PROSECUTING ALLEGED ISRAELI WAR CRIMINALS IN ENGLAND AND WALES

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The criminal justice system in England & Wales is faced with allegations made by Palestinians of Israeli war crimes contrary to the Geneva Conventions Act 1957 (and which in some cases also involve allegations of torture contrary to s134 Criminal Justice Act 1988) – how will it cope with this challenge?

INTRODUCTION AND BACKGROUND TO ISSUES

In 2005, the authors[1] worked with lawyers from the Palestinian Centre for Human Rights (PCHR)[2], on behalf of mutual clients, on files of evidence for use in England and Wales relating to alleged "grave breaches" of the Fourth Geneva Convention 1949,[3] including torture (which is also an international crime regardless of the existence of a military occupation).[4] Evidence files

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[2] PCHR is an independent Palestinian human rights organization based in Gaza City. The Centre enjoys Consultative Status with the ECOSOC of the United Nation. It is an affiliate of the International Commission of Jurists-Geneva, the International Federation for Human Rights (FIDH) – Pairs, and the Euro-Mediterranean Human Rights Network - Copenhagen, Arab Organization for Human Rights – Cairo. It is a recipient of the 1996 French Republic Award on Human Rights and the 2002 Bruno Kreisky Award for Outstanding Achievements in the Area of Human Rights. More information about PCHR can be found on its website at: www.pchrgaza.org.

[3] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Vol 75 UNTS 287 (IVGC).

[4] Israel signed the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, G.A. Res 39/46 39 UN GAOR Supp (No. 51) UN Doc. A/39/51 (1984), entered into force in 1987, Vol 1465 UNTS 85 (UNCAT) on 22 October 1986 and ratified it on 3 October 1991. The Convention entered into force in Israel on 2 November 1991. Article 5 (2) of UNCAT requires each state party to take measures to establish universal jurisdiction over persons suspected of torture, unless it extradites the suspect. The UK ratified UNCAT on 8 December 1988 and it took effect on 7 January 1989. Section 134 of the Criminal Justice Act 1988

relating to Gaza cases were handed over to the anti-terrorist and war crimes unit of the Metropolitan police on 26 August 2005.[5]

Naturally, in such cases, lawyers in England and Wales are reliant to a great extent on the collection of evidence by lawyers and other human rights defenders in the Occupied Palestinian Territory (OPT). The cases discussed here therefore have their origins in work carried out by many such people, primarily PCHR, led by Raji Sourani,[6] and by a variety of other lawyers, NGOs, academics and researchers working in the OPT. Without this professional, dedicated and often dangerous work, it would simply not have been possible to credibly pursue cases in England and Wales.

Grave breaches are criminalised in England and Wales under the Geneva Conventions Act 1957 (the 1957 Act).[7] The 1957 Act was introduced in order to comply with this country's treaty obligations to provide domestic laws to enable "universal jurisdiction" to be exercised over the grave breaches specified in the four Geneva Conventions of 1949. The alleged victims only sought remedies in England and Wales because they were denied any remedy through the Israeli legal system.

(a) The allegations

Before considering in detail the legal issues mentioned above it will be helpful to set out more details of the type of cases under review and how they have been dealt with so far in England and Wales. The following cases, which all identify Major General (reserve) Doron Almog[8] as a suspect, demonstrate very well the allegations made by Palestinians under occupation:

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makes it a criminal offence for a public official or person acting in an official capacity to commit torture or cruel, inhuman or degrading treatment or punishment, whatever his nationality and wherever in the world he commits the offence.

[5] In the absence of a national police force, the Metropolitan Police Service (MPS), as the largest police authority in the country, has traditionally provided a 'home' for major national/international police operations. In the early 1990s the MPS established a centrally funded War Crimes Unit to investigate cases under the War Crimes Act 1991, regarding allegations dating back to World War II. That Unit was disbanded in 1999, but a 'dedicated section' of the Anti-Terrorist Unit of the MPS continued to have responsibility to investigate war crimes and related international crimes – see *Hansard* HC 14 June 2005 c296W.

[6] Raji Sourani is a practising lawyer and the Director of PCHR. He has been detained at various times by both Israel and the Palestinian Authority.

[7] 1957 c 52.

[8] GOC Southern Command of the Israel Defence Forces (IDF) from 8 December 2000 to 7 July 2003.

