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Palestinian Political Prisoners: Unfair Game for Israel's Persecution

Israel's Supreme Court decides that the state has no obligation to allow family visits for Gazans detained in Israel

By Grietje Baars[1]

1. Introduction

On 9 December 2009, the Israeli Supreme Court rejected petitions by Gaza detainees and their relatives, together with Palestinian and Israeli human rights organizations against Israel's general policy, in place since June 2007, not to permit Gaza residents to visit their relatives incarcerated in Israeli jails.[2] The respondents included the Government of Israel, the Ministers of the Interior and Defence, and the Israel military commander for the southern region which includes Gaza. The Israeli Supreme Court held that Israel has no obligation to allow "foreigners" entry into Israel (especially those from what it considers to be an "enemy entity"). The Court surmised that the resultant infringements of international human rights law against the Gaza prisoners are only indirect, as the State is not claiming that these detainees may receive no visitors at all.

In this decision, the Court explicitly placed "Israel's rights as a sovereign state" squarely above the rights of the persons under its control. In doing so, the Court not only misapplied international law, but also once again purported to legitimize a manifestation of Israel's continued and systematic persecution of Palestinians. This practice, together with other manifestations of deliberate deprivation of Palestinian basic rights, were highlighted and condemned in the Report of the United Nations Fact-Finding Mission on Gaza (the "Goldstone Report").[3] Cumulatively, such practices may amount to persecution, which is defined as the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"."[4] Persecution is a potential crime against humanity for which members of the Israeli civilian and military leadership risk incurring individual responsibility in international criminal law.[5]

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[2] HCJ 5268/08, *Anbar et al. v. GOC Central Command et al.* and HCJ 5399/08, *Adalah et al. v. The Defense Minister et al.* (decision delivered 9 December 2009) available in English as translated by Adalah at: http://www.adalah.org/eng/pressreleases/pr.php?file=09_12_10_9

[3] See specifically, the section on persecution, paras. 1332-5 and 1502 of the Report of the United Nations Fact-Finding Mission on Gaza, September 2009, UN Doc A/HRC/12/48, available at: http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm .

[4] For a definition of "persecution", see the Rome Statute, Article 7 (which is considered to codify customary international law and as such applies to Israel). The Rome Statute only deals with persecution as a crime against humanity - if it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack and if it is committed "in connection with" any act referred to in Article 7 (1) or any crime within the jurisdiction of the court. In customary international law, however, "persecution" is a stand-alone international crime, see Werle, G.: Principles of International Criminal Law, TMC Asser, 2009 at 332, and *Prosecutor v Kupreskic et al*., ICTY Trial Chamber Judgment, of 14 January 2000, paras 580ff. See also, *Prosecutor v Tadic*, Trial Chamber Judgment, 7 May 1997, paras. 697, 710.

[5] For a detailed analysis of the legal concept of "persecution", see *Prosecutor v Kupreskic et al*., ICTY Trial Chamber Judgment of 14 January 2000, paras 580ff.

2. Facts of the case

As of December 2009, 738 individuals from Gaza are detained in prisons and detention centres inside Israel.[6] Since 6 June 2007, their relatives have not been allowed to enter Israel for family visits. On this day, Israel suspended the visiting programme which had been in place and was run by the International Committee for the Red Cross ("ICRC"), a measure against which the ICRC protested publicly in May 2008 and again in June 2009.[7] The Gaza detainees, many of whom are held indefinitely without trial,[8] have since been in virtual isolation, as they are generally not allowed to use telephones or the internet, and are only occasionally allowed to send written messages through the ICRC to their families back home.

Israel's decision to stop family visits was taken in June 2007 days before the takeover by Hamas of the Gaza administration. The decision must be seen in the context of a tightening regime of measures implemented by Israel against the population of Gaza, coupled with a loosening of the restraints on the use of force against them.[9] More broadly, it should be evaluated as part of Israeli policies vis-à-vis the Palestinian people as a whole.

