Commentary on the Fourth Geneva Convention, the explicit intention of the drafters of Article 53 had been to protect civilians by ensuring that *property in their individual possession and which was necessary to their survival* – listing specifically *houses*, as well as food, clothing, tools, transport, property necessary for their employment – were protected from unnecessary destruction through this provision.¹⁰¹ The ICRC Commentary notes that the provision specifically refers to *destruction*, as opposed to other actions like requisition, or confiscation of property.¹⁰²

In notes on Article 147, the ICRC Commentary further stipulates that for it to be considered a *grave breach*, the destruction must be *extensive* rather than an isolated incident.¹⁰³ It is clear that the complete levelling of 59 houses located in Block O of Rafah Refugee Camp by the Israeli military as the Occupying Power, constituted extensive, systematic and intentional ‘destruction’ of property ‘necessary to the survival’ of the civilian property owners, including Mr Matar.

According to a policy brief from Harvard University to the United Nations Information System on the Question of Palestine (**UNISPAL**),¹⁰⁴ Article 53 implies the following conditions must be met, in order for the destruction of property to be considered justified by reason of military necessity, as argued by the Israeli military. Firstly, the Occupying Power must be *actively* engaged in a military operation requiring the use of armed force.¹⁰⁵ That is, an Occupying Power is not permitted to demolish houses as part of a law enforcement operation, for instance as a form of riot control.¹⁰⁶ For an intervention to qualify as a ‘military operation’, the Occupying Power must demonstrate that the use of military force was “warranted by the circumstances at the time, that it was facing systematic and organised lethal violence equivalent to one faced in an armed conflict”.¹⁰⁷ The policy brief further outlines that absolute military necessity in the context of home demolitions requires the following elements to be fulfilled:

- 1) The individual house was offering an essential and immediate contribution to the enemy's military operation and was, therefore, endangering the security of the occupation forces;
- 2) The demolition of the house was, at the time, an adequate response to that specific threat and there was no less intrusive response possible;

¹⁰⁰ Ibid, art 53.

¹⁰¹ Jean S. Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC Commentary), International Committee of the Red Cross, 1958, art 53.

¹⁰² Ibid.

¹⁰³ Ibid, art 147.

¹⁰⁴ Harvard Humanitarian Initiative, ‘The Legality of House Demolitions Under IHL’, HPCR 5/2004, 31 May 2004. <https://reliefweb.int/report/israel/opt-legality-house-demolitions-under-international-humanitarian-law>.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

- 3) The demolition of the house offered concrete military advantages that outweigh the damage caused to the civilian asset and its consequences on the life of Palestinian individual and families.¹⁰⁸

It is clear that the Israeli military was *not* involved in an ongoing military operation with the families residing in the houses of Block O, Rafah Refugee Camp at 1:30am on 10 January 2002. That is, the actions of the Israeli military were not in response to any immediate and specific threat emanating from the homes in question, rather they were a retributive response to the killings of Israeli soldiers by other actors the previous day. Therefore, following the Article 53 conditions for military necessity above, it is evident that the Israeli military home demolition ‘response’ was undeniably excessive and intrusive, and in no way an ‘adequate’ response to a ‘specific threat’. There is no doubt, that the very real consequences of this action were not proportional to any anticipated concrete military advantage for the Israeli military.¹⁰⁹

Wider Israeli policy of punitive home demolitions as ‘clearing actions’

The specific incident that occurred at Block O, Rafah Refugee Camp on 10 January 2002 was part of a wider Israeli practice termed as “clearing actions”, where hundreds of Palestinian homes were demolished, thousands of trees uprooted and thousands of acres of agricultural land destroyed, primarily in Gaza.¹¹⁰ The Israeli military’s Chief of Staff was directly quoted in a report on the Israeli military practice of house demolitions in Gaza as saying, “the D-9 [bulldozer] is a strategic weapon here.”¹¹¹

Part of this strategy was the destruction of Palestinian property for the creation of buffer zones, or what was termed ‘security strips’, near where Israeli military posts or Israeli settlements were located.¹¹² According to B’tselem, Israeli officials explicitly admitted that this was the purpose underlying the demolition of dozens of houses in Block O of the Rafah Refugee Camp.¹¹³ Following the incident in January 2002, the former OC of Israeli military’s Southern Command, Yom Tov Samiah, stated that:

these houses should have been demolished and evacuated a long time ago, because the Rafah border is not a natural border, it cannot be defended... Three hundred meters of the Strip along the two sides of the border must be evacuated... Three hundred meters, no matter how many houses, period.¹¹⁴

The Israeli military has never contended that their policy of property destruction only targets individuals who were themselves involved in attacks, or attempted attacks, against either Israeli civilians or combatants.¹¹⁵ In fact, for the incident at Block O, Rafah Refugee Camp, the

¹⁰⁸ Ibid.

¹⁰⁹ The ‘principle of proportionality in attack’ is an underlying principle of International Humanitarian Law (IHL) and is codified at Article 51(1)b of the First Additional Protocol, see First Additional Protocol (n 77). While Israel is not a party to the First Additional Protocol, this notion of proportionality is taken so seriously that it is said to be one of the ‘fundamental’ principles of IHL, and it has become part of customary law, see Henckaerts (n 77), CIHL Rule 14.

¹¹⁰ B’Tselem, ‘Policy of Destruction: House Demolitions and Destruction of Agricultural Land in the Gaza Strip’, February 2002, <https://www.btselem.org/sites/default/files/sites/default/files2/publication/200202_policy_of_destruction_eng.pdf>, p.3.

¹¹¹ Amos Harel, ‘This Time, the Chief of Staff Keeps His Lips Sealed’, *Ha’aretz*, 28 December 2000.

¹¹² B’Tselem (n 110).

¹¹³ Ibid.

¹¹⁴ Voice of Israel, ‘Another Matter’, 16 January 2002, in B’Tselem (n 110) p.6.

¹¹⁵ B’Tselem (n 110) p.4.

Israeli military confirmed that the individuals responsible for the killing of the four Israeli soldiers on 9 January 2002 were also killed that same day.¹¹⁶ As a result, the Israeli policy of home demolitions can be understood as a form of collective punishment. Collective punishment is designed as an intimidatory measure to terrorise the Occupied population and is viewed as a serious violation of IHL. It is universally accepted that reprisals against protected persons (and their property) are contrary to the Fourth Geneva Convention concerning the protection of civilian persons in time of war, which states that, “no protected person may be punished for an offence he or she has not personally committed”.¹¹⁷ In addition, Article 50 of The Hague Regulations of 1907 contains a prohibition on such conduct.¹¹⁸

The ICRC Commentary specifically states that in the context of Occupation, responsibility is *personal*, that is, it is against the Convention to inflict penalty or punishment on individuals who have not themselves committed the acts subject to complaint.¹¹⁹ The Commentary considers that the Article 33 prohibition on reprisals is, “absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity.”¹²⁰

In addition to violations of the Fourth Geneva Convention, the Special Rapporteur for the UN Commission on the question of the violation of human rights in the OPT, Mr John Dugard, who visited the site of the demolished houses of Block O in February 2002, concluded that:

The practice of house demolitions has serious legal consequences. First, it may, according to the Committee against Torture, in certain instances amount to cruel, inhuman or degrading treatment or punishment in breach of article 16 of the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, which Israel ratified in 1991 (Conclusions and recommendations of the Committee against Torture of November 2001 on the third periodic report of Israel).¹²¹

3. Extrajudicial Assassination of Salah Shehadeh in al-Daraj in July 2002

Factual background

Almog, amongst others,¹²² is alleged to have held command responsibility for the operation to extrajudicially assassinate Salah Shehadeh, Commander of the armed wing of Hamas.¹²³

¹¹⁶ Ibid.

¹¹⁷ Fourth Geneva Convention (n 1) article 33.

¹¹⁸ Second International Peace Conference, *Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (Hague Regulations), International Conferences (The Hague), 18 October 1907, (entered into force 26 January 1910), article 50.

¹¹⁹ ICRC Commentary (n 101) article 33.

¹²⁰ Ibid.

¹²¹ Human Rights Council, ‘Report of the Special Rapporteur for the UN Commission on the question of the violation of human rights in the Palestinian Territories’, E/CN.4/2002/32, 6 March 2002, <<https://reliefweb.int/report/israel/report-special-rapporteur-commission-human-rights-situation-human-rights-palestinian>>, pp. 29-32.