1. The demolition of 59 houses in Rafah, Gaza Strip, on 10 January 2002
2. The killing of Noha Shukri Al Makadma on 3 March 2003 as the result of a punitive house demolition
3. The killing of Mohamad Abd Elrahman on 30 December 2001
4. The dropping of a one ton bomb on the Al Daraj neighbourhood of Gaza City on 22 July 2002

Mr Almog was due to speak at a synagogue in Solihull, Birmingham, on 11 September 2005. After having received the files of evidence as to his criminal liability for the above alleged offences, the police failed to make a decision whether they would arrest Doron Almog under their "general arrest" powers. However, they adopted a neutral stance in relation to the complainants' application to Bow Street Magistrates' Court for an arrest warrant. That step does not require the consent of the police, the Director of Public Prosecutions (DPP) or the Attorney General (s25 Prosecution of Offences Act 1985), whereas a prosecution under the 1957 Act in principle requires all their involvement, and in practice the Attorney General must provide his consent for proceedings to be instituted.[9]

(b) The warrant

A hearing took place at Bow Street Magistrates' Court on 9 September 2005, before Senior District Judge Timothy Workman. The application was for warrants in all four of the above cases in which Doron Almog was named as a suspect. The Court was provided with all of the evidence that had been supplied to the police in relation to those cases. The Senior District Judge adjourned the matter overnight and on the morning of Saturday, 10 September, he issued a warrant for the arrest of Doron Almog (backed for bail but with stringent conditions) in relation to the complaint regarding the 59 house demolitions. The Senior District Judge indicated that the other cases would be more appropriately proceeded with by giving the police the opportunity to interview Doron Almog under caution. (The issue of an arrest warrant in a case precludes that step.)

It appears that on the afternoon of 11 September 2005, the police waited at the immigration desk at Heathrow airport for Doron Almog to disembark from an El-Al flight that had arrived some time earlier, but when he did not emerge

[9] The Prosecution of Offences Act 1985 created the Crown Prosecution Service (CPS), which is headed up by the DPP. The Attorney General is a member of the cabinet of the Government of the day, has final responsibility for enforcing criminal law and 'superintends' the DPP Section 1A (3) of the 1957 Act provides that 'proceedings for an offence shall not be instituted…except by or with the consent of the Attorney General'.

the police failed to board the 'plane to arrest him, as they were perfectly entitled to do.[10] An article "posted" at 4.15pm on 11 September 2005 on the website of the Israeli newspaper "Ha'aretz" first reported the news that Doron Almog had evaded arrest by remaining on the 'plane until it returned to Israel.

Subsequently, in an interview on Channel 4 television news, on the evening of Tuesday, 13 September, Doron Almog stated that the flight crew initially asked him to wait on the 'plane and that he was then told that the military attaché to the Israeli Embassy was coming to speak to him. Mr Almog said that he telephoned the attaché on his mobile 'phone but soon afterwards the attaché came onto the 'plane to brief him in person. He stated that the attaché told him "*There is a warrant arrest (sic) against you waiting at the immigration office and we advise you…to stay aboard and get back to Israel*". (This interview echoed comments that Mr Almog was already reported to have made to Israeli journalists, as published in the Hebrew press.)

(c) The aftermath

The police were asked to:

1. Urgently investigate the leak of the existence of the warrant;
2. Explain why the officers did not board the aeroplane to arrest Mr Almog when he did not disembark as expected;
3. Investigate the role of staff from the Israeli Embassy in assisting Mr Almog to escape arrest; and
4. Make the arrest warrant international/European.

At the time of writing (January 2005) none of the above had been conducted. Indeed the fourth request quickly became redundant when the warrant was formally cancelled by Senior District Judge Workman on 14 September 2005 The failure of the police to address the remaining issues is now the subject of a police complaint that the authors have asked the police to refer for independent investigation by the Independent Police Complaints Commission.

[10] As confirmed by Hazel Blears, Home Office Minister, *Hansard* HC 25 Oct 2005 c344W, under the Police and Criminal Evidence Act 1984 (PACE), s 17(1)(a), a constable may enter and search any premises for the purpose of executing a search warrant of arrest issued in connection with or arising out of criminal proceedings. An aircraft is specified under the meaning of 'premises' by PACE, s 23(a).

Further, the British Government has decided to review the law following lobbying by the Government of Israel to try to ensure that in future similar arrest warrants cannot be issued at the request of complainants.[11]

THE LAW[12]

Some historical legal perspective is needed to fully appreciate the significance of the above events. The importance to civilians under occupation of the practical application of "universal jurisdiction" cannot be underestimated. Indeed those who drafted IVGC were conscious of the vulnerability of civilians under occupation. When IVGC was negotiated, the actions of Germany and Japan as military occupiers were fresh in the minds of all concerned. Third parties (that is, including those not involved in a particular conflict) were given legal obligations so that they might effectively "hold the ring" between the military occupier and the (otherwise unrepresented) civilians under occupation.

