HCJ 3292/07

1. Adalah – Legal Center for Arab Minority Rights

2. The Palestinian Center for Human Rights – Gaza

3. Al-Hak

v.

1. Attorney General

2. Military Advocate General

3. Shmuel Zakai

4. Dan Harel

5. Moshe Ya'alon

6. Shaul Mofaz

7. Israel Defense Forces

8. Government of Israel

The Supreme Court sitting as the High Court of Justice

[May 6, 2009]

Before President D. Beinisch, Justices E. Rubinstein, H. Melcer

Israeli legislation cited:

Commissions of Inquiry Law, 5729-1968, s. 1, 28

Military Jurisdiction Law, 5715-1955, s. 537

Penal Law, 5737-1977.

Foreign legislation cited:

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, & § 146.

Israeli Supreme Court cases cited:

[1] HCJ 4694/04 *Abu Atara v. Commander of IDF Forces in the Gaza Strip* [unreported, May 18, 2004].

[2] HCJ 4969/04 *Adalah v. GOC Southern Command* [unreported, July 13, 2005].

[3] HCJ 7178/08 *Forum of the Heads of the Druse and Circassian Councils in Israel et al. v. Government of Israel* (not yet reported, November 18, 2009).

[4] HCJ 6001/97 A*mitay – Citizens for Good Governance and Integrity v. Prime Minister* (October 22, 1997) [unreported, Oct. 22, 1997].

[5] HCJ 7232/01 *Yusuf v. State of Israel* [2003] IsrSC 57(5) 561.

[6] HCJ 2624/97 *Adv. Yedid Ronel v. Government of Israel* [1997] IsrSC 51(3) 71.

[7] HCJ 6728/06 *Ometz Association (Citizens for Good Governance and Social Justice*) *v. Prime Minister of Israel* [unreported, Nov. 30, 2006].

[8] HCJ 7195/08 *Abu Rahma v. Military Advocate General* (not yet reported, July 1, 2009).

[9] HCJ 9594/03 *Betzelem v. Military Advocate General* (not yet reported, August 21, 2011).

[10] HCJ 425/89 *Zufan v. Military Advocate General* [1989] IsrSC 43(4) 718.

[11] HCJ 4550/94 *Isha v. Attorney General* [199 5] IsrSC 49(5) 859.

[12] HCJ 7053/96 *Amcor Ltd. v. Minister of the Interior* [1999] IsrSC 53(1) 193.

[13] HCJ 170/87 *Asulin v. Mayor of Kiryat Gat* [1988] IsrSC 42(1) 678.

[14] HCJ 8517/07 *Bassam Aramin v. Attorney General* (not yet reported, July 10, 2011).

[15] HCJ 1901/94 *MK Uzi Landau v. Jerusalem Municipality* [1994] IsrSC 48(4) 403.

[16] AdminAppA 7142/01 *Haifa Local Planning and Building Committee v. Society for the Protection of Nature* [2002] IsrSC 56(3) 673.

[17] HCJ 769/02 *Public Committee Against Torture v. Government of Israel* [unreported].

For the petitioners — H. Jabarin, O. Cohen

For respondents — A. Helman

Petition to the Supreme Court sitting as the High Court of Justice for an Order Nisi and an Interim Order

Facts: In 2004, following a series of murderous terrorist attacks on Israeli civilians in 2004, as well as continual rocket launches against Israeli civilian targets, the Israel Defense Forces conducted two military campaigns in the Gaza Strip – Operation Rainbow (May, 2004) and Operation Days of Repentance (September-October, 2004). More than a year after the end of the second campaign, Adalah – Legal Center for Arab Minority Rights (petitioner 1) requested of the Attorney General and the Military Advocate General (respondents 1 and 2) that criminal investigations be opened in the matter of Operation Rainbow, due to the civilian casualties and the destruction of homes that had occurred in the course of its conduct. The request was denied by the Military Advocate General. The request was repeated and again denied; the third request, in January 2007 – more than two years after the end of hostilities – included a demand to open a criminal investigation in the matter of Operation Days of Repentance as well. The petitioners claimed, based primarily on newspaper reports surveying the situation in the Gaza Strip after the operations, as well as on reports by international organizations and statements by international bodies criticizing the

Israeli actions, that the extensive damage necessarily indicated criminal violations of human rights such as the rights to life and bodily integrity, as well as violations of International law relating to treatment and protection of civilians and civilian structures in times of war. The Military Advocate General again declined to open criminal investigations, and in April, 2007, this petition was filed, asking that the Attorney General and Military Advocate General show cause why a criminal investigation should not be opened for the purpose of prosecuting those responsible for the civilian casualties and damage that resulted from the operations.