The State's arguments

According to the Court decision, the June 2007 policy was implemented on the basis of the 19 September 2007 Israeli Government's "Ministerial Committee for National Security" decision that *"additional restrictions will be imposed on the Hamas regime in a way that will limit the transfer of goods to the Gaza Strip, reduce the supply of fuel and electricity, and impose a restriction on the movement of people to and from the Strip"*.[10]

Oddly, the court justified the June policy on the basis of the government's late-September decision. The judgment states that the authorized official to implement the ministerial committee's decision is the military commander of the region. In constitutional democracies generally, a military

[6] See Addameer's website: http://addameer.info/?cat=18. Of the 738 prisoners, nine individuals from Gaza are being held under the Israeli Incarceration of Unlawful Combatants Law – 2002. According to information received from Defense of Children International – Palestine and Al Mezan, as of December 2009, two minors (under the age of 18) was being held in Israeli prisons, one of whom has been sentenced to 10 years in prison. Around 21 minors from Gaza were arrested and detained in 2009 but they were subsequently released.

[7] ICRC Press Release, "Gaza: families should be allowed to resume visits to relatives detained in Israel", 10 June 2009 and ICRC Press Release, "Gaza: ICRC Calls for Immediate Resumption of Family Visits to Detainees in Israel," 26 May 2008 available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/html/gaza-news-100609!OpenDocument http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/israel-news-260508?opendocument

[8] Hundreds of Palestinian prisoners are held either as "administrative detainees" or under the Israeli Incarceration of Unlawful Combatants Law - 2002. Those individuals are often tried without due respect for fundamental fair trial guarantees, and convictions are frequently secured through the use of secret or coerced evidence. See, for example, Yesh Din – Volunteers for Human Rights: "Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories", December 2007, available at: http://www.yeshdin.org/site/images/BackyardProceedingsEng.pdf.
Note that since Israel's "Disengagement" from Gaza, Gazans are no longer tried in military courts and are now tried in Israeli civilian courts. For an overview of the changed legal framework, see the Goldstone Report, para 1449ff.

[9] See, for example, Deputy Defense Minister Matan Vilnai … threatening a "shoah," the Hebrew word for holocaust or disaster, in Ha'aretz, "Barak: Hamas will pay for its escalation in the south", 29 January 2009, available at http://www.haaretz.com/hasen/spages/959532.html

[10] See the Israeli Ministry of Foreign Affairs, "Security cabinet declares Gaza hostile territory", 19 September 2007, and "Behind the headlines: Israel designates Gaza a 'hostile territory'", 24 September 2007, available at www.mfa.gov.il .

commander's authority is strictly limited to decisions based on military security needs. Quite remarkably, in the case before the Supreme Court the state claimed that the main component of the September 2007 decision was "a basic act of war craft", and at the same time that "the main component of the policy at the centre of the case is political."[11]

However, the state also argued that there was a security element to the decision, which was "the volume of traffic anticipated at the border crossings if the visits are renewed" and because "residents of the Strip pose a "heightened risk" under the existing circumstances and … it is not possible to nullify the various security dangers even if the visits are renewed with the assistance of the Red Cross."[12] The state's security argument is particularly weak, as the state-of-the-art security system equipped with body scanners and hermetic remote-controlled gates present at the Erez Crossing between Gaza and Israel, according to the Dutch company that designed and built it, can securely accommodate up to 4,000 persons crossing *per hour*.[13] As argued by the petitioners, any security concerns that may exist must, and can, be dealt with on an individual case-by-case basis. Allowing a military commander to set such sweeping policies as the wholesale cancellation of the ICRC prison visit programme would thus seem to amount to permitting the military to set politically-grounded policies. The fact that the ministerial committee decision containing the political directive was adopted three and a half months after the suspension of the ICRC programme may even suggest that the political decision was taken at least partly to ratify the military policy *post-hoc*. That the Supreme Court glosses over this apparent inconsistency in its decision seems congruent with more regular accusations made against the court. The Supreme Court is often accused of giving both the executive and the military so much leeway as to erode the checks and balances that are the cornerstone of a democratic state committed to the rule of law.[14]