The relevant provisions of the Fourth Geneva Convention 1949 are as follows:

> "*ARTICLE 146*
> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

[11] See *Hansard*: HC 29 Nov 2005 c298W and HC 7 Dec 2005 c1363W.

[12] See also, Daniel Machover and Kate Maynard 'The UK's duty to 'universal jurisdiction' *The Times* October 4 2005.

> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.
>
> *ARTICLE 147*
> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

The very first words of the second paragraph of Article 146 above (i.e. "each High Contracting Party") make it clear in the context of this Convention that Article 146 includes non belligerent State parties to the Convention, not just States that are involved in the conflict in question. Moreover, the phrase "each High Contracting Party" is used elsewhere in the Convention, making it very clear that those who drafted it did really mean to address *every* High Contracting Party.

Although it is unnecessary to have recourse to the *Travaux Preparatoires* (i.e. as a "supplementary means of interpretation" of this provision, pursuant to Article 3 of the Vienna Convention on the Law of the Treaties 1969[13]), the discussions of those who drafted the Convention makes this interpretation abundantly clear. Debates concerning an Italian proposal to limit this provision to the parties to a conflict, and the way that proposal was rejected, also make it very clear that Article 146 was drafted to achieve "true universality".[14]

The three distinct (and positive and interdependent) obligations imposed on each High Contracting party, and the practical application of these duties in Britain, are illustrated below.

[13] Vol 1155 UNTS 331.

[14] This is a phrase used in The War Office, *The Law of War on land, being Part III of the Manual of Military Law*, H Lauterpacht (Ed) 1958.

(a) The duty to enact legislation

The Geneva Conventions Bill was introduced first in the House of Lords.[15] On 25 June 1957, the then Lord Chancellor, Viscount Kilmuir said the following:

> "The Conventions require the parties either to try in their own Courts persons accused of these offences, wherever the breaches are committed and regardless of the nationality of the accused, or else to hand them over to another party to the conventions for Trial. [T]he offences . . . shall be triable in the UK wherever and by whomsoever the offences were committed. This is an unusual extension of our jurisdiction, but it is made necessary by the special circumstances against which we are providing." [16]

Later in the debate, Viscount Alexander of Hillsborough (opposition spokesman) said the following:

> "I was going to say a word or two about the question of the changes in powers in trying in our Courts certain of the offences committed by persons of other nationalities; but after what the noble and learned Viscount, the Lord Chancellor has said, there is no need to do anything of that kind. I feel most strongly and I am sure that your Lordship's House will feel, that whilst we know that when a great and savage war occurs conventions are often overridden, nevertheless conventions have played their part when they have been almost universally observed by those engaged in the strife . . . so I think we are taking a good step in the right direction in seeking for this ratification."

In Committee, on 2 July 1957, the Bill was amended unopposed to include "persons who aid, abet or procure" grave breaches. When the matter went before the House of Commons on 12 July 1957, the Joint Under Secretary of State for the Home Department, a Mr Simon MP, noted the following:

> "This Bill marks a considerable departure in our criminal law. It makes liable to the criminal jurisdiction of our domestic

[15] In accordance with the principle established in *Pepper v Hart* [1993] AC 593.
[16] *Hansard*, HL Deb 25 June 1957 c348.

> courts persons accused of certain offences wherever the breaches are committed and regardless of the nationality of the accused. There is very limited precedent for such a provision in our law but we believe that such a departure is necessary, if we are to honour certain new types of international obligations now recognised as morally binding."[17]

In the same debate, Sir Frank Soskice accepted in principle "the departure from the criminal law which this Bill involves" and recognised that Britain should be "ready to shoulder the obligations" imposed by the Geneva Conventions. There is nothing in the debates held in Parliament that indicates that it was the intention of Parliament that either the victim or the alleged perpetrator should be a British national or that there had to be a direct connection between the offences alleged and England and Wales.

Furthermore it is well established that at least grave breaches of the Geneva Conventions have also risen to the status of *jus cogens* offences.[18] Such offences cannot be derogated from or modified unless by similar customary law.[19] It is suggested that *jus cogens* offences also attract universal jurisdiction[20] and that as a consequence of recognising an offence as an elevated level of offence, it carries a duty to either prosecute or extradite those accused of carrying out such crimes.[21]

(b) The duty to search

The authoritative commentary on the Fourth Geneva Convention published by the International Committee of the Red Cross (edited by Dr Jean Pictet) says as to the active duty to search for alleged offenders of all nationalities:

> "As soon as a contracting party realises that there is on its territory a person who has committed . . . a [grave] breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should

[17] *Hansard*, HC volume 573, p 716.
[18] See T Meron *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) pp 41-62.
[19] See I Brownlie *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) p 488.
[20] Kenneth Randall 'Universal Jurisdiction Under International Law' 66 *Tex L Rev* 800–815.
[21] M Cherif Bassiouni 'International Crime: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law & Contemp Probs* 63, at 65-66.