Held: The generality of the petition, in that it did not specify individual cases in which criminal offenses were allegedly committed, but rather referred to the damage, *per se*, to civilians and civilian objectives in the course of the two operations, was to its detriment: the High Court of Justice ruled in the past that it cannot adjudicate a petition tainted by generality in the definition of the dispute, in the factual basis that it lays and in the requested relief. No proof was offered here of invalid, unlawful motives for launching the operations – on the contrary, the respondents argued for a right of self-defense and that it was their duty to defend the citizens of Israel. The determination that there was a security need put the actions in the realm of security policy, within the clear discretion of the security authorities and not justiciable by the High Court.

A demand to conduct a criminal investigation must be supported by a suitable *prima facie* foundation, answering to the provisions of the domestic penal laws. In cases in which the laws of war have been violated, charges will be filed pursuant to Israeli domestic law for the appropriate criminal offense, the principles of which, as a rule, parallel the principles of international criminal law. The opening of a criminal investigation is not an automatic process in every case in which there is a grave outcome, such as the deaths of civilians and wide-spread destruction of houses. It must arise from a real suspicion that criminal violations were, indeed, committed. An investigation of that type must be conducted when a *prima facie* suspicion arises of conduct that deviates from Israeli law or of serious violations of international law that amount to criminal offenses under the domestic penal laws. In view of the absence of such a suspicion and of the required evidentiary foundation, the criminal law is not the appropriate tool for investigating issues such as the subject of the petition. Other means of investigation and review may exist, such as commissions of inquiry; as a rule, the discretion granted to the investigative and prosecutorial bodies with regard to the establishment of a commission of examination or inquiry in general, and with regard to the selection of a particular type of examination mechanism in particular, is extremely broad, and judicial review of a decision of that type is limited and restricted to an examination of the feasibility of the choice.

The "principle of distinction", which imposes on the fighting army an obligation to refrain from intentionally harming the civilian population, is a basic principle of the laws of war that govern armed conflicts between Israeli security forces and the

terrorist organizations that control the Gaza Strip. However, the laws of war also recognize the existence of "collateral damage" – damage caused to civilians indirectly, as a result of an attack aimed at the military targets of the enemy – and such damage does not constitute a violation of the laws of war, even if it is foreseeable, provided that it meets the requirements of the law, among which are the proportionality of the anticipated harm that would be caused to the civilians vis-à-vis the benefit anticipated from the military action, and refraining from deliberate attacks on civilians. Therefore, the fact that citizens were harmed is not sufficient to establish a real suspicion that criminal offenses were committed in violation of the laws of war.

Regarding one particular incident described in the petition, in which civilians were killed as a result of artillery fire at an abandoned house towards which a procession of Palestinian civilians was moving, the Court did not find cause to intervene in the conclusion of the MAG, affirmed by the Attorney General, that the erroneous decision of the squadron commander was not unreasonable to the point of justifying the conduct of criminal proceedings against him.

The extensive delay in filing the petition also militated against granting the sought relief: here, not only did the delay imply a waiver of the right to apply to the courts (subjective delay), but changes had occurred in the actual situation on the ground, making it difficult to establish what actually happened (objective delay). Even though the Court accepted that as a rule, the claim of delay should not be allowed when the rule of law and the violation of human rights is at stake, nevertheless it held that in the present case, the delay actually negated the ability to address the petition, and there was no longer any point to it.

In short, the sweeping petition and the serious claims made therein did not lay a proper factual or legal foundation for a practical and concrete deliberation. The petition mixed legal claims and claims that belong in the arena of public discourse, and not in a legal proceeding. The petition was denied.

JUDGMENT

President D. Beinisch

The subject of this petition is the decision of the Military Advocate General (hereinafter: MAG), which was approved by the Attorney General, to refrain from opening a criminal investigation following the injury to civilians and destruction of homes in the Gaza Strip that occurred in the course of Operation Rainbow, from May 18-24, 2004, and in the course of Operation Days of Repentance, from September 28, 2004 to October 16, 2004.