¹²² Court Order, *Ra’ed Mohammed Ibrahim Mattar et. Al. v Dan Halutz, Benjamin Ben-Eliezer, Doron Almog et al.*, Central Magistrates Court No. Four, Audiencia Nacional (Spanish national Court of Justice), Preliminary Report no: 157/2.008-G.A., available in English here: <https://www.fidh.org/IMG/pdf/admission_order_propery_translated-1.pdf>.

¹²³ Palestinian Centre for Human Rights, ‘PCHR Submits Lawsuit against Israeli Officials via Spanish National Court’, Ref 57/2008, 25 June 2008, <<https://pchrghaza.org/en/pchr-submits-lawsuit-against-israeli-officials-via-spanish-national-court-2/>>.

During this operation, the Israeli military Southern Command used an F-16 fighter jet to drop a one-tonne laser guided bomb onto an apartment building in al-Daraj, a densely populated residential neighbourhood of Gaza City, between 11.30pm and midnight on the 22 July 2002 (the **al-Daraj bombing**).¹²⁴

Together with Salah Shehadeh, 14 civilians including eight children (a two-month-old infant), two elderly men, and two women, were killed.¹²⁵ Shifa Hospital reported that more than 140 civilians were injured by the blast, 15 with extremely serious injuries.¹²⁶ Eleven civilian homes were completely destroyed, and 32 civilian homes damaged, with an area approximately half the size of a city block completely leveled.¹²⁷ The large scale civilian death and destruction of civilian objects caused by the attack is attributed to the size of the bomb used by the Israeli military (the second largest in the Israeli arsenal), the timing of the strike and because al-Daraj is one of the most densely populated residential areas on earth.¹²⁸

The Chief of Operations for the Israeli military, General Dan Harel, stated that the operation was “a precision attack”¹²⁹, echoed by Ariel Sharon who initially referred to it as “one of our great successes”¹³⁰ in a statement to the Israeli Cabinet. When questioned by the United Nations Security Council (**UNSC**), Israel did not deny the severity of the damage caused by the al-Daraj bombing and instead, sought to justify the attack as part of the wider Israeli policy of ‘targeted killings’.¹³¹

However, The New York Times reported that other Israeli military officials felt they had, “badly miscalculated the scale of the collateral damage.”¹³² This was confirmed by the transcript of the UNSC meeting on 24 July 2002, where Israel did admit to the Council that they had not considered the extent of the collateral damage that could eventuate from the use of a one-tonne bomb in a high density residential neighbourhood.¹³³ Israel claimed they had not considered the potential extent of the collateral damage that could be caused by such an operation, despite planning the strike on al-Daraj in advance, with the decision to deliberately target such a densely populated residential neighbourhood at a time in the evening when it could reasonably be expected that many civilians would be present in their homes.

¹²⁴ Machover D. and Maynard K., ‘Prosecuting Alleged Israeli War Criminals in England and Wales’, *The Denning Law Journal*, p.109; David E. Sanger, ‘Bush Denounces Israeli Airstrike as Heavy Handed’, *The New York Times*, 24 July 2002, <<https://www.nytimes.com/2002/07/24/world/bush-denounces-israeli-airstrike-as-heavy-handed.html>>.

¹²⁵ David E. Sanger, ‘Bush Denounces Israeli Airstrike as Heavy Handed’, *The New York Times*, 24 July 2002, <<https://www.nytimes.com/2002/07/24/world/bush-denounces-israeli-airstrike-as-heavy-handed.html>>.

¹²⁶ John Kifner, ‘Gaza Mourns Bombing Victims; Israel Hastens to Explain’, *The New York Times*, 24 July 2002, <<https://www.nytimes.com/2002/07/24/world/gaza-mourns-bombing-victims-israel-hastens-to-explain.html>>.

¹²⁷ *Ibid.*

¹²⁸ Machover and Maynard (n 124) p.109.

¹²⁹ David. E Sanger (n 125).

¹³⁰ CNN, ‘Sharon praises airstrike ‘success’’, 23 July 2002, <<https://edition.cnn.com/2002/WORLD/meast/07/23/mideast.reaction/index.html>>.

¹³¹ *Ibid.*

¹³² David. E Sanger (n 125).

¹³³ UN Security Council, 4588th Meeting Official Records, ‘Agenda: The situation in the Middle East, including the Palestinian question’, 57 UN SCOR (4588th mtg), UN Doc S/PV.4588, 24 July 2002.



*Figure 4 Children injured from one tonne bombe air strike on al-Daraj
Photo: © Abid Katib/Getty Images*

Yesh Gvul, an Israeli pacifist movement brought a petition to the Israeli Supreme Court regarding the incident.¹³⁴ The State Attorney of Israel, as respondent, maintained that the assassination of Shehadeh was lawful and that the bombing of al-Daraj was proportionate to the military objective of killing Shehadeh.¹³⁵ In the response, the State Attorney confirmed that:

This decision was taken at the highest level, having described the importance of stopping the activity of Shehadeh, despite the information and estimates of the damages to other people, which may be caused as a result of the attack.¹³⁶

It is clear that due to the position of Almog as GOC of the Israeli Southern Command at the time of al-Daraj bombing, he was part of the command chain, at ‘the highest level’ responsible for the attack.

¹³⁴ *Yoav Hass et al v The Judge Advocate General et al*, HCJ 8794/03, 23 December 2008, available in English here: <<https://www.yumpu.com/en/document/view/21436436/hcj-8794-03-geneva-academy-of-international-humanitarian-law->>.

¹³⁵ *Ibid*; See Response on Behalf of the State Attorney’s Office.

¹³⁶ *Ibid*; See Response on Behalf of the State Attorney’s Office (translation from Hebrew, emphasis in the original) in Machover and Maynard (n 124).



*Figure 5 Hana Matta, mother of two-month-old Dina, who was killed, tries to recover the clothes of her baby from the rubble outside her destroyed house in Gaza City.
Photo: © Quique Kierszenbaum/Getty Images*

International outcry

UN Secretary General Kofi Annan issued an immediate statement on 22 July 2002, where he deplored the air strike in al-Daraj. He stated that, “Israel has the legal and moral responsibility to take all measures to avoid the loss of innocent life”¹³⁷ and that Israel, “clearly failed to do so in using a missile against an apartment building.”¹³⁸ He urged Israel to conduct itself fully in accordance with international humanitarian law, which suggests that Annan considered this attack in breach of the Geneva Conventions.¹³⁹

On 23 July 2002, the ICRC issued a press release concerning the al-Daraj bombing which stated, “attacks against civilians, indiscriminate attacks as well as reprisals against civilians and their property are strictly prohibited under international humanitarian law (IHL) which requires an absolute distinction between civilian population and military target.”¹⁴⁰ It is rare for the ICRC to release public statements concerning violations of IHL, as it relies on the Red Cross fundamental principles of confidentiality and neutrality to operate effectively in its

¹³⁷ Spokesman for UN Secretary-General Kofi Annan, ‘Deplored Israeli air attack in Gaza, Secretary-General expresses concern over possible consequences of attack’, Statement SG/SM/8316, 22 July 2002, <<https://www.ohchr.org/en/statements/2009/10/deploring-israeli-air-attack-gaza-secretary-general-expresses-concern-over>>.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ ICRC, ‘Civilians must not be attacked’, Press Release, 23 July 2002, <<https://reliefweb.int/report/israel/icrc-civilians-must-not-be-attacked>>.

unique role during times of armed conflict. The ICRC's rare use of a public statement in this case underscores the gravity of the incident.