> be taken spontaneously, therefore, not merely in pursuance of a request from another State." [22]

The ICRC commentary confirms that a High Contracting Party is not entitled to sit back and do nothing but has an active obligation to search. It follows that this duty should include maintaining border controls that enable a state to ensure that known suspects seeking to enter the jurisdiction are arrested on arrival. In the British context, common sense dictates that the *necessary spontaneous police action* can only occur where alleged war crimes have been investigated to the point where the police are able to decide whether there are reasonable grounds to arrest a suspect who arrives in or is discovered in the jurisdiction. For the authors, the deterrence value of this Article hinges largely on this obligation. There is certainly no question under the Convention that the nationality of the individual concerned or of any victim is relevant to the exercise of jurisdiction. The ICRC Commentary, following the passage referred to above, states:

> "The Court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same Courts."

(c) The duty to prosecute or extradite

The unequivocal wording of the duty of each High Contracting Party in article 146 of IVGC indicates that once a suspect is located in the territory of a High Contracting Party, the state has a duty to either prosecute or extradite the alleged war criminal to enable a prosecution.[23] The duty to "prosecute or extradite" has been emphasised by the UN on several occasions. Notably, the UN General Assembly Resolution *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*[24] specifically states:

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[22] ICRC *Volume IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: commentary* (Geneva, 1958) p 598. Although commonly referred to as 'Pictet's Commentary' the commentary on IVGC was written mainly by Oscar Uhler and Henri Coursier, with the participation of F Siordet, C Pilloud, J-P Schoenholzer, R-J Wilhelm and R Boppe.

[23] M Scharf 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law & Contemp Probs* 41, at 43

[24] GA Res 3074 (XXVIII), 28 GAOR Supp No (30A), UN Doc A/9030/Add 1 (1973)

> "War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."[25]

The resolution goes on to provide that:

> "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment-of persons guilty of war crimes and crimes against humanity."[26]

Further, according to the General Assembly Resolution adopted by the UN, two years earlier, in 1971, a refusal by states to co-operate in fulfilling their obligations under the Geneva Conventions including the arrest, extradition, trial and punishment of those accused of war crimes, "is contrary to the general purposes and aims of the UN Charter and recognized norms of international law."[27]

Arguably, the maxim *aut dedere aut judicare*[28] also applies to grave breaches/war crimes by virtue of their nature as universally reprehended offences and because such offences are "of concern to all states and all states ought therefore to cooperate in bringing those who commit such offences to justice."[29] The practice of states is not in fact generally consistent with this duty,[30] but there is nonetheless a strong case for assuming that there is a customary international law duty to prosecute war crimes in light of existing treaties, declarations and practice in relation to crimes committed during the Second World War.[31]

[25] Ibid paragraph 1.
[26] Ibid paragraph 8.
[27] GA Res 2048 (XXVI), 27 UN GAOR Supp (No 29), UN Doc A/8429 (1971)
[28] See generally M. Cherif Bassiouni and Edward M. Wise *Aut Dedere Aut Judicare The Duty to Extradite or Prosecute in International Law* (M Nijhof, 1995).
[29] Ibid p 24.
[30] See M Cherif Bassiouni 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' 42 *Va J Int'l L* 81 at 117 and C Edelenbos 'Prosecution of Human Rights Violations' (1994) 7 *LJIL* 5 at 15-16 & 20.
[31] Ibid Edelenbos at 15.

In relation to torture, it is argued that UNCAT[32] specifically imposes an obligation to either prosecute or extradite those accused of committing torture by virtue of Article 7.1 of the Torture Convention. This article states:

> "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

This position was affirmed by Lord Brown-Wilkinson in the *Pinochet (No. 3)* case[33] when he stated:

> "The purpose of the Convention was to introduce the principle of *aut dedere aut punire* – either you extradite or you punish."

Furthermore, the wording of Article 7.1 of the Torture Convention clearly indicates that the obligation arises when an alleged offender is *found* in the territory of the State Party and is thus capable of providing for universal jurisdiction. The courts of England and Wales therefore have universal jurisdiction over acts of torture under the Criminal Justice Act 1988, s 134 (which covers acts committed "in the UK or elsewhere"). There is no requirement for any connection with England and Wales of the defendant, victim or suspects.