Factual Background and Course of Events in the Petition

1. The background to the petition before us, which was filed on April 15, 2007, lies in a period of time in which a difficult security situation pertained and the activities of the Palestinian terrorist organizations were at their peak. The military operations that are the subject of the petition were preceded by a series of murderous events that occurred in the area of the Gaza Strip in May 2004. On May 2, 2004, Tali Hatuel, who was in the late stages of pregnancy, and her four daughters were murdered by a gunfire attack on their car while they were driving on the Kisufim Road. On May 11, 2004, an Israel Defense Forces armored personnel carrier was hit by an RPG rocket, and six soldiers riding in it were killed. On May 12, 2004, another five soldiers were killed, also as a result of an RPG fired at the armored personnel carrier in which they rode. Two days later, on May 14, 2004, another two soldiers were killed in the same area as they were engaged in an operation to locate the body parts of those soldiers who had been killed previously. These heavy losses were apparently caused by weapons that were suspected of having been smuggled into the Gaza Strip through underground tunnels that had been dug beneath the Philadelphia Corridor. Against that backdrop, a decision was made to launch Operation Rainbow, in which a division was sent into the southwestern neighborhoods of Rafiah for the purpose of preventing the transfer of weapons, finding wanted persons and tunnels, and preventing repetition of the sniper fire aimed at forces moving along the Philadelphia Corridor. As the State explained, during the military campaign IDF forces encountered strong opposition from terrorists operating

out of residential buildings throughout Rafiah.

In addition to the incidents that took place along the Philadelphia Corridor, over the course of 2004 there was a significant increase in the number of Kassam rockets that were fired from the northern Gaza Strip into Israeli territory. In June 2004, a man and a four-year-old child were killed by a Kassam rocket that landed near a kindergarten in Sederot, and in September, two other toddlers were killed as a result of the direct hit of a Kassam rocket on a residential building in Sederot. That month, 46 Kassam rockets were fired at Israel. The Government stated that on that basis, it had become necessary to conduct a preventive operation in the area of the Kassam rocket launches in the northern Gaza Strip. Operation Days of Repentance, which was conducted in the northern Gaza Strip from September 28, 2004 until October 16, 2004, was designed to reduce the scope of Kassam rocket launches at Israeli towns and to strike at the terrorist organizations behind that activity.

2. Subsequent to those operations, in July 2005 the Israeli Government implemented the disengagement plans from the Gaza Strip, the military administration of that region ended, and the Hamas organization seized power in the Gaza Strip. In November 2005, petitioner 1 (hereinafter: the petitioner) requested that respondents 1 and 2 order that a criminal investigation be opened in the matter of Operation Rainbow. About a month later, the MAG informed the petitioner that its request had been denied. In May 2006, following another request by the petitioner, the MAG again informed the petitioner of his decision not to open a criminal investigation regarding Operation Rainbow. On January 16, 2007, the petitioner applied for the third time to the MAG, and that time the application also included a demand to open a criminal investigation with regard to the events that took place during Operation Days of Repentance. On February 7, 2007, the MAG informed the petitioner that its request to open a criminal investigation for Operation Days of Repentance had also been denied. On April 15, 2007, the present petition was filed, in which the petitioners requested that the Court instruct the Attorney General and the MAG to explain why they should not order the opening of a criminal investigation to prosecute those responsible for the deaths of civilians and the widespread destruction of civilian houses and property in the Gaza Strip during Operation Rainbow and Operation Days of Repentance. On May 6, 2009, a hearing was held, in which we heard the arguments of the parties.

Pleadings of the Parties

3. According to the petitioners, the respondents or those acting on their behalf blatantly violated human rights law and international humanitarian law by launching Operation Rainbow and Operation Days of Repentance, and in the framework of incidents that occurred during those operations, they committed acts that constitute criminal offenses under both International law and the Penal Law, 5737-1977. The petitioners therefore argue that respondents 1 and 2 were obliged to order the opening of a criminal investigation of the incidents that occurred during the two said military operations. The petitioners argue, *inter alia*, that the right to life and the right to bodily integrity were violated; that widespread destruction of civilian houses and structures was perpetrated; that the prohibition on reprisals against civilians and civilian structures was violated; and that during the military operations, cautionary measures necessary for protecting the civilian population that happened to be in the area of the fighting were not adopted. The petitioners stated that these claims were based on the public statements of IDF soldiers and commanders after the end of the fighting, and primarily on newspaper reports that surveyed the situation in the Gaza Strip after the Operations– and their outcomes; they argue that such extensive destruction could not be the result of legal activity that meets the requirements of the law. The petitioners also based their arguments on reports by international organizations and statements by international bodies that criticized the conduct of the IDF in the Operations.