The European Union High Representative for the Common Foreign and Security Policy, Javier Solana, issued a statement on 23 July 2002, where he strongly condemned the attack, calling it an, "extra-judicial killing operation, which targeted a densely populated area"¹⁴¹ and sent his condolences to the families of the victims and the Palestinian people.¹⁴²

On 23 July 2002, in a public statement issued through a press briefing from White House spokesperson, Ari Fleischer, the Bush Administration denounced the attack as a, "heavy handed action" and stated that this case was "a knowing attack against a building in which innocents were found".¹⁴³ The New York Times reported how one Presidential aide described President Bush as "visibly angry"¹⁴⁴ upon hearing news of the attack, quoting a senior administration official as saying, "we had to show the Sharon government there are some redlines."¹⁴⁵

During the special UNSC meeting of 24 July 2002, no State in attendance supported the Israeli attack on al-Daraj, in fact many States deplored the attack.¹⁴⁶ At the UNSC meeting, the United States Ambassador to the UN, John Negroponte stated:

President Bush made clear that the heavy-handed action Israel took on 23 July did not serve the cause of peace. He further expressed his concern about the strike's toll on civilian lives. We have made his concerns known directly to the Israeli government.¹⁴⁷

Prior to attending the special UNSC meeting, British Foreign Secretary Jack Straw appeared before the UK House of Commons where he referred to the attacks as unjustified and disproportionate.¹⁴⁸ In reference to a similar extrajudicial assassination (of Sheikh Yassin), Jack Straw commented on the Israeli policy of what he called, "so-called assassinations – straightforward killings", and called them:

unlawful, unjustified and self-defeating, and they damage the case that Israel makes in the world. The fact that the killings led to the deaths of not only those whom Israel holds responsible for terrorism, but entirely innocent by-standers, including children, simply emphasizes the unlawful nature of that approach, and its counter-productive effect.¹⁴⁹

The air strike was widely condemned by other governments, including the strongly worded statement of the Swedish Foreign Minister, Anna Lindh. She labelled the attack, "a crime

¹⁴¹ EU High Representative Javier Solana, 'Dr Javier Solana condemns the killing of Palestinians in Gaza', Press Release, 23 July 2002, <<https://reliefweb.int/report/israel/eu-dr-javier-solana-condemns-killing-palestinians-gaza>>.

¹⁴² Ibid.

¹⁴³ Transcript of Press Briefing by US President Bush Spokesperson Ari Fleischer, 23 July 2002, accessed here <<https://www.presidency.ucsb.edu/documents/press-briefing-ari-fleischer-169>>.

¹⁴⁴ David. E Sanger (n 125).

¹⁴⁵ Ibid.

¹⁴⁶ UN Security Council (n 133).

¹⁴⁷ Ibid.

¹⁴⁸ *Hansard*, HC Deb 23 Jul 2002 c840, <<http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020723/debtext/20723-03/htm>> in Machover and Maynard (n 124).

¹⁴⁹ Ibid.

against international law and morally unworthy of a democracy like Israel.”¹⁵⁰ The Danish Foreign Minister, Per Stig Moeller, made a statement on behalf of all 15 EU governments, where he noted that the attack was “completely unacceptable,”¹⁵¹ and further stated that “the EU and the international community at large have consistently rejected the Israeli method of extra-judicial killings.”¹⁵² He also categorised the attack as one that caused, “indiscriminate civilian casualties.”¹⁵³

Grave breaches analysis

The air strike directly resulted in the wilful killing of Eman Ibrahim Hassan Matar, Muna Fahmi Al Huweiti and up to twelve others and for the causing of serious injury to body or health of Marwan Zeino and up to 150 others. The extrajudicial assassination operation also caused the devastating and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, where up to eleven civilian homes were completely destroyed, and 32 civilian homes partially destroyed by the air strike on al-Daraj.

Earlier, on 9 November 2000, the Israeli military extrajudicially assassinated Hussein ‘Abayat, a senior Fatah activist, in a similar operation, as he was driving his car on a busy street of a village in the West Bank, killing two civilian women in the process.¹⁵⁴ This marked the beginning of the wider Israeli practice of extrajudicial assassinations, and Israel has since publicly confirmed that their practice of, as they term it, ‘targeted killings’ occurs under direct government orders.¹⁵⁵ As such, it has become a wider Israeli state policy, and general practice of the Israeli military.¹⁵⁶ By 31 August 2007, 367 Palestinians had been killed as a direct result of this practice; 149 of those killed were civilian bystanders.¹⁵⁷

In January 2002, PCATI and the Palestinian Society for the Protection of Human Rights and the Environment filed a petition against the State of Israel with the Israeli Supreme Court, seeking a determination that the extrajudicial assassination policy was illegal.¹⁵⁸ The petitioners argued that the policy was unlawful for a series of legal reasons, including:

- 1) Extrajudicial assassinations are illegal under domestic law enforcement standards in Occupied Territory, which forbid the use of lethal force unless necessary to protect against imminent threat of death or serious bodily injury;

¹⁵⁰ Haaretz, ‘US Calls Air Strike Heavy-handed’, 24 July 2002, <<https://www.haaretz.com/2002-07-24/ty-article/u-s-calls-air-strike-heavy-handed/0000017f-e058-d568-ad7f-f37b29ba0000?lts=1707786604885>>.

¹⁵¹ United Nations Division for Palestinian Rights, The Question of Palestine, ‘Chronological Review of Events Relating to the Question of Palestine’, Monthly Media Monitoring Review, July 2002, <<https://www.un.org/unispal/document/auto-insert-199996/>>.

¹⁵² Haaretz (n 150).

¹⁵³ Ibid.

¹⁵⁴ Michelle Lesh, ‘The Public Committee Against Torture in Israel v The Government of Israel: The Israeli High Court of Justice Targeted Killing Decision’, [2007] MelbJIntLaw 21; (2007) 8(2) Melbourne Journal of International Law 373, p.1.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ B’Tselem, *Statistics: Fatalities*, 18 October 2007, <<http://www.btselem.org/English/Statistics/Casualties.asp>>.

¹⁵⁸ The Public Committee Against Torture in Israel v The Government of Israel (2006) HCJ 769/02, (PCATI v The Government of Israel) available in English from <<https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf>>, at 27 February 2024, at [45] (President Barak); Additional Protocol I (n 77), art 51(2).

- 2) Military force can *only* be used in the context of self-defence, as understood by Article 51 of the *Charter of the United Nations* to be between States (that is, Article 51 does not permit the use of force as self-defence by a State against individuals);
- 3) Extrajudicial assassinations deny the targeted individual their right to due process and also violate the fundamental right to life which is protected under IHL and international human rights norms;
- 4) The targeted individuals are not given any opportunity to prove their innocence as they are denied due process, and there is no form of independent judicial review of the operations;
- 5) When it is accepted that there is an international armed conflict existing (as in the context of Gaza), the targets of the extrajudicial assassinations must be regarded as *civilians*, and therefore are protected from military attack as per Article 51(3) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (the **First Additional Protocol**)¹⁵⁹ which reflects customary law and is therefore binding on Israel;
- 6) In the context of any civilian who directly participates in hostilities, such an individual loses their protection from military attack *only* for the time they participate in conduct that directly endangers human life, and upon cessation of such conduct they regain their civilian protected status, and;
- 7) The policy routinely causes harm to civilian bystanders, in violation of the fundamental IHL principles of discrimination and proportionality.¹⁶⁰

It took five years for the Israeli Supreme Court to reach a decision, with the majority opinion of the problematic and widely disputed ‘Targeted Killings Case’ handed down on 14 December 2006.¹⁶¹ It was held that for an extrajudicial assassination (targeted killing) to be considered legal, a four-fold test for a case-by-case approach must be followed.¹⁶² When considering the fourth criterion of ‘proportionality’, President Barak emphasised that the customary IHL rule protecting civilians was *central* to the principle of proportionality.¹⁶³ This sentiment was echoed by Vice-President Eliezer Rivlin.¹⁶⁴ Both argued that there was no ‘simple formula’ to determine proportionality, and the Court discussed the proportionality principle through the use of a scenario where the target shoots at combatants and/or civilians from the front porch of their home: “shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed.”¹⁶⁵

In this case, we see Israel’s own High Court of Justice, notorious for shielding perpetrators of IHL violations, of the view that the action taken by the Israeli military was disproportionate. Israeli human rights law scholar Orna Ben-Naftali points out that this comment from the Court was not a hypothetical and clearly referenced the al-Daraj bombing.¹⁶⁶ Ben Naftali has further stated, “the devastating impact of the operation, which could have reasonably been foreseen,

¹⁵⁹ First Additional Protocol (n 77), art 51(3).

¹⁶⁰ Lesh (n 154).

¹⁶¹ Ibid.

¹⁶² PCATI v The Government of Israel (n 158) at [40] (President Barak).

¹⁶³ Ibid, at [45] (President Barak); Additional Protocol I (n 77), art 51(2).

¹⁶⁴ Ibid at [4] – [5] (Vice President Rivlin).