IMPUNITY IN ISRAEL

Of course, it is always to be hoped that a country engaged in a military occupation will uphold civilised standards and avoid the temptation to take advantage of the overpowering strength it wields over the civilians under its control. Occupying armies and the military and civilian legal systems of the occupying power should be able to bring to account its own "war criminals".

Unfortunately, the record shows that most alleged grave breaches in the OPT are not even investigated as such by Israel. They are either ignored or officially sanctioned as legal in the teeth of international legal opinion to the contrary.

For many years, most cases of punitive house demolitions, killings and torture in the occupied Palestinian territories have not been the subject of

[32] See n 4 above.

[33] *Regina v Bow Street Stipendiary Magistrates and Others, Ex Parte Pinochet Ugarte* (No 3) [2000] 1 AC 147 per Lord Brown-Wilkinson at 200.

criminal investigations, let alone prosecutions. The failures of the Israeli legal system are well documented by now but can be illustrated briefly by some of the cases in point (in relation to house demolitions and assassinations).

(a) Punitive house demolitions

According to PCHR, between 29 September 2000 and 31 January 2005, more than 2,702 houses in the Gaza Strip were completely demolished by the Israeli occupying forces since the outbreak of the (second) *intifada*, rendering thousands of Palestinian civilians homeless.[34] B'Tselem put the figure of house demolitions in the whole of the OPT from September 2000 to November 2004, as 4,170.[35]

According to a policy brief by Harvard University to the United Nations Information System on the Question of Palestine (UNISPAL),[36] house demolitions broadly come within three categories:

1. First, houses are demolished by Israeli occupation forces because a building permit was not sought prior to their construction, or for some other technical breach of applicable administrative law.
2. Second, houses are demolished as part of military operations. Such destructions are arguably necessary during armed hostilities and fall to be judged under the rules relating to military necessity.
3. Finally, demolitions occur outside the scope of military operations or Israeli administrative power in the OPT. These demolitions are purportedly a response against persons suspected of taking part in - or directly supporting - criminal or guerrilla activities. These demolitions are referred to routinely as "punitive demolitions".

The distinction in practice is however often difficult to determine, particularly between 2 and 3 above.

A series of cases in the Supreme Court of Israel confirm that the domestic courts do not regard the policy of punitive house demolitions as unlawful.[37]

[34] http://www.pchrgaza.org/Library/alaqsaintifada.htm

[35]http://www.btselem.org/English/Publications/Summaries/200411_Punitive_House_Demolitions.asp

[36]http://domino.un.org/UNISPAL.NSF/0/13f65639b6eb7b9485256ea600641d69?OpenDocument

[37] eg *Almarin v IDF Commander in Gaza Strip* HCJ 2722/92 (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), *Janimat v OC Central Command* HCJ 2006/97 (the court refused to interfere with the discretion of the

The authority for punitive house demolitions stem from the Defence (Emergency) Regulations 1945 (according to Israeli courts that insist the Regulations are still good law). These regulations were introduced into the legal structure of Palestine by Britain, in response to resistance to British rule. Regulation 119(1) states:

> "A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land."

Demolitions purportedly required by military necessity must be judged by internationally accepted criteria (i.e. as set out in the above policy brief to UNISPAL):

1. The individual house must offer an essential and immediate contribution to the enemy's military operation and, therefore, endanger the security of the occupation forces; and
2. The demolition of the house must, at the time, be an adequate response to that specific threat and there must be no less intrusive response possible; and
3. The demolition of the house must offer concrete military advantages that outweigh the damage caused to the civilian asset and its consequences on the life of Palestinian individuals and families.

The facts of each case must meet this (relatively high) threshold, otherwise the house demolition in question is not a militarily necessary.

Two cases involving house demolitions were presented to the police and Bow Street Magistrates' Court in relation to Doron Almog, alleging the grave

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military commander and stop the house demolition ordered by the military commander of the West Bank).

breach of "extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly".

One involved the demolition of 59 houses in Rafah by bulldozer on 10 January 2002. The IDF gave conflicting and inconsistent reasons for these demolitions, including that the operation was a retaliatory measure for the (unrelated) death of two Israeli soldiers,[38] to weaken the fear of the existence of tunnels[39], and for purported reasons of military necessity.

The other case involved the punitive demolition of the house of the family of a suspected suicide bomber by dynamite, which partially demolished a neighbouring house killing Noha Shukri Al Makadma who was in her ninth month of pregnancy.[40]

The victims in both of these cases claimed that these demolitions were illegal, but no investigation took place. PCHR attempted to instigate investigations into both of these cases. In relation to the case of the 59 house demolitions, PCHR wrote to the IDF legal advisor requesting a criminal investigation, but no reply was received. In relation to the house demolition that killed Noha Shukri Al Makadma, PCHR wrote to the Legal Advisor of the IDF requesting an inquiry and for disciplinary measures to be brought against those responsible. In its reply, the Ministry of Defence expressed regret for the "injuries of guiltless people" but rejected the request for an inquiry.