4. In their response to the petitioners' pleadings, filed on April 30, 2009, respondents 1-2 and 7-8 (hereinafter jointly: the State or the respondents) argued that the petition should be denied *in limine* since it was tainted by generality and given the considerable delay in its filing. According to the State, this is a petition that seeks to order the opening of a criminal investigation for two military operations that were conducted in 2004 – over two and a half years before the petition was filed. It was argued that the petitioner first contacted respondents 1 and 2 in the matter of Operation Rainbow only in November 2005 – a year and a half after the Operation – and that already in December 2005 – over a year before the filing of the petition – respondent 2 informed petitioner 1 that its request to open a criminal investigation in the matter of Operation Rainbow was denied. With regard to Operation Days of Repentance, the petitioner first contacted the

respondents in January 2007 – over two years after the end of the Operation. According to the respondents, this delay is exacerbated by the complexity of the large-scale military operations that are the subject of the petition; the lack of any basis for individual suspicion; and implementation of the disengagement plan~~s~~ and departure of IDF forces from the Gaza Strip, which now makes it difficult, if not impossible, to conduct an effective investigation in that area. The respondents further argue that the petitioners are attempting to bring about the investigation of the former Minister of Defense, the former Chief of General Staff and other senior officers for their responsibility for the consequences of two complex and dangerous operations that extended over more than 24 days in total, and which took place over a large area in the Gaza Strip – all on the basis of general descriptions that rely mainly on newspaper reports which do not constitute a proper factual basis for obtaining relief from the court. Additionally, the respondents claim that the issue of the destruction of houses in the course of fighting has already been adjudicated in HCJ 4694/04 *Abu Atara v. Commander of IDF Forces in the Gaza Strip* [1], and HCJ 4969/04 *Adalah v. GOC Southern Command* [2]. In *Abu Atara v. IDF Commander* [1], the Court dismissed a petition in which it was asked to order cessation of the demolition of buildings in the area of the Gaza Strip. In *Adalah v. GOC Southern Command* [2], a petition on the general question of the legality of demolishing houses in the framework of a military operation was denied. According to the respondents, denial of the abovementioned petitions indicates that the Court had accepted the position of the State whereby, in general, the demolition of houses in the framework of the fighting in the Gaza Strip does not constitute a "war crime", as claimed by the petitioners, and insofar as this petition deals with the issue of demolishing houses, it should be dismissed *in limine* in view of the precedent on the matter.

In essence, in their response the respondents argued that the Court's intervention in the discretion of the Attorney General and the MAG with regard to opening a criminal investigation is extremely limited. In the present matter, it was argued that in the absence of a factual basis for claims regarding criminal suspicions, and in view of the special characteristics of the war against terrorism and the complexity of the military operations that are the subject of the petition, and since, at the end of the operations, the IDF conducted operational inquiries at the various levels of command, there is no cause for intervening in the discretion of the competent authorities.

Deliberation and decision

5. This petition clearly presents the substantive rationales behind measures from the area of procedural law. Thus, from among three threshold arguments presented by the respondents, two of them do not permit us to conduct an in-depth discussion of the issues raised in the petition, let alone to grant the remedy sought therein. The petitioners argued that a petition dealing with the rule of law ought not to be denied due to threshold arguments. While the Court has said more than once that threshold arguments *per se* would not constitute cause for denying a petition that raises substantive questions, in the case before us the causes for denying the petition are not merely threshold arguments; rather, they touch upon the essence of the matter.

6. First, it must be said that the generality of the petition is to its detriment. As stated, in the framework of the petition we were asked to grant relief directed at the Attorney General and the MAG, whereby they are requested to explain why they should not order a criminal investigation for the purpose of prosecuting those responsible for the deaths of many civilians and the extensive destruction of civilian houses and property in the southern Gaza Strip during Operation Rainbow, and in the northern Gaza Strip during Operation Days of Repentance. As stated, these operations took place over twenty-four days, during which there were many exchanges of fire and incidents. The petitioners argue in their petition that in their opinion, the respondents – senior officers in the security forces, from the Commander of the Gaza Division during the operations, through the GOC Southern Command and the Chief of General Staff, to the Minister of Defense, the IDF and the Government of Israel – are responsible for the outcomes of the Operations, which, the petitioners claim, "cannot be described as anything other than war crimes" (section 7 of the petition). The petition, in accordance with this perception on the part of the petitioners, does not specify individual cases in which criminal offenses were allegedly committed but, rather, refers to the damage, *per se*, to civilians and civilian objectives in the course of the two operations. The question that it raises is whether the State of Israel should be obligated at present to open a *criminal* investigation pertaining to the entire conduct of the operations, while, according to counsel for the petitioners, the specific actions serve only as indications of the *modus operandi* that was adopted during the operations.