¹⁶⁵ Ibid at [46] (President Barak).

¹⁶⁶ Orna Ben-Naftali, ‘A Judgment in the Shadow of International Criminal Law’, (2007) 5 *Journal of International Criminal Justice* 322, p.330.

clearly fails to meet the proportionality standard. This is what the judgment says explicitly. It is a war crime. This is what the judgement says implicitly.”¹⁶⁷

4. Punitive home demolitions in Block 3 of al-Bureij Refugee Camp in March 2003

Factual background

At some time after midnight on 3 March 2003, the Israeli military conducted a military incursion into the al-Bureij Refugee Camp, using infantry, up to 25 tanks and two bulldozers, as well as engineering forces backed by fighter helicopters.¹⁶⁸ During this incursion, Israeli military combat engineers demolished the home of Adel Abd Asalam as part of their wider practice of punitive home demolitions. The Israeli military alleged that the son of Adel Abd Asalam was responsible for an attack against Israeli soldiers on 9 February 2003 and it was for this reason they punitively destroyed the home of Adel Abd Asalam and other Palestinian civilians.¹⁶⁹

The home of Adel Abd Asalam was located in Block 3 of al-Bureij Refugee Camp as part of a group of four contiguous homes each attached to the other.¹⁷⁰ The blast of the demolition caused the southern wall of the next door Al Makadma family home to collapse together with rubble from the home of Adel Abd Asalam and crush the Al Makadma family as they were sheltering inside from the Israeli military incursion. The family had received no warning, no evacuation order, in fact, just prior to the demolition the Israeli military had issued a curfew order to residents using the loud speaker of a local mosque.¹⁷¹ The Al Makadma family and their neighbours had sheltered inside their homes as a result of the Israeli military curfew.¹⁷²

As a result of the building collapse, Noha Sabri Al Makadma, who was nine months pregnant, was killed together with her unborn baby. Her husband Shukri Hassan Al Makadma and their children were also seriously injured in the attack.¹⁷³ Following the building collapse, Mr Al Makadma and his neighbours were able to pull his wife and children (Mouna (two), Noor (three), Yousef (five), Mohammad (six), Ala’a (eight), Saqr (ten), Naseem (twelve), Jamil (fourteen), Nasmah (sixteen) and Majed (seventeen)) out of the rubble.¹⁷⁴

An ambulance was called but was prevented from attending the scene by the Israeli military.¹⁷⁵ The family was evacuated to a neighbour’s house where first aid for Noha Sabri Al Makadma was attempted.¹⁷⁶ Neighbours then attempted to carry her in a blanket to the nearest clinic, but they were fired upon and were forced to leave her in the street, where she

¹⁶⁷ Ibid.

¹⁶⁸ CNN, ‘Eight dead in Israel-Palestinian clashes’, 4 March 2003, <<https://edition.cnn.com/2003/WORLD/meast/03/02/mideast/>>.

¹⁶⁹ Human Rights Watch, ‘Promoting Impunity: The Israeli Military’s Failure to Investigate Wrongdoing’, 21 June 2005, see ‘Ignored or Lost’ in Chapter V ‘Lowest Priority’: Deaths of Palestinian Civilians, <<https://www.hrw.org/report/2005/06/21/promoting-impunity/israeli-militarys-failure-investigate-wrongdoing>>.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ B’Tselem, ‘Palestinian woman crushed to death as Israeli forces blew up her home’, *The Electronic Intifada*, 2 March 2003, <<https://electronicintifada.net/content/palestinian-woman-crushed-death-israeli-forces-blew-her-home/1207>>.

¹⁷⁴ Human Rights Watch (n 168).

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

later died before an ambulance was able to reach her.¹⁷⁷ Mr Al Makadma had suffered a fracture to the middle vertebra of his neck.¹⁷⁸ Neighbours took the risk and carried him to an ambulance waiting approximately 30 metres away.¹⁷⁹ The ambulance came under heavy fire but eventually made it to a UNRWA medical clinic where Mr Al Makadma was able to receive medical care.¹⁸⁰

In addition, the demolition caused the partial destruction of the property of the Al Makadma family, as well as the home of Shami Abdul Salam, located next door to the Makadma family, and the destruction of up to six other homes.¹⁸¹ In reference to the punitive demolition of the house of Adel Abd Asalam, the Israeli military stated, “the demolition of houses of terrorists sends a message to suicide bombers and their accomplices that anyone who participates in terrorist activity will pay a price for their actions.”¹⁸² According to Amnesty International, this exact phrase was commonly used by the Israeli military in their public statements following home demolitions.¹⁸³ There was no official signed demolition order served and executed in relation to the destruction of the homes.¹⁸⁴



*Figure 6 Destruction of homes in al-Bureji on 3 March 2003
Photo: © Fayez Nureldine/AFP via Getty Images*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Amnesty International, 'Israel and the Occupied Territories – Under the rubble: house demolitions and destruction of land and property', 17 May 2004, <<https://www.amnesty.org/en/documents/mde15/033/2004/en/>>.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Human Rights Watch (n 168).

Grave breaches analysis

The destruction of the homes of Block 3 of al-Bureij Refugee Camp, that is the partial destruction of the property of the Al Makadma family, as well as the home of Shami Abdul Salam, located next door to the Makadma family, and the destruction of up to six other homes,¹⁸⁵ amounts to a grave breach of the Fourth Geneva Convention, that is the extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly.¹⁸⁶ The destruction of the homes of Block 3 of al-Bureij Refugee Camp is evidence of a wider policy of ‘extensive’ punitive house demolitions implemented by Israeli military commanders, including Almog, as GOC of the Israeli Southern Command.

Notwithstanding the clear unlawfulness of the demolitions themselves, those who carried out the punitive demolitions made no attempt to evacuate the occupants from homes adjacent to the targeted property. It must also be highlighted again that these homes were not properly searched or evacuated prior to any demolition. The Israeli military, as they often claimed, announced on 3 March 2003, that their actions during home demolition incidents were ‘targeted’ and ‘calculated’, which suggests that if such actions were targeted then the decision makers were either reckless not to fully contemplate the potential collateral damage of the operation, or worse, they did contemplate it and continued with the operation regardless.¹⁸⁷

As the Military Commander responsible for Gaza during these house demolition operations (which caused widespread, extensive destruction), the power and discretion to order the destruction of each property was vested in Almog, under regulation 119 of the Defence (Emergency) Regulations 1945. The Israeli Supreme Court confirmed this in the case of *Janimat v OC Central Command Major General Uzi Dayan* in relation to the military commander for the West Bank (OC Central Commander).¹⁸⁸ As well as having the power to order the confiscation and destruction of property, Almog was also responsible for the planning and conduct of all military operations in the Gaza Strip. As such he had direct control over which properties were targeted and destroyed during the course of all military operations in Gaza for the time these incidents occurred.

It is clear that Almog directly implemented a policy of punitive house demolitions in Gaza throughout his tenure as military commander. On his retirement he published his personal support for the policy of “demolishing the homes of terrorists’ families” in an article titled ‘Cumulative Deterrence and the War on Terrorism.’¹⁸⁹

By giving the orders for each military operation and each punitive house demolition (as, for example, he admitted to ordering the demolition of 59 homes in Block O, Rafah Refugee Camp during an appearance on Israeli television program Meet the Press, see above), he has command responsibility for the grave breach and war crime of causing the extensive

¹⁸⁵ Amnesty International (n 180).

¹⁸⁶ Fourth Geneva Convention (n 1) art 147.

¹⁸⁷ Israel Defense Forces, Announcement, 3 March 2003, available on request.

¹⁸⁸ *Janimat et. al v OC Central Command Major General Uzi Dayan*, Judgment of the Supreme Court of Israel sitting as the HCJ, Case No HCJ 2006/97, available in English here: <https://hamoked.org/images/4980_eng.pdf>.

¹⁸⁹ Almog, D., ‘Cumulative Deterrence and the War on Terrorism’, *The US Army War College Quarterly*, Volume 34 Number 4, Parameters Winter 2004, pp.13-4, <<https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2222&context=parameters>>.

destruction of property carried out unlawfully and wantonly and without military necessity, and wilfully causing the death of Noha Sabri Al Makadma.