Evidence of two other similar punitive house demolitions by dynamite in the Gaza Strip conducted in the four months prior to the death of Noha Shukri Al Makadma and ending in civilian deaths, were also presented to the British police as "evidence of similar fact". In both these cases PCHR wrote to the legal advisor of the IDF requesting criminal investigations and asking for the IDF to change their practices to avoid further deaths of innocent civilians. In one case no reply was ever received. In the other, without any obvious inquiry, the reply stated that there was "no suspicion of any breach of duty by the IDF to warrant the opening of a criminal investigation".

On 17 February 2005, Defence Minister Shaul Mofaz announced the end to the policy of demolishing the houses of "terrorist's" families.[41] However, the

[38]http://web.archive.org/web/20031011141900/www.idf.il/english/announcements/2002/january/11.stm

[39]http://web.archive.org/web/20030807150540/www.idf.il/english/announcements/2002/january/27.stm

[40] In the case of the killing of Noha Shukri Al Makadma, it was alleged that the property destruction was extensive as part of a wider policy of 'extensive' punitive house demolitions of the Government of Israel and implemented by military commanders. It was also alleged that her death also amounted to the grave breach of wilful killing.

[41] See the official IDF announcement:
http://www1.idf.il/DOVER/site/mainpage.asp?clr=1&sl=EN&id=7&docid=37885

demolition of Palestinian homes purportedly for reasons of military necessity has not abated.

(b) Targeted assassinations

According to PCHR, from 29 September 2000 to 31 January 2005, Israeli occupying forces and settlers killed 2,714 Palestinian Civilians in the OPT. 418 (14%) were killed in assassination operations, and of these, at least 154 were bystanders, of whom 44 were children.[42]

Evidence in relation to one of these assassination operations was presented to the British police. This was the well known case of the assassination of Salah Shehadeh.

Between 11.30 pm and midnight on 22 July 2002, an Israeli F16 fighter plane dropped a one ton bomb on the Al Daraj neighbourhood of Gaza City ("the al-Daraj bombing"). The target of the bombing was the house of Shehadeh, and it was a direct hit. However, his house was in one of the most densely populated residential areas on earth.

In total, fifteen people died in the blast. Up to 150 people received injuries, some of them serious and permanent. Eight houses in the vicinity of the bombing were completely destroyed and a further nine partially destroyed. A further twenty one houses received moderate damage.

The IDF Spokesperson's Announcement of 23 July 2002 stated that:

> "The IDF attack last night was directed at Salah Shehade and him alone. The strike was accurate, carried out using designated technology. The objective is to thwart future and upcoming terror activities by attacking the source itself, namely Shehade. There was no intention of harming members of his family or other civilians."[43]

The "Yesh Gvul" movement in Israel filed a petition in the Israeli High Court on 30 September 2003, asking the court to require the Attorney General and the Military Advocate General to mount a criminal investigation with a view to putting on trial all those in the command chain of the bombing.[44]

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[42] http://www.pchrgaza.org/Intifada/Killings_stat.htm

[43] http://web.archive.org/web/20030807154927/www.idf.il/english/announcements/2002/july/23.stm

[44] The Yesh Gvul petition is against former Prime Minister Ariel Sharon, former Defence Minister Binyamin Ben Eliezer, former Chief of Staff Moshe Ya'alon, the present Chief of Staff and former Air Force Commander Dan Halutz, former Attorney General Elyakim Rubinstein, former Judge Advocate General Menachem Finkelstein and others (*Yoav Hess et al v Judge Advocate General et al*, HCJ case 8794/03).

The State of Israel (respondent) maintained that the assassination itself was lawful and that the military operation was proportionate to the legitimate aim of killing Shehadeh. It stated that the potential for the death of civilians and the destruction of property was considered before going on to take the risk, and ordering the bombing mission:

> "It is important to emphasize that one of the central considerations, which were accounted for throughout all planning stages of the operation against Shehadeh and its approval was the **proportionality** consideration – the obligation to make sure that hitting Shehadeh would not lead to hitting the civilian population in his vicinity, disproportionate to the military aims the operation set out to achieve. The discussions largely dealt with the subject of hitting civilians, which may be a result of attacking Shehadeh.
>
> "After the discussion for instance, it had been decided to carry out the attack in the late hours of the evening (close to midnight), when pedestrians would not be expected to move around the street close to the house of Shehadeh.
>
> "Also upon such consideration it had been decided to use one bomb of 1000 Kg (which was the quantity of explosives required in order to achieve in reasonable probability the aim of the operation) and not two bombs of 500 Kg each, because the use of two bombs would increase considerably the risk of missing the target and as a result endangering a building close to that of the intended target with a direct hit.
>
> "At the end, after receiving precise intelligence information about the hiding place of Shehadeh, the execution of the operation had been decided according to the abovementioned outline. **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." [45]

After the respondent replied, on 3 March 2004, the court suspended the case, pending a decision on another petition (filed by the Public Committee

[45] HCJ 8794/03 *Yoav Hess v Judge Advocate General*; Response on Behalf of the State Attorney's Office (translation from Hebrew, all emphases in the original).

Against Torture in Israel in January 2002) challenging the lawfulness of the assassination policy of the State of Israel.[46]

On 16 February 2005, a hearing of the "assassination policy" petition was held, and that petition was itself adjourned indefinitely as a result of Prime Minister Sharon's commitment at the Sharm-el Sheikh summit of 8 February 2005, to suspend the policy of assassinations ("pre-emptive liquidations").[47]

The Yesh Gvul movement wrote to the High Court requesting the petition for a criminal investigation into the bombing to be re-opened. Yesh Gvul requested a hearing and the State was given to 15 June 2005 to respond. A hearing took place on 5 September 2005, when the case was adjourned indefinitely (as in the "assassinations policy" case).

During the course of September 2005, advocates for the petitioners asked for a hearing on the assassination policy case, in response to the public resumption of that policy by the IDF. During the course of November 2005, the State Attorney's Office agreed that both petitions should be restored for a hearing at the High Court.

On 11 December 2005, a hearing of both petitions was held, and the High Court ruled that the Shehadeh petition is dependent on the outcome assassination petition. The court gave the State Attorney's Office 20 days to submit further legal arguments, but as of 9 January 2006, he had not done so.

Meanwhile, the international view of the al-Daraj bombing was that it was unlawful and disproportionate. This view is certainly held by the British Government. The International Committee of the Red Cross (ICRC) issued a press release of 23 July 2002, entitled "Civilians must not be attacked" [48] Several members of the UN Security Council condemned the bombing in those terms, including Jack Straw, the British Foreign Secretary, who was in the chair, at its meeting on 24 July 2002.[49] Before travelling to the UN, Jack Straw had told the House of Commons that he would ensure that Sir Patrick Cormack's views "which I think the whole house shares, about the unjustified and disproportionate nature of the attack and its consequences are conveyed to the ambassador and, through him, to the Israeli Government."[50]

Similarly, after the assassination of the spiritual leader of Hamas, Sheikh Yassin, by the Government of Israel, Jack Straw confirmed that the British

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[46] HCJ 769/02.

[47] See the PCATI press release:
http://www.stoptorture.org.il/eng/press.asp?menu=6&submenu=1&item=237

[48] http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5CBJGJ

[49]http://domino.un.org/UNISPAL.NSF/0/604c82baa09d068e85256c1a0064bda3?OpenDocument

[50] *Hansard*, HC Deb 23 Jul 2002 c840.
http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020723/debtext/20723-03.htm

Government considered the policy of "so-called assassinations – straightforward killings"as

> "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 bystanders, including children, simply emphasises the unlawful nature of that approach, and its counter-productive effect."[51]

Despite the international view taken towards the criminal nature of the acts described above, it is clear that a climate of impunity has taken hold in Israel and its occupying army, that is unchecked by its own criminal or civil justice system. One of the few ways to combat impunity is the practical application of universal jurisdiction.

EXERCISING UNIVERSAL JURISDICTION OVER ISRAELI SUSPECTS

Certainly where war crimes, genocide and crimes against humanity are concerned, instead of individual countries doing their duty, in the few cases where international consensus has been possible, a "pooling of resources" has been achieved through the creation of ad hoc international criminal tribunals set up under resolutions of the UN Security Council. There is no chance of such an ad hoc tribunal being established in the foreseeable future in the case of Israel, as the US would veto such a proposal at the UN Security Council. Furthermore, the International Criminal Court cannot deal with alleged Israeli war crimes as Israel has refused to sign up to it.

Criminal trials in the domestic courts of third-party states (those remote from the conflicts in question) since 1949 might have deterred many war crimes. However, many alleged crimes in, for example, the occupied territories, Kuwait and East Timor have gone unchallenged across the world. Israelis, Iraqis and Indonesians should have been arrested and tried in other countries, to ensure legal accountability but also to deter criminality.