The Court's failure to consider international humanitarian law

As Israel – including the Supreme Court[15] - considers Gaza as no longer occupied, the Court failed to take into account applicable principles of international humanitarian law ("IHL"). That Gaza is indeed still occupied has been persuasively argued elsewhere.[16] The Gazans who are the initiators and the subject of this petition (both the detainees and their relatives), therefore, are not "foreigners" or "members of an enemy entity" but "protected persons" to whom the occupying power owes a particular duty of care. Article 27 of the Fourth Geneva Convention of 1949 ("GCIV") is the general article that lays down the fundamentals of the protection of the occupied population, and this includes, among others, the protection of family rights. Whereas an occupying power may, according to Article 76 of the GCIV, detain members of the protected population, it may do so *only inside the occupied territory* unless there is a pressing security need for detainees to be transferred

[11] Decision, Adalah's translation.
[12] Decision, Adalah's translation.
[13] Interwand, "Dutch Innovation in Gaza", available at http://www.interwand.nl/lang/EN/news/news1.htm
[14] Generally, see Kretzmer, D.: The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories (SUNY Series in Israeli Studies), 2002.
[15] HCJ 9132/07, *Al-Bassiouni, et al v. Prime Minister* (decision delivered 30 January 2008), available in English at: elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf
[16] See, for example, Scobbie, I: (2007) '*An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*.' In: Cotran, E. and Lau, M., (eds.), Yearbook of Islamic and Middle Eastern Law, Volume 11 (2004-2005), Brill, pp. 3-31; Gisha Legal Center for Freedom of Movement: *Disengaged Occupiers: The Legal Status of Gaza,* 2007, available at http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf ; Goldstone Report, Chapter IV, especially para. 276.

out.[17] This provision enables the continued upholding of protected persons' rights insofar as possible even when they or their relatives are in detention. Article 76 of GCIV also requires that proper regard be paid to the special treatment due to minors in detention. Denying detained children visits from their parents or indeed any other relative seems to be a particularly grave infraction of the special protection due to children.

Lip-service to "humanitarian concerns"

Apart from obligations under IHL, Israel has obligations under international human rights law towards both the detainees in Israeli detention and their families in Gaza.[18] In its judgment, the Supreme Court only pays brief lip-service to "humanitarian considerations" which gives the impression that it regards human rights as mere concessions, as a "bonus" rather than fundamental basic entitlements. In its list of issues to be addressed at the 99th Session in July 2010, the Human Rights Committee included the question relative to Article 23 of the International Convention on Civil and Political Rights ("ICCPR"). The question asked is "What measures are taken by the State party to reinstate the possibility of family visits for Palestinian prisoners from Gaza?"[19] Under Article 37 of the Convention on the Rights of the Child (CRC), Israel has a legal duty to guarantee and protect the fundamental rights of child detainees, including those from Gaza, who are incarcerated in Israel. Specifically, Article 37(c) includes "the right [of the child] to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."[20] A blanket ban is *a priori* incompatible with this fundamental basic requirement.[21]

[17] On March 25, 2009, Yesh Din, the Association for Civil Rights in Israel and HaMoked filed a petition to the Israeli Supreme Court (HCJ 2690/09, Yesh Din et al v. Commander of the Military Forces in the West Bank) demanding that prisoners and detainees who reside in the West Bank not be held in facilities within Israel, and that arraignment hearings for such detainees also not be held in courts outside the West Bank. See Yesh Din Press Release: "Yesh Din Petitions HCJ: Stop holding Palestinian detainees inside Israel", 25 March 2009, available at http://www.yesh-din.org/site/index.php?page=pastupdates&lang=en.

[18] Such as Articles 2, 10, 17, 23 of the ICCPR.