The wilful killing of Noha Sabri Al Makadma, who was nine months pregnant at the time, on 3 March 2003, during an Israeli military targeted punitive demolition of the neighbouring home in Block 3 of the al-Bureij Refugee Camp also amounted to the war crime of causing the excessive incidental death of a civilian.

C. Israel's Unwillingness to Prosecute

Israel has proven unwilling to adequately prosecute the alleged crimes outlined in this Dossier. There is a clear structural deficiency in the Israeli justice system with respect to human rights violations against Palestinians, due to a number of issues including:

- 1) clear conflict of interest in an investigative system that is subordinate to the same authority is subject to investigation;
- 2) unlawful delays in investigation;
- 3) lack of transparency and;
- 4) the shielding of high-level officials from criminal responsibility.¹⁹⁰

Palestinian human rights organisations, including PCHR, have concluded that the structure of the Israeli investigative system precludes effective, independent and impartial investigations, and does not operate in accordance with the requirements of international law, and as such Israeli authorities are unable and unwilling to prosecute perpetrators for violations against Palestinians.¹⁹¹

1. Murder of Three Boys Through the Use of Flechette Weaponry in December 2001

Two investigations were launched into the killing of the three boys walking home from Beit Lahiya. One investigation was conducted internally within the Israeli military, and the other conducted by the Foreign and Defence Committee of the Knesset.

The meeting of the Knesset Foreign Affairs and Defence Committee on 22 January 2002 was devoted to clarifying the circumstances of the death of the three boys.¹⁹² The Military Commander of the district brigade responsible for the incident, Colonel Ghannem Hamada, attended the meeting as representative of Almog. Hamada admitted that the type of shell fired by the tank was a flechette. This was effectively the first time that an authoritative Israeli military source had admitted the use of this weapon. The adjourned meeting was never reconvened and no conclusions were ever published.¹⁹³

¹⁹⁰ Valentina Azarov and Sharon Weil, 'Israel's Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice', *International Criminal Law Review*, (2012), 905-935.

¹⁹¹ Al-Haq et al, 'Four Palestinian Human Rights Organizations Submit File to the ICC Prosecutor: Israel is Unable and Unwilling to Conduct Genuine Investigations and Prosecutions', 23 December 2017, <<https://www.alhaq.org/advocacy/6294.html>>.

¹⁹² Barak (n 54) p.121.

¹⁹³ Ibid.

On 8 May 2002, an Israeli lawyer working with the PCHR wrote to the Israeli Military Attorney on behalf of the families of the three deceased boys, asking whether the incident would be investigated and if so, requesting the conclusions of the investigation.¹⁹⁴ On 13 June 2002, the Military Attorney responded with the findings of the investigation via letter, stating that there was no reason to take legal steps against any of the military parties involved.¹⁹⁵ The Israeli Military Attorney refused to disclose the investigation material on the grounds of secrecy (s539a of the Israeli Military Law jurisprudence 1955).¹⁹⁶

Both PHR and PCHR jointly filed a petition with the Israeli Supreme Court, requesting an order that would prohibit the use of flechette shells during Israeli military operations in Gaza.¹⁹⁷ The State Attorney for Israel responded to the petition directly referring to the incident, as it was raised in the petition. Again, it was claimed that Israeli military forces fired flechette shells against those who they believed to be armed terrorists.¹⁹⁸ However, this account is incompatible with the film screened before the Knesset Foreign Affairs and Defence Committee on 22 January 2002, which showed the three boys walking *away* from the military position when they were fired upon with the flechette artillery shells.¹⁹⁹ The State Attorney for Israel gave no explanation of why other less lethal means were not used to stop/confront the boys.²⁰⁰ Ultimately, the Israeli High Court held that the use of flechette tank shells was not unlawful *per se*, and that the question of whether their use was justified in each circumstance was at the discretion of the authorised commander responsible for the decision according to military directives.²⁰¹

The PCHR filed a petition for compensation on behalf of the family of Mohamad Abd Elrahman Al Madhoun. However, in light of an amendment to the tort legislation in Israel, which applies retrospectively, the petitioners expected the claim to be dismissed.²⁰²

¹⁹⁴ Letter, Rosental & Yahya to IDF Military Attorney, 8 May 2002, available on request.

¹⁹⁵ Letter, IDF Military Attorney to Rosental & Yahya, 13 June 2002, available on request.

¹⁹⁶ *Ibid.*

¹⁹⁷ *PHR and PCHR v Doron Almog* (n 74).

¹⁹⁸ Summary of the Attorney General's Reply to Petition HCJ 8990/02, 22 January 2003, available on request.

¹⁹⁹ Barak (n 54) p.121.

²⁰⁰ Summary of the Attorney General's Reply to Petition HCJ 8990/02 (n 197).

²⁰¹ *PHR and PCHR v Doron Almog* (n 74).

²⁰² Petition for Compensation, *Inheritance of the Late Mohamad Abd Elrahman Ahmad Almadhoun v The State of Israel*, A 04/4418, 31 August 2004, available on request.



*Figure 7 A Palestinian man beside a house showing small pointed metal darts 'flechette' sticking out of a wall, 2009
Photo: © Associated Press*

2. Punitive Home Demolitions of Block O, Rafah Refugee Camp in January 2002

On 1 April 2002, PCHR sent a letter of complaint to the Legal Advisor of the Israeli military.²⁰³ In this letter, PCHR outlined that the homes of Block O, Rafah Refugee Camp were not demolished out of military necessity, and that the families were given no opportunity to evacuate, nor make any appeals against the decision to demolish their homes. PCHR requested an open investigation, compensation for the home owners and for the Israeli military to cease such arbitrary measures of collective punishment against Palestinian civilians.

PCHR sent follow up letters to the Legal Advisor of the Israeli military on 7 August 2002 and 5 September 2002.²⁰⁴ There was no response.

A petition for compensation and an application for the court fees to be waived, were filed. PCHR received no response to either application. However, in light of a subsequent amendment to the tort legislation in Israel, which applied retrospectively, the petitioners concluded that the claim would be dismissed.²⁰⁵

²⁰³ Letter, Palestinian Centre for Human Rights to IDF Legal Advisor, 1 April 2002, available on request.

²⁰⁴ Letter, Palestinian Centre for Human Rights to IDF Legal Advisor, 7 August 2002, available on request.

²⁰⁵ Letter, Palestinian Centre for Human Rights to IDF Legal Advisor, 5 September 2002, available on request.



*Figure 8 Senior UN official Peter Hansen (L), commissioner of the UN Relief and Works Agency, listens to a Palestinian woman as they sit on the ruins of her house.
Photo: © Abid Katib/Getty Images*

3. Extrajudicial Assassination of Salah Shehadeh in al-Daraj in July 2002

Immediately after the al-Daraj bombing, there were various attempts within Israel to hold both the State of Israel and individuals accountable for the consequences of the attack, as well as challenge the wider Israeli practice of extrajudicial assassinations. On 30 September 2003, the Yesh Gvul pacifist movement in Israel filed a petition (the **Shehadeh Petition**) in the Israeli High Court seeking to compel the Israeli Attorney-General and the Military Advocate General to conduct a criminal investigation into the al-Daraj bombing and the command chain responsible for the attack.²⁰⁶ The Shehadeh Petition was in response to the steadfast refusal to investigate the al-Daraj bombing by the Military Advocate General, Menachem Finkelstein.²⁰⁷

On 3 March 2004, the Israeli Supreme Court suspended the case, pending the outcome of another petition (the **Extrajudicial Assassinations Petition**) filed by PCATI and the Palestinian Society for the Protection of Human Rights and the Environment, which challenged the lawfulness of the wider Israel policy of extrajudicial assassinations (termed by Israel as ‘targeted killings’).²⁰⁸ The Extrajudicial Assassinations Petition was heard on the 16 February

²⁰⁶ *Yoav Hass et al v The Judge Advocate General et al*, HCJ 8794/03, 23 December 2008, available in English here: <<https://www.yumpu.com/en/document/view/21436436/hcj-8794-03-geneva-academy-of-international-humanitarian-law->>.

²⁰⁷ *Ibid.*

²⁰⁸ Machover and Maynard (n 124).