Individual states have lacked the political will to prosecute foreign war criminals. Countries have resisted getting "involved", even though they have a legal duty to "seek out and prosecute" alleged war criminals and either prosecute or extradite those accused of committing offences contrary to

[51] *Hansard*, HC Deb 30 March 2004 c1043.
http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmhansrd/vo040330/debtext/40330-01.htm

UNCAT. Arguably, a continuing failure to comply with (or even accept) the duty to prosecute or extradite those suspected of committing serious international crimes, not only will this frustrate all attempts to bring such alleged offenders to justice but it will bolster the sense of impunity of such persons.[52]

The British police have discretion as to whether or not to investigate particular criminal allegations. That discretion has to be exercised lawfully. The law of England and Wales does not entitle the police a "get out clause" not to investigate *any* allegations of such offences, as that would amount to an absolute discretion to ignore the duty to uphold the law. So, which cases should it investigate? What is the future for universal jurisdiction in England and Wales?

Quite simply, it the authors' view that, for all the reasons given above, the police need to allocate resources to investigate **credible** allegations of war crimes and torture. In the past the police were given resources specifically to pursue investigations under the War Crimes Act 1991 (the 1991 Act). More than £11 million was reportedly spent by the Home Office (the majority of which was allocated to the police) on the investigation of alleged war criminals resident in Britain, resulting in only two prosecutions and only one conviction.[53] Such cases of war crimes were specifically funded by central Government over an extended period. The reported cost of investigations to the end of 1996 was approximately £6 million for the Metropolitan Police and approximately £2 million for the CPS and the expected cost of investigations for 1996-97 was about £630,000. Home Office special funding for the war crimes unit stopped in 1995, but it was stated during a Parliamentary debate in March 1997 that the Metropolitan police would receive a total of £1.7 billion in 1997-98 for all their policing needs, **including war crimes investigations**.[54]

The investigative resources (police officer time and expenses) required to prepare evidence files for advice from the CPS in some of these cases is relatively modest. For example, in each of the Gaza cases provided to the police the suspect has been identified, witnesses identified etc. No great difficulties are posed in obtaining further evidence locally in relation to the cases now with the police. Anyhow, it would be perverse if a State, such as Israel, were to be "rewarded" (i.e. by police inaction) for making it more difficult for the British police to investigate alleged crimes committed under military occupation. These will clearly be much cheaper cases to investigate

[52] See Cherif Bassiouni and Wise, above n 28, p 24.

[53] A case against Szymon Serafinowicz, a collaborationist police chief allegedly personally responsible for hundreds of killings, collapsed in 1997 after the jury decided he was not fit to plead. Twenty elderly witnesses were brought to Britain and more than £2m spent before the trial collapsed.

[54] *Hansard* HC Deb, 5 Mar 1997 c1004, as regards the expenditure under the 1991 Act.

than those investigated under the 1991 Act referred to above. Indeed, in some cases the investigative burden is minimal and the case will revolve primarily around legal issues (i.e. as to "military necessity").

In this context the comments of DAC Peter Clarke on 19 July 2005, just after the conviction of Mr Zardad (reported to have been the first) under s134 Criminal Justice Act, are relevant:

> "We had to find witnesses in remote parts of Afghanistan and give them the confidence to come forward to give evidence in a British court. The fact that they did so is testament to their courage and to the skill of the police officers who supported them. It was a huge challenge, in the prevailing circumstances in Afghanistan, to investigate and find evidence to the standard demanded by the British courts. Today's verdict shows what can be achieved, and that the UK is not a safe haven for people like Zardad." [55]

These comments suggest that there will ***not*** be impunity in England and Wales for torturers or war criminals, even after the investigative burden placed on the police since the bombings in London of 7 July 2005.

Accordingly, police forces in third party states, including in this country, will continue to be given evidence to consider on a case by case basis. The task facing victims and their legal advisers is to persuade police forces across the world to conduct expeditious and robust preliminary investigations so that decisions can be made in each case whether to arrest the suspect on arrival in their jurisdiction. Police forces will in that way put themselves in a position where arriving suspects can actually be arrested and charged, where the evidence permits.

If the police engage with these issues in a serious way, the very prospect of alleged war criminals being brought to justice in Britain or any other country is likely to provide a deterrent to future perpetrators of war crimes. Criminal trials would certainly provide genuine deterrence and begin to provide justice for victims, where justice has eluded them at home. The end of impunity would then be in sight.

[55] http://cms.met.police.uk/news/convictions/terrorism/afghan_warlord_jailed_following_anti_terrorist_investigation