We are therefore dealing with relief that is formulated in the broadest

and most general language. In this context, we have already stated in the past that "the generality of the petition – in defining the dispute, in the factual basis that it lays and in the requested relief – is to its detriment, and, as such, it cannot be adjudicated by this court in its existing format" (HCJ 7178/08 *Forum of the Heads of the Druse and Circassian Councils in Israel et al. v. Government of Israel* [3]).

7. We should further state that we did not accept the argument that the operations – as such – constituted action that was not justified from a security standpoint and, therefore, should be deemed war crimes. As we described above, the situation in the Gaza Strip prior to the launching of Operation Rainbow enabled the terrorist bodies to strike again and again at IDF soldiers and civilians living in the region, with weapons that had been smuggled into the region through tunnels. This attack by the terrorist bodies, which continued to escalate, and the use of increasingly dangerous weapons, are what led to the launching of the campaigns. We have not been convinced – and neither have the petitioners laid any factual foundation for this far-reaching claim, except for one newspaper interview – that the purpose of the operation was reprisal or collective deterrence for the civilian population in Gaza to refrain from cooperating with the terrorist elements. Clearly, justifications of this type for military actions are invalid but, as stated, in the circumstances of the matter, it was not proven that they were the basis for launching the operations. On the contrary – the State argues that it regarded itself as obligated to protect its residents against harm and against the murder of women and children, and it acted out of recognition of its right to self-defense, which includes defending its citizens. It also considered itself obligated to defend the residents living in towns adjacent to the Gaza Strip against the Kassam rockets and other missiles that were aimed at them from the northern Gaza Strip and, to that end, it deemed that there was an operational need to strike at the terrorist entities that were using those missiles, and at their weapons and launching sites. The determination that there was a security need for a massive operation – aimed at thwarting, or at least reducing, the activities of the terrorists in the southern Gaza Strip and their access to advanced weapons that were smuggled through the tunnels into the Gaza Strip for their use – is a matter of security policy, which is within the clear discretion of those responsible for security, and it is not a matter suitable for review by this Court.

8. The relief sought in the petition is that a criminal investigation be

initiated. Under the circumstances and with the data before us, recourse to the tools of criminal law is not appropriate for addressing the problematic nature of this issue, for reasons related to the nature of criminal law. First, relief in the form of criminal prosecution is relevant in Israel with regard to cases in which there is a suspicion that an offense has been committed. The suspicion of violation of the law that amounts to an offense cannot be considered in isolation from the protections afforded by the penal laws with regard to actions in war, and this question is, of course, a complex one which depends on the circumstances of a particular case. A demand to conduct a criminal investigation requires that there be a proper preliminary factual foundation. It should be emphasized that a criminal investigation is not the only tool through which violations of the law can be investigated, when they do not amount to criminal offenses. Our system also offers other means of examination and review, which enable us to deal with large-scale events, or with examining the policy of deploying the defense forces. Secondly, criminal law in Israel is confined by the bounds of the penal laws and criminal investigations related to offenses under those penal laws, but not necessarily to violations of other norms that are not part of the positive law. Under various laws, military or government activities that are not necessarily criminal may be investigated and examined and they may even be criticized, and operative recommendations that are not anchored, *ab initio*, in criminal law may also be made, even though they may sometimes entail conclusions about violations of the penal laws.

Thus, for example, s. 537 of the Military Jurisdiction Law, 5715-1955 states that the minister of defense or the chief of general staff may appoint a commission of inquiry to investigate any matter pertaining to the military, and the Commissions of Inquiry Law, 5729-1968 states that in cases in which the government sees that there is a matter of public importance requiring clarification, it may also order the establishment of a commission of inquiry (s. 1). Section 28 of this Law also anchors the government's authority to establish investigative committees for clarifying issues that it does not necessarily consider appropriate for clarification by means of a state commission of inquiry (in this matter, see HCJ 6001/97 *Amitay – Citizens for Good Governance and Integrity v. Prime Minister* [4]). Various types of commissions of inquiry and investigation were established in the past when claims were made concerning events whose consequences necessitated clarification and the examination of issues of public interest, among which, of course, have been military and combat actions. Indeed, the common

perception in our system is that commissions of inquiry do not deal with "legal" liability, but rather, with "public" responsibility and, in certain cases, they may constitute only one stage on the road to a decision about whether criminal proceedings should be initiated. At times, a problem may even arise when events for which criminal liability may be assigned are reviewed by a commission of inquiry instead of, or before, the judicial criminal process (Amnon Rubinstein and Barak Medina, *Constitutional Law of the State of Israel* (6th ed., 5765-2005), pp. 1033-1034 (hereinafter: Rubinstein and Medina).