2005, but was adjourned indefinitely following the suspension of the Israeli policy of extrajudicial assassinations (referred to as ‘pre-emptive liquidations’ in the announcement) by then Israeli Prime Minister Ariel Sharon at the Sharm-el Sheikh summit of 8 February 2005.²⁰⁹

Following this development, the Yesh Gvul movement wrote to the Israeli Supreme Court to request that the Shehadeh Petition be re-opened and a hearing took place on 5 September 2005 where the Shehadeh Petition was also indefinitely adjourned.²¹⁰ Following the resumption of the extrajudicial assassination policy by Israel, the Israeli State Attorney’s Office agreed to restore both the Shehadeh Petition and the extrajudicial assassination Petition in November 2005.²¹¹

On 11 December 2005, both petitions were heard, and the Israeli High Court ruled that the outcome of the Shehadeh Petition was dependant on the outcome of the Extrajudicial Assassinations Petition. On 14 December 2006 the Israeli High Court finally released their controversial decision on the Extrajudicial Assassinations Petition, commonly referred to as the ‘Targeted Killings Case’, where it held that, amongst other findings, according to customary international law, they could not “determine that a preventative strike is always legal, just as we cannot determine that it is always illegal.”²¹²



Figure 9 A young Palestinian boy watches as bulldozers clear rubble from the site of the airstrike at al-Daraj.
Photo: © Abid Katib/Getty Images

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² PCATI v The Government of Israel (n 158) at [60] (President Barak); [7] (Vice-President Rivlin); [48] (President Beinisch).

In the problematic and widely disputed majority opinion of the Israeli Supreme Court referred to above, a four-fold test for a case-by-case approach was outlined.²¹³ It was held that for an extrajudicial assassination (targeted killing) to be considered legal, it must satisfy four criteria. As per the third criteria of the ruling by its own Supreme Court, the State of Israel is obligated to *objectively* investigate decisions taken by the Israeli military where civilians have been killed as the result of an extrajudicial assassination.²¹⁴

As a result of this requirement, on 17 June 2007 the Israeli Supreme Court ordered that the State of Israel had 45 days to inform the Court whether it would establish an independent committee to investigate the al-Daraj bombing.²¹⁵ On 17 September 2007, the State Prosecutor of Israel, Shai Nitzan, agreed that the State of Israel would establish an objective investigative committee to examine the circumstances under which civilians were killed in the action against Shehadeh.²¹⁶ On January 2008, the Prime Minister of Israel at the time, Ehud Olmert, appointed former Military Advocate General Tzvi Inbar, Major General Yitzhak Eitan and Mr Yitzhak Dar to form the investigative committee.²¹⁷ Following the death of Tzvi Inbar, former Supreme Court Justice Tova Strasberg-Cohen was appointed to the investigative committee.

On 27 February 2011, after considerable delay, the investigative committee submitted their findings to the Prime Minister of Israel, at the time, Benjamin Netanyahu.²¹⁸ Despite their acknowledgement of the greatly disproportionate loss of life during the Israeli military attack on al-Daraj, the investigative committee recommended that no personal measures be taken against those in the command chain responsible for the al-Daraj bombing.²¹⁹ Ultimately, the investigative committee declined to open any criminal investigations into anyone in the command chain.²²⁰

4. Punitive Home Demolitions in Block 3 of al-Bureij Refugee Camp in March 2003

The domestic courts in Israel do not regard the policy of punitive house demolitions as unlawful. The practice and scale of property destruction by the Israeli military, conducted with impunity, is illustrated in a number of cases heard by the Israeli Supreme Court. In the case of *Almarin v IDF Commander in Gaza Strip*, the judgment of Justice Bach holds that the authority of the Commander extends to the destruction of those parts of the property that are owned or used by members of the family of the suspect or by others which is in direct contravention of the Fourth Geneva Convention.²²¹ In *Janimat v OC Central Command*, the

²¹³ Ibid at [40] (President Barak).

²¹⁴ Ibid.

²¹⁵ Lesh (n 154).

²¹⁶ Yuval Yoaz, 'Panel to Look into Civilian Deaths in 2002 IAF Attack on Shehadeh', *Haaretz*, 17 September 2007, <<https://www.haaretz.com/2007-09-17/ty-article/panel-to-look-into-civilian-deaths-in-2002-iaf-attack-on-shehadeh/0000017f-e078-d38f-a57f-e67af8040000>>.

²¹⁷ Government of Israel, 'Salah Shehadeh – Special Investigatory Commission', Press Release, 27 February 2011, <<https://www.gov.il/en/departments/news/spokeshchade270211>>.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ *Almarin v IDF Commander in Gaza Strip*, Supreme Court of Israel sitting as the High Court of Justice, HCI 2722/92, available in English here: <https://hamoked.org/files/2011/4810_eng.pdf>.

Court refused to interfere with the discretion of the Military Commander (Almog's equivalent in the West Bank) and did not halt the house demolition he had ordered.²²²

By letter of 14 May 2003, PCHR wrote to the Legal Advisor of the Israeli military requesting an open inquiry into the incident, disciplinary measures to be brought against those responsible, and compensation for the family.²²³ By letter of 4 November 2003, the Israel Ministry of Defence responded to PCHR, expressing regret for the "injuries of guiltless people" but rejected any claim for compensation on the grounds that the State is not responsible for paying damages for the consequences of military operations.²²⁴

In 2005, a petition for damages from the State of Israel was lodged. However, in light of the amendment to the tort legislation in Israel, which applies retrospectively, the petitioners expected the claim to be dismissed.²²⁵



Figure 10 The family of Noha Sabri Al Makadma at her funeral. Noha was 9 months pregnant at the time of the attack.
Photo: © Fayez Nureldine/AFP via Getty Images

D. Evasion of Justice

1. United Kingdom Arrest Warrant

²²² *Janimat et. Al v OC Central Command Major General Uzi Dayan* (n 172).

²²³ PCHR Letter to Israel Ministry of Defence, 14 May 2003, available on request.

²²⁴ Israel Ministry of Defence Letter to PCHR, 4 November 2003, available on request.

²²⁵ Petition for Compensation, *The Inheritance of the Late Noha Sabri Abd Elhamid Almakadmeh et. al v The State of Israel*, T.A 05, 2 March 2005, available on request.

On 26 August 2005, Hickman Rose solicitors acting on behalf of PCHR and Palestinian victims of the incidents the subject of this Dossier, passed documents to the then Anti-Terrorist Branch, now the Counter Terrorism Command (**CTC**), a Specialist Operations branch within London's Metropolitan Police Service (**MPS**).²²⁶ The documents contained allegations of war crimes alleged to have been committed by Almog during the four incidents that are the subject of this Dossier.²²⁷ It was also known by Hickman Rose that Almog was due to visit the United Kingdom to participate in fundraising activities for the organisation he established in Israel.²²⁸

At the time, the CTC were only able to provide a limited immediate response due to apparent demands on the Command at the time,²²⁹ although they made an undertaking to Hickman Rose that they would not contact Israeli authorities.²³⁰ Hickman Rose notified the CTC of their intention to apply for an arrest warrant for offences contrary to the *Geneva Conventions Act 1957* if the CTC decided against direct action.²³¹ As of 5 September 2005, the CTC had not made a clear decision regarding their plan of action for a potential investigation into the allegations against Almog.²³² They spent the time between 5 and 9 September 2005 in conversation with the Foreign and Commonwealth Office (**FCO**) and MPS Legal Services. As of the 9 September 2005 the CTC felt they should prepare themselves for the issuance of an arrest warrant and advised the FCO to prepare similarly.²³³

On 10 September 2005, responding to an arrest warrant application by Hickman Rose solicitors, Chief Magistrate Timothy Workman of Bow Street Magistrates' Court, held that there were reasonable grounds for suspicion that the grave breach of 'extensive destruction of property carried out unlawfully/wantonly' did occur, which is considered a criminal offense according to sections 1 and 1A of the UK's *Geneva Conventions Act 1957*, and a court date was set for 27 October 2005.²³⁴

While the allegations put forward in the arrest warrant concerned four separate incidents that are also the subject of this Dossier, Chief Magistrate Workman exercised his discretion to consider an arrest warrant in respect of one of the incidents only, that of the home demolitions in Block O of Rafah Refugee Camp.²³⁵ Chief Magistrate Workman felt that the other incidents could be considered by the Authorities, (that is, the Metropolitan Police, the CPS and the Attorney General) in the fullness of time.²³⁶ However, considering the urgent nature of the arrest warrant application due to the imminent arrival of Almog in the United Kingdom and the very real potential for him to leave before the Authorities could complete

²²⁶ Metropolitan Police Service, *Summary of Decision Log relating to Doron Almog*, 18 July 2007, p.1, available here: <<https://image.guardian.co.uk/sys-files/Guardian/documents/2008/02/19/Warcriminal.pdf>>.