[19] CCPR List of Issues (Israel) UN Doc CCPR/C/ISR/Q/3, available at http://www2.ohchr.org/english/bodies/hrc/hrcs99.htm. In their report to the CCPR, Adalah, Al-Mezan and Physicians for Human Rights – Israel had additionally addressed the prison visits issue under Articles 7 (right not to be tortured), 10 (rights of detainees), 12 (freedom of movement) and 17 (right to privacy), see http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AdalahAlMezanPHR_Israel97.doc

[20] Note that the CRC and other human rights instruments apply to Gazans in Israeli detention.. This point was confirmed by the UN Committee Against Torture ("CAT") in its review of Israeli practices in May 2009 (para. 11), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/431/65/PDF/G0943165.pdf?OpenElement

[21] For further important critiques of Israel's systematic deprivation of Palestinian fundamental rights (including detainees' rights), see, UN CAT, Concluding Observations of the Committee against Torture: Israel, 23 June 2009, CAT/C/ISR/CO/4. See also, for example, DCI Palestine's Alternative Report for Consideration Regarding Israel's Third Periodic Report to the UN Human Rights Committee, available at http://www.dci-pal.org/english/doc/reports/AlternativeReport.pdf . The Committee on the Rights of the Child has asked Israel for further information on the issue in its "List of Issues to be taken up in connection with the consideration of the initial report of Israel" (CRC/C/OPAC/ISR/1) (discussed January 2010), at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-OPAC-ISR-Q-1.pdf . Note that in its response to the CRC, Israel avoids answering the point and states it considers itself not bound to the CRC "beyond its territory", Written Replies by the Government of Israel, CRC/C/OPAC/ISR/Q/1/Add.1 , at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-OPAC-ISR-Q-1-Add1.doc

Dehumanization

In a previous decision, the Israeli Supreme Court stated that, "It is a firmly established precept that the human rights to which a person is entitled simply by being human remain even when he is detained or imprisoned, and the fact that he is incarcerated cannot serve to deprive him of any right".[22] That detainees from Gaza *can* be deprived of all visitation rights according to the Israeli Supreme Court points to their dehumanization by the court and perhaps the State of Israel at large. Gazans are not, or no longer, seen as right-bearing individuals whom the state has the duty to protect. On a larger and more immediate scale this is of course seen in the relative ease with which a policy of 'no second thoughts' was adopted by the Israeli military during Israel's latest major assault on Gaza (Operation "Cast Lead").[23]

That such dehumanization plays out on the micro-level in state institutions including the Israel Prison Service ("IPS") which holds and is charged with the care of, members of the affected group, can be seen in an example described in the Goldstone Report. During Operation Cast Lead, Adalah submitted a pre-petition demanding that Gazan prisoners be allowed to use the telephone to contact family members to check on their well-being.[24] According to Adalah, the IPS replied that they allowed each detainee to use the telephone once. While some prisoners confirmed to Adalah that they had been allowed to use the telephone, others said that they were forbidden from doing so on the grounds that they did not present a certificate proving that a close relative had passed away during the offensive.[25]

Pawns in a political game: Collective punishment and bargaining chips,

When people have been 'dehumanized' and rendered valueless as individuals in the eyes of a powerful state, it becomes possible to imagine their utilization for political ends.

The measures taken in June and September of 2007 add to measures taken following the 2006 Palestinian election victory of Hamas, which included the restriction on entry of essential goods. These were described by Dov Weisglass, adviser to then Prime Minister Olmert as "putting Gazans on a diet".[26] Gisha, Adalah and a number of other organizations challenged the 2007 electricity and fuel cuts policy calling it "collective punishment", but without success.[27]

The petitioners in the case under review here also called the ban on visits "collective punishment". Collective punishment violates Article 33 of GCIV which holds that "No protected person may be punished for an offence he or she has not personally committed. Collective penalties … are prohibited." The ban on family visits is likely aimed at weakening the resolve of detainees and