9. It must be emphasized that the decision as to whether a certain matter gives rise to a suspicion that would justify a criminal investigation lies first and foremost with those who head the prosecution system, who have the authority and the power to press criminal charges for the commission of a criminal offense. As a rule, the attorney general is in charge of the investigative and criminal prosecution system, and the MAG has broad discretion in matters pertaining to the military. When the subject of the examination is primarily of an operational nature, the decision as to the mechanism of the investigation is usually in the hands of military entities, but the military system's tools of examination cannot block additional investigations in accordance with the substance of the matter in question. In this regard we must distinguish insofar as possible between an investigation with the predetermined intention of reaching a particular criminal or civil legal result, and other issues that require examination concerning public or individual responsibility and accountability. When the investigation is one in which the dominant aspect requiring examination is public, the political echelons are authorized to decide on the examination. In certain situations, our case law has indeed recognized the fact that the authority to establish a commission of inquiry or examination in relation to a particular matter may become an obligation (Rubinstein and Medina, at p. 1037). However, these are unusual cases (HCJ 7232/01 *Yusuf v. State of Israel* [5], at p. 573). As a rule, the discretion granted to the investigative and prosecutorial bodies with regard to the establishment of a commission of examination or inquiry in general, and with regard to the selection of a particular type of examination mechanism in particular, is extremely broad, and judicial review of a decision of that type is limited and restricted to an examination of the reasonability of the choice (HCJ 2624/97 *Adv. Yedid Ronel v. Government of Israel* [6], at p. 79; HCJ 6728/06 *Ometz Association (Citizens for Good Governance and Social Justice) v. Prime Minister of Israel* [7], per Justice

Hayut, para. 3).

Beyond what is required in the present case, we should note that this Court exercises its judicial review bearing in mind the investigative bodies and the laws that our legal system makes available, and the petitioners, too, have focused their petition on the demand to make use of only the criminal tool. The issue of adapting the investigation and examination mechanisms that exist within the Israeli legal system to comport with alleged violations of the laws of war and the obligations imposed on Israel under international law, which are external to Israeli criminal law and positive law, is the subject of various discussions in the international arena, and not only in relation to Israel. This issue is also at the center of academic writing, which adopts various positions on the independence of the mechanisms in our system for investigating and examining claims about violations of the laws of war and their ability to investigate the alleged violations (see Amichai Cohen and Yuval Shani, *The IDF Investigates Itself: Investigating Suspicions of Violations of the Rules of Warfare*, Policy Study 93, Israel Democracy Institute (2011) (hereinafter: Cohen and Shani)). That is not the question before us and we do not need to address it, since we are dealing with a petition to invoke criminal law, which does not establish a basis for the arguments it raises. We have also noted the fact that the fundamental question about the suitability of the investigative mechanisms for the claims and complaints made about violation of the laws of war is currently being examined by the Public Commission for Examination of the Maritime Incident of May 31, 2010, headed by Justice (Emeritus) J. Turkel, which is still looking into the matter.

10. In addition, the relief sought by the petitioners is not practical, as stated, for another reason. The petitioners demand that a *criminal* investigation be opened and that those responsible for the apparent "crimes" face *criminal* prosecution. They do so on the basis of alleged violations of international humanitarian law, from which, they claim, violations of Israeli criminal law can be deduced (secs. 174 and 178 of the petition). Indeed, in our legal system, charges based on Israeli law are filed with the military and civil courts in the appropriate cases. In cases in which the laws of war have been violated, charges will be filed pursuant to Israeli law for the appropriate criminal offense, the principles of which, as a rule, parallel the principles of international criminal law. In cases of this type, the prosecution must establish the elements of the specific offense, just as in any other criminal trial. It is important to clarify that this Israeli policy, even when the

international law, *per se*, is not applied as part of Israeli criminal law, does not violate Israel's obligations under the Geneva Convention, since it allows for the imposition of effective criminal sanctions for violators of substantive sections of the Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949) (hereinafter: the Geneva Convention), § 146; and see HCJ 7195/08 *Abu Rahma v. Military Advocate General* [8], paras. 35-44; Ward Ferdinandusse, "The Prosecution of Grave Breaches in National Courts", *J Int'l Criminal Justice* 7 (4) (2009) 723-729, 741). This is the case when the charges express the criminal nature of the act attributed to the accused and the punishment imposed in the event of conviction reflects the aggravated circumstances of committing an offense against protected civilians under the laws of warfare (Knut Dörmann and Robin Geiβ, "The Implementation of Grave Breaches into Domestic Legal Orders", *J Int'l Criminal Justice* 7(4) (2009) 703-721, 710). Moreover, various scholars argue that the decision to handle war crimes within the existing domestic criminal system (as opposed to legislating new war crimes offenses, or assimilating the laws of war into the local legal system verbatim) has clear advantages, such as the familiarity of the prosecution authorities with the elements of the offense and, accordingly, their enhanced ability to conduct an effective trial in such cases (*ibid*., at p. 709).