²²⁷ Ibid.

²²⁸ Jewish National Fund, 'Retired IDF Veteran and War Hero Dedicates Life to Defending People with Disabilities', Press Release, 22 February 2021, <<https://www.jnf.org/menu-3/press-releases/press-release-stories/february-22-2021>>.

²²⁹ The arrest warrant occurred in the wake of the London bombings of 7 July 2005.

²³⁰ Metropolitan Police Service (n 225).

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Judgment of Senior District Judge Tim Workman, *Bow Street Magistrates' Court Application for a Warrant of Arrest of Major General Doron Almog*, 10 September 2005.

²³⁵ Ibid.

²³⁶ Ibid.

their investigations, the arrest warrant was granted with respect to the Block O, Rafah Refugee Camp home demolitions incident.²³⁷

On 10 September 2005, the CTC contacted Hickman Rose to inform them that the Command required three more weeks to establish their position in the event an arrest warrant was issued.²³⁸ In this conversation, the CTC was informed by Hickman Rose that in fact, an arrest warrant had been issued. Hickman Rose solicitors warned the CTC that they were anxious to ensure the immediate arrest of Almog and requested circulation of the warrant at all ports of entry into the UK.²³⁹

In the afternoon of 10 September 2005, Hickman Rose solicitors were contacted by a journalist from The Guardian who had some level of knowledge of the arrest warrant application.²⁴⁰ In light of this development, the CTC immediately considered entry port circulation, however they were ultimately dissuaded from this course of action as it was felt that nationwide circulation of such sensitive information regarding Almog could have formed a disproportionate risk to operational security.²⁴¹ Almog was due to head from Heathrow airport straight to Solihull Synagogue for an event on the 11 September 2005. It was decided by the CTC, together with the West Midlands Special Branch (where the Synagogue was located), and the National Community Tensions Team, that the arrest of Almog should not happen at the Synagogue.²⁴² The CTC claims to have made discreet enquiries within the Synagogue community using a ‘trusted partner’, while ensuring to avoid alerting Almog of the arrest warrant.²⁴³ The CTC claimed that they had relied on this trusted partner to establish Almog’s itinerary in order to facilitate his arrest.²⁴⁴

Almog was due to arrive at Heathrow airport on 11 September 2005 at 13:25 on an El Al Flight from Tel Aviv and intended to leave for the Synagogue from the airport.²⁴⁵ The CTC planned to intercept Almog at the Heathrow immigration desk using a uniform arrest rather than a CTC officer, where he would then be escorted to Heathrow police station to await a decision regarding the execution of the warrant.²⁴⁶

By 14:30 on 11 September 2005, it became apparent to the CTC that Almog had been tipped off when he failed to appear at the immigration desk.²⁴⁷ As it transpired, an Israeli military attaché was sent from the Israeli Embassy to Heathrow where they notified El Al cabin crew to inform Almog to remain on the plane during passenger disembarkation. The military attaché subsequently boarded the plane to advise Almog of the arrest warrant. As a result, Almog refused to leave the plane, remaining onboard for two hours until it departed for a return flight to Tel Aviv at 15:30.²⁴⁸

²³⁷ Ibid.

²³⁸ Metropolitan Police Service (n 225) p.2.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid, p.3.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Vikram Dodd, ‘Papers reveal how alleged war criminal escaped UK arrest’, *The Guardian*, 20 February 2008, <<https://www.theguardian.com/uk/2008/feb/20/uksecurity.israelandthepalestinians>>.

The CTC considered boarding the El Al flight, as police did routinely board aircraft, but they claimed it was not clear to them how to proceed in cases where the airline carrier did not give consent for the police to board.²⁴⁹ El Al refused voluntary access to the CTC and they felt they were unable to receive legal advice in time before the 15:30 departure of the plane to feel sure that the arrest warrant had jurisdiction over the plane.²⁵⁰ The CTC also argued that there was potential for armed confrontation, as El Al flights carried armed air marshals and they were unclear as to whether or not Almog was travelling with a personal security detail.²⁵¹ They felt there could be public safety issues and risk to police officers were they to board the plane without the consent of El Al and forcibly remove Almog.

At 15:20 on 11 September 2005, the CTC informed Hickman Rose that Almog was expected to disembark from an El Al flight but had not entered the United Kingdom.²⁵² They notified Hickman Rose of the likely scenario that Almog had been pre-warned of the arrest warrant. Hickman Rose solicitors told media that they disagreed with the CTC assessment that the police did not have the ability to non-consensually board the El Al plane and that it was within police powers to prevent the plane from departing for Tel Aviv.²⁵³

Hickman Rose subsequently requested a review of the failed execution of the arrest warrant through the Independent Police Complaints Commission (IPCC). The investigation could not uncover the source of the information leak and the IPCC held that the CTC had not breached any rules by failing to board the El Al plane or stop it from departing in order to execute the arrest warrant.²⁵⁴ PCHR and Hickman Rose released a statement in response to the decision of the IPCC, where they noted that it was highly concerning that the CTC had acted on the assumption that armed Israelis might engage in violence with the MPS while in the territory of the United Kingdom:

These are serious failures which raise concerns about the effectiveness of the police in cases where international criminal suspects come to this country. They also reveal an extraordinary assumption that armed Israelis might engage British police on British soil as they try to make an arrest under a lawful warrant issued by a British judge. The fact that this risk was apparently taken into account, and led to police inaction, is a matter of grave concern.

Hopefully, the police have subsequently sought to obtain assurances that such fears would never be realised and the legal position has been clarified within the MPS, so that there can never again be any concerns about boarding a 'plane on British soil to effect a lawful arrest, even where that 'plane is owned by the national airline of a foreign country. It also seems appropriate for the role of a Trusted Partner in such cases to be reviewed.²⁵⁵

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Metropolitan Police Service (n 225) p.3.

²⁵³ Ibid.

²⁵⁴ Dominic Casciani, 'Police feared 'airport stand off', *BBC*, 19 February 2008, <http://news.bbc.co.uk/2/hi/uk_news/7251954.stm>.

²⁵⁵ PCHR and Hickman Rose, 'British police feared a "real threat of an armed confrontation" with armed Israelis at Heathrow Airport, Statement, 19 February 2008, <<https://pchr.org/en/pchr-and-hickman-rose-british-police-feared-a-real-threat-of-an-armed-confrontation-with-armed-israelis-at-heathrow-airport/>>.

It is understood that Almog has not returned to the UK since his evasion of justice fearing further arrest, despite legislative changes requiring the consent of the Director of Public Prosecutions in issuing any future warrants.²⁵⁶

2. Audiencia Nacional (Spain National Court)

On 24 June 2008, the PCHR filed a lawsuit with the Audiencia Nacional, the National Court of Spain, against seven senior Israeli military officials. Along with Almog, this included former Defence Minister Benjamin Ben-Eliezer, his former military advisor, Michael Herzog, former Israeli Army Chief of Staff Moshe Ya'alon and Dan Halutz, former Commander of the Israeli Air Force, who were all alleged to have been part of the chain of command for the air strike on al-Daraj during the extrajudicial assassination of Saleh Shehadeh in July 2002.²⁵⁷ The National Court of Spain has previously heard other high profile international crimes cases including the infamous Pinochet case, as well as a case concerning former military leaders of El Salvador.²⁵⁸ As the National Court considered whether to accept the case, it requested that the State of Israel provide further information.²⁵⁹ Israel was not forthcoming with the requested information and it was for this reason, the Court formally took up the case.²⁶⁰ The National Court of Spain initially accepted to examine the case, the first step towards a formal prosecution.

PCHR filed this lawsuit on behalf of six Palestinians who survived the Israeli military extrajudicial execution operation in the Gaza Strip in July 2002. This was the first time that survivors of an Israeli military attack had filed a lawsuit against members of the Israeli military in Spain. PCHR embarked on this lawsuit after lengthy consultations with international legal experts and more than two years of collaborative work between Palestinian human rights organisations (including the Arab Cause Solidarity Committee and the Al-Quds Association for Solidarity with People in Arab Countries) and Spanish civil society organisations.