[22] HCJ 337/84, *Hokma v. The Minister of the Interior*, PD 50(4) 136.
[23] PCATI Special Report November 2009: No Second Thoughts: The Changes in the Israeli Defence Forces' Combat Doctrine in Light of "Operation Cast Lead" available at: http://www.stoptorture.org.il/files/no%20second%20thoughts_ENG_WEB.pdf . See also, Darrly Li, "From Prison to Zoo," in Adalah's Newsletter Vol. 44 January 2008 available at http://www.adalah.org/newsletter/eng/jan08/Li.doc
[24] Adalah Press Release, "Adalah to Attorney General and Prison Service: Prisoners from Gaza incarcerated in Israel must be allowed to use telephones to check on their family members", 31 December 2008, available at: http://www.adalah.org/eng/pressreleases/pr.php?file=08_12_31
[25] Goldstone Report, para. 1458.
[26] The Observer (UK), "Gaza on brink of implosion as aid cut-off starts to bite", 16 April 2006, available at http://www.guardian.co.uk/world/2006/apr/16/israel
[27] HCJ 9132/07, *Al-Bassiouni, et al v. Prime Minister*, Paragraph 12.

getting them to cooperate or even collaborate with Israel. In addition, the restoration of rights may be bartered by Israel for another concession from the Palestinian side.

Addameer considers that the June 2007 policy is intended to coerce the Palestinians to respond to Israel by forcing a change in the Palestinian leadership.[28] The organization has also pointed out that the timing of major arrest raids often coincides with political events such as the breakdown of negotiations over the release of Israeli soldier Gilad Shalit. These acts would suggest that such arrests are politically motivated.[29] Despite a court ruling calling the practice illegal,[30] Israel has used Palestinian prisoners as bargaining chips, and at times has even coerced them to participate in the negotiation for their own release, as recounted by an interviewee in the Goldstone Report:

> "In March, two [Palestinian Legislative] Council members and former detainees interviewed by the Mission reported that a group of detainees associated with Hamas were given mobile telephones and asked to meet as a group and to intervene in the negotiations surrounding the release of Gilad Shalit. According to the interviewees, detainees were gathered from different prisons for this meeting in Ktziot prison in the Negev. Some detainees were brought out of solitary confinement for this purpose, while solitary confinement is normally imposed because allowing these specific detainees to meet and speak with others is considered a security risk.31 On this occasion, the group of senior Hamas detainees (Council members and other leaders) were asked to call other Hamas leaders in Gaza and Damascus to influence the negotiations over Gilad Shalit and the prisoner exchange. However, they decided not to cooperate, stating that they were not free to confer or negotiate from detention."[32]

If persons are detained for the purpose of functioning as bargaining chips or for the exercise of political pressure on a collective, these practices also render their detention arbitrary and thus contrary to Article 9 of the ICCPR. The Goldstone Report contained the recommendation that *all Palestinian political prisoners* be released:

> "(e) The Mission recommends that Israel should release Palestinians who are detained in Israeli prisons in connection with the occupation. The release of children should be an utmost priority."[33]

Persecution and individual liability of the Israeli leadership

The long-standing practice of Israel's arbitrary detention of its political opponents forms the context for the Supreme Court decision under review, which should be evaluated more generally as reflecting Israel's increasingly oppressive and aggressive attitude to Gaza. As such, it should also be seen as part and parcel of Israel's policy of physically and politically separating the West Bank from

[28] Addameer website: http://addameer.info/?p=728
[29] This issue is discussed by Addameer and borne out in the Goldstone Report, paras 1481-1487.
[30] Additional Hearing 7048/97, *Anonymous v. The Minister of Defence*, PD 54(1) 721.
[31] One of the detainees (Muhammed Jamal, a member of the Palestinian Legislative Council) who had been brought out of solitary confinement petitioned against being returned there, but lost. See Prisoner Petition 443/09, *Jamal v. Israel Prison Service* (Nazareth District Court, decision delivered 24 June 2009).
[32] Goldstone Report, para. 1483.
[33] Goldstone Report, Chapter XXXI, Recommendations to Israel, (e).