11. Above and beyond the aforementioned difficulties, even in specific aspects pertaining to events that occurred in the course of the operations discussed in the petition, the petitioners do not establish cause for attacking the decision not to open a criminal investigation dealing with any specific event. The petition, as stated, is based on newspaper interviews and reports, which cannot serve as evidence in a criminal proceeding, and on the reports of international organizations that deal primarily with examining the outcome of the events and not with analyzing the occurrences, the threats and the responses of security forces during the operations. This meager evidentiary foundation cannot form the basis of a criminal charge at the high level of proof required for a trial of this type. The petition itself relates to dozens, if not hundreds, of incidents which resulted in the destruction of the homes of Palestinian civilians, and more than a few cases that resulted in the deaths of civilians who were not involved in the fighting. Even the petitioners themselves are not claiming that criminal acts brought about the demolition of every house among the hundreds of houses that were demolished. It should be emphasized that even according to the norms of international humanitarian law, the very obligation to investigate, which

arises in cases of a suspected violation of the law as will be elucidated below, does not arise when complaints are not based on an initial factual foundation, even if only *prima facie*. The scholar Michael Schmitt explains:

> Not every allegation requires an investigation; only those sufficiently credible to reasonably merit one do (Michael N. Schmitt, "Investigating Violations of International Law in Armed Conflict", *Harvard National Security Journal* 2 (2011) 31, 39).

12. With regard to specific events that ostensibly give rise to concrete suspicions of criminal offenses, even the State does not dispute the obligation to investigate suspected violations of the law. This obligation is derived directly from Israel's obligation to defend the lives of the protected civilians in territories under belligerent occupation against intentional harm, and it is also anchored in the provisions of international humanitarian law, e.g., in § 146 of the Geneva Convention. There are those who claim that this is also required by the Human Rights Conventions (see, e.g., Cohen and Shani, at pp. 22-24). However, the parties before us are divided on the question ofwhat would be a sufficient indication of the existence of a suspicion that would justify opening a criminal investigation with regard to a certain event. While the petitioners claim that the outcome of the operations as such – the deaths of civilians and the destruction of many houses – should lead to the opening of a criminal investigation, the respondents argue that the circumstances of every incident should be examined individually and a determination should be made as to whether there is a suspected violation of the laws of war and Israeli law in the matter.

The question of whether a criminal investigation should be opened automatically in every case in which the death of a civilian resulted from actions by security forces was dealt with in a parallel petition that was filed with this Court on this issue, i.e., HCJ 9594/03 *Betzelem v. Military Advocate General* [9], and we do not see fit to elaborate on this here. We should briefly clarify that the opening of a criminal investigation is not an automatic process in every case. It must arise from a real suspicion that criminal violations were, indeed, committed. The picture that emerges from a description of the fighting in a situation of armed conflict with a murderous terrorist organization, whose operatives took shelter among the civilian population, is certainly a harsh one, and the consequences of the fighting

were painful for the civilian population in whose vicinity or among whose houses the terrorists operated. However, even that harsh general picture does not constitute, *per se*, cause for an investigation of a criminal nature. An investigation of that type must be conducted when a *prima facie* suspicion arises of conduct that deviates from Israeli law or of serious violations of international law that amount to criminal offenses under the penal laws.

13. It should be borne in mind that the laws of war, which apply to armed conflicts between Israeli security forces and the terrorist organizations that control the Gaza Strip, provide protection to civilians who are not involved in the fighting, and the "principle of distinction" – which imposes on the fighting army an obligation to refrain from intentionally harming the civilian population – is a basic principle of those laws. However, alongside the principle of distinction, the laws of war also recognize the existence of "collateral damage" – damage caused to civilians indirectly, as a result of an attack aimed at the military targets of the enemy. The recognition of collateral damage derives from the understanding that the requirement to refrain completely from harming civilians during combat would negate the ability to fight in the modern era. Collateral damage does not constitute a violation of the laws of war, even if it is foreseeable, as long as it meets the requirements of the law, among which are the proportionality of the anticipated harm that would be caused to the civilians vis-à-vis the benefit anticipated from the military action, and refraining from deliberate attacks on civilians. No-one disputes the fact that unfortunately, innocent people may also be harmed during the fighting. This is particularly true in modern-day wars, in which boundaries are blurred between the front and the rear, between military targets and civilian targets, and between innocent civilians and those involved in terrorism and armed conflict. In the matter at hand, combat actions are often undertaken – for lack of choice – in the midst of civilian neighborhoods, from which and from within which the terrorist organizations operate. In such situations, an army must make every effort to refrain from harming innocent civilians. Nevertheless, sometimes harm to the civilian population cannot be avoided completely. We must not forget that the fighting occurs under conditions of pressure and uncertainty, with soldiers' lives being at risk. Intensive combat is sometimes conducted against armed terrorists who operate knowingly and intentionally from within the civilian population. This combat activity is sometimes required by the laws of human rights, which charge the State of Israel with the obligation to protect its citizens and residents against terrorist attacks that endanger