PCHR noted that similar cases were previously filed in Israeli courts, but did not lead to successful prosecutions. On the contrary, the Israeli judiciary was used as a legal cover for the perpetration of war crimes, and as a tool to deliberately hinder international jurisdiction under the pretext of a “fair” national judicial system operating in Israel.

On 4 May 2009, Judge Fernando Andreu of the National Court of Spain announced the Court's decision to continue the investigation into the events surrounding the al-Daraj attack. The National Court of Spain rejected the arguments of the Spanish Prosecutor and the State of Israel, both of whom claimed the incident had been adequately investigated within Israel. Judge Andreu confirmed that the National Court of Spain felt that this position was incorrect

²⁵⁶ Anshel Pfeffer, 'Fear of Arrest Still Prevents Israeli Officials From Visiting Britain', *Haaretz*, 20 May 2012, <<https://www.haaretz.com/2012-05-30/ty-article/.premium/fear-of-arrest-still-prevents-israeli-officials-from-visiting-britain/0000017f-ee6d-da6f-a77f-fe6f5d0e0000>>

²⁵⁷ Palestinian Centre for Human Rights (n 123).

²⁵⁸ *Ibid.*

²⁵⁸ Al Goodman, 'Spain Court in 2002 Israel war crime probe', *CNN*, 29 January 2009, <<https://edition.cnn.com/2009/WORLD/europe/01/29/spain.israel.gaza.lawsuit/index.html>>.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

and contrary to the rule of law.²⁶¹ Judge Andreu stated that the Court wished to observe the principle of universal jurisdiction. The State of Israel and the Spanish Prosecutor appealed the decision of Judge Andreu. On 30 June 2009, the Spanish Appeals Court upheld the argument of the Spanish Prosecutor, and voted 14-4 in favour of closing the investigation. The Appeals Court felt that there was in fact no jurisdiction to hear the matter in Spain due to its lack of competence with respect to international crimes and that the incident supposedly remained under investigation by Israel.²⁶²

In February 2010, the European Center for Constitutional and Human Rights (ECCHR) submitted an expert opinion on concurrent criminal jurisdictions under international law in response to the argument of the National Court of Spain that the Court was not competent to open investigations into international crimes committed in Gaza.²⁶³ The ECCHR expert opinion concluded that States have a responsibility to open investigations into international crimes if there are no *genuine* investigations on-going in the territorial state in which the crime was committed. Additionally, States are *not* limited by the fact that one State has already exercised its criminal jurisdiction over a crime by opening their own investigations. The ECCHR expert opinion shows that there *is no hierarchy of criminal jurisdictions* in international law. That is, a State exercising its criminal jurisdiction on the principle of personality or universality does not necessarily have to give priority to the State exercising territorial jurisdiction. Although there is a clear preference and policy favouring investigations by the territorial State, these investigations *must* meet universal standards. Inadequate investigations are a serious problem in many violations of international law. The consequences are a climate of impunity and the aggravation - or in the worst case - avoidance of later prosecution. Therefore, a State has the responsibility to open investigations if such investigations in another country do not meet universal standards.²⁶⁴

Ultimately, on 4 March 2010, the Spanish Supreme Court upheld the decision of the Appeals Court which closed the investigation into the al-Daraj bombing.²⁶⁵

E. Individual Criminal Responsibility – Command Responsibility

Under international criminal law, there are different grounds for criminal responsibility. Almog could be held criminally responsible for crimes committed by forces under his effective command and control, either due to his direct orders as a superior, or as a result of his failure to exercise control properly over such forces, where he as military commander either knew or should have known that the forces under his command were committing or about to commit the crimes and failed to take all necessary and reasonable measures within his power

²⁶¹ Palestinian Centre for Human Rights, 'PCHR will Appeal to Supreme Court against Spanish Appeals Court's Decision', Press Release Ref: 84/2009, 30 June 2009, <<https://pchrgaza.org/en/pchr-will-appeal-to-supreme-court-against-spanish-appeals-courts-decision/>>.

²⁶² Palestinian Centre for Human Rights, 'PCHR take Al Daraj case to Constitutional Court' Challenge Restrictions on Universal Jurisdiction Law in Spain', Press Release Ref: 29/2010, <<https://pchrgaza.org/en/pchr-take-al-daraj-case-to-constitutional-court-challenge-restrictions-on-universal-jurisdiction-law-in-spain/>>.

²⁶³ Ibid.

²⁶⁴ Florian Jeßberger, 'The Responsibility to Investigate International Crimes', *European Center for Constitutional and Human Rights*, 2010, <<https://www.ecchr.eu/en/publication/the-responsibility-to-investigate-international-crimes/>>.

²⁶⁵ Appeal 1979/2009, Spanish Supreme Court, 4 March 2010, available in English here: <https://ccrjustice.org/sites/default/files/assets/AlDaraj_SupremeCourt_Decision_03.04.2010_ENG.pdf>.

to prevent or repress the commission of the crimes or submit the matter to competent authorities for investigation and prosecution.²⁶⁶ The commission of war crimes by virtue of command or superior responsibility is widely recognised as a form of individual criminal responsibility under international and national criminal law, including Australia's Commonwealth Criminal Code,²⁶⁷ and is considered an established norm of customary international law.²⁶⁸

Considering all the evidence available, much of it based on publicly available sources, it is clear that Almog was a military commander in a position of superior responsibility, as GOC of the Israeli Southern Command, at the time the incidents that are the subject of this Dossier occurred. As a result, Almog could be held criminal responsibility for crimes committed by his subordinates/forces under his effective control.

It is alleged that Almog can be held individually criminally responsible for a number of war crimes on the basis of his command responsibility as GOC for the Israeli Southern Command. This is in respect of the following alleged grave breaches:²⁶⁹

- 1) The wilful killing of Mohamad Abd Elrahman Al Madhoun aged 16, Ahmad Mohammad Banat aged 15 and Mohamad Ahmad Lobad aged 17, who were killed with flechette artillery shells while walking home from Beit Lahiya on 30 December 2001. The decision of Almog as GOC of Israeli Southern Command to use flechette weaponry during Israeli military operations in Gaza is in direct breach of the fundamental international humanitarian law prohibition on causing unnecessary suffering and superfluous injury and indiscriminate means and methods of warfare;
- 2) The extensive destruction of the property of Abdul Salam Mahmoud Dhib Matar and others, not justified by military necessity and carried out unlawfully and wantonly, during the punitive demolitions of 59 homes located in Block O, Rafah Refugee Camp on 10 January 2002;
- 3) The wilful killing of Eman Ibrahim Hassan Matar, Muna Fahmi Al Huweiti and up to twelve others and for the causing of serious injury to body or health of Marwan Zeino and up to 150 others, during the Israeli military's extrajudicial assassination of Saleh Shehadeh by an air strike on 22 July 2002;
- 4) The destruction of property, not justified by military necessity and carried out unlawfully and wantonly, where up to eleven civilian homes were completely destroyed, and 32 civilian homes partially destroyed by the air strike on al-Daraj in 22 July 2002;

²⁶⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute), art 28(a).

²⁶⁷ *Criminal Code Act 1995* (Cth), sch 1 ('Criminal Code'), s 268.115.

²⁶⁸ Henckaerts (n 77), see CIHL Rule 153.

²⁶⁹ Fourth Geneva Convention (n 1) article 147; and *Geneva Conventions Act 1957* (Cth), s 7(2)(d) and (e).

- 5) The wilful killing of Noha Sabri Al Makadma, who was nine months pregnant at the time, on 3 March 2003,²⁷⁰ during an Israeli military targeted punitive demolition of the neighbouring home in Block 3 of the al-Bureij Refugee Camp;
- 6) The wilful causing of serious injury to Shukri Hassan Al Makadma and his children on 3 March 2003²⁷¹ during an Israeli military targeted punitive demolition of the neighbouring home in Block 3 of the al-Bureij Refugee Camp, and;
- 7) The extensive destruction of property owned by Shukri Hassan Al Makadma on 3 March 2003,²⁷² carried out unlawfully and wantonly, with no justification of military necessity during an Israeli military targeted punitive demolition of the neighbouring home in Block 3 of the al-Bureij Refugee Camp.

²⁷⁰ Criminal Code, s 268.24.

²⁷¹ Criminal Code, s 268.28.

²⁷² Criminal Code, s 268.29.