Gaza, and making it virtually impossible for Palestinians to travel from Gaza to the West Bank and vice versa.[34] This state of affairs was recently graphically illustrated when Bethlehem University student Berlanty Azzam was forcibly apprehended at a West Bank checkpoint, and transported back to Gaza where she was born.[35]

Out of the various forms of individual and state responsibility that may arise from the facts described,[36] the crime of persecution warrants particular consideration. The International Criminal Tribunal for the former Yugoslavia ("ICTY") has stated, "[i]n determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane"."[37] In *Tadic*, the ICTY held that "the crime of persecution encompasses a wide variety of acts, including, inter alia, those of a physical, economic, or judicial nature that violate an individual's basic or fundamental rights." Cumulatively, the policies described in this review may amount to the persecution of the Gaza people.[38] When part of a deliberate, widespread or systematic attack against a civilian population, persecution constitutes a crime against humanity. According to the ICC's "Elements of Crimes", an "attack" need not entail the use of force[39]; it can encompass any mistreatment of the civilian population.[40] The "widespread or systematic" elements can be equally satisfied by the accumulation of the separate acts constituting persecution. A competent court may find a mental element in the various pronunciations of leaders and decision-makers, or infer such from the relevant facts and circumstances.[41] In conclusion, quite aside from its responsibility for the heinous acts perpetrated during "Operation Cast Lead", and its broader treatment of the Palestinian people, Israel's leadership (past and present) is laying itself open to incurring individual responsibility for perpetration of, or participation in, this persecution.

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[34] For a description of the extremely limiting new policy on movement, see Goldstone Report, paras. 1524-27, and Gisha *Restrictions and Removal: Israel's double bind policy for Palestinians holders of Gaza IDs in the West Bank*, available at http://www.gisha.org/index.php?intLanguage=2&intSiteSN=119&intItemId=1635&OldMenu=15

[35] See the updates on the Bethlehem University website: http://www.bethlehem.edu/Berlanty/BU-updates.shtml. Israel's policy of separation violates the *ius cogens* right to self-determination of the Palestinian people, Goldstone Report, para. 1549.

[36] This includes individual and state responsibility for violations of international humanitarian law and state responsibility for violations of human rights provisions.

[37] For a definition of "persecution", see Rome Statute, Article 7 (which is considered to codify customary international law and as such applies to Israel). The Rome Statute only deals with persecution if it is committed "in connection with" any act referred to in Article 7 (1) or any crime within the jurisdiction of the court. In customary international law, however, "persecution" is a stand-alone international crime, see Werle, G.: Principles of International Criminal Law, TMC Asser, 2009 at 332, and *Prosecutor v Kupreskic et al*., ICTY Trial Chamber Judgment of 14 January 2000, paras 580ff.

[38] For a slightly narrower application of the concept, see: Goldstone Report para. 1332-1335. Taken together with Israel's policies and actions in the West Bank, including East Jerusalem, this persecution may form an element of the crime of Apartheid. For a discussion of Israeli policies and practices amounting to persecution as an element of the crime of Apartheid, see p. 270ff, *Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law*, a study coordinated by the Middle East Project of the Democracy and Governance Programme, Human Sciences Research Council of South Africa, published May 2009, available at http://www.hsrc.ac.za/Research_Publication-21366.phtml

[39] Article 7(3) Elements of Crime 2002, available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf

[40] See *Prosecutor v Kunerac et al*. ICTY (Appeals Chamber) Judgment of 12 June 2002, para 86.

[41] Introduction, para. 3, Elements of Crime 2002.

Aside from the right to have their rights honoured and protected, and to live their lives in dignity and freedom, the Gazans and the Palestinians in general, have the right to an effective judicial remedy. Without domestic enforcement of international law, the onus is on the international community to fulfil these rights and uphold the rule of law, internationally, for the benefit of all.