their lives. Therefore, the fact that citizens were harmed is not sufficient to establish a real suspicion that criminal offenses were committed in violation of the laws of war. In the absence of evidence that criminal offenses were committed, there is also no obligation to conduct a *criminal* investigation of the events.

The State's notice in response to the petition states that when there is doubt as to whether conduct that caused harm to civilians was within the boundaries of the law, the MAG refers to a preliminary factual examination that is conducted in the framework of an operational investigation, which is submitted to him for review. The operational investigation has additional purposes, such as examining the conduct of the forces and deriving lessons in order to avoid grave consequences in the future, even if these consequences did not stem from criminal behavior on the part of the combat forces. It also serves other internal operational needs. The question of the independence of this investigative mechanism and its suitability for establishing the basis for the data used by the MAG in the initial decision about opening a criminal investigation is not at issue in this petition because, as stated, no concrete cases were presented to us in which there was, indeed, a suspected violation of criminal law. Even with regard to specific events that were presented, incidentally, in the petition by means of newspaper reports, the manner in which they were handled by the security forces was not elucidated, and the petitioners did not present any arguments regarding their initial handling by means of an operational investigation. Moreover, even the State agrees that when a suspicion does, indeed, arise concerning criminal behavior, the operational investigation is not sufficient to fulfill the obligation to investigate violations of the law. It should be noted in this context that the reporting and factual examination procedures used by the MAG to make decisions have undergone changes in recent years, and a preliminary report is now submitted to the MAG himself within 48 hours from the time that harm was caused to any civilian who was not involved in the fighting. This report enables effective and immediate handling of the incident, either by way of a criminal investigation or by way of review and deriving other lessons.

14. Moreover, we have not seen fit to intervene in the decision regarding one particular incident, which was presented in the petition as an example of the general argument regarding the conduct of the security forces – an incident in which civilians were killed when tank artillery was fired at an abandoned house toward which a procession of Palestinian civilians was

moving. As emerges from the detailed position of the State in this context, the incident was investigated at all levels of the IDF and the briefings were submitted to the MAG, who found that the commander of the squadron made a professional mistake with regard to the extent of the shooting, but the decision to actually shoot was justified under the conditions that existed in the field. The MAG determined that the mistake was made during the fighting and under conditions of pressure and uncertainty, and that the intention of the squadron commander was actually to prevent casualties. He therefore reached the conclusion, which was affirmed by the Attorney General, that the erroneous decision of the squadron commander was not unreasonable to the point of justifying the conduct of criminal proceedings against him. We would clarify that conditions of pressure and combat situations do not justify – *per se* – the firing of artillery shells at civilians, but the details of the investigation that was conducted and the array of circumstances that led to the MAG's conclusion on that matter were not before us. As we know, the principle of maximum restraint in judicial intervention in the decisions of the executive authority regarding investigation and prosecution is deeply rooted in the judicial tradition of this Court. Similar to the Attorney General, the discretion of the MAG on the question of whether to initiate criminal proceedings is extremely broad. *Inter alia*, he must act fairly, honestly and in good faith; he must act reasonably and with proportionality; he must take into account the relevant considerations and only those considerations; he must refrain from any illegitimate discrimination; and he must exhibit independence in his decision, as the person responsible for the rule of law in the military (*Abu Rahma v. Military Advocate General* [8], para. 66). Accordingly, intervention in the professional decisions of the MAG is implemented only rarely, in extremely exceptional circumstances (HCJ 425/89 *Zufan v. Military Advocate General* [10], at pp. 727-728; HCJ 4550/94 *Isha v. Attorney General* [11], at pp. 871-872). As an aside, it may be noted that as a rule, the decision to terminate the handling of an incident as a criminal matter does not obviate other treatment – disciplinary, systemic or educational – of an incident that has had grave consequences.

15. Another factor that negates the ability to examine the decisions of the MAG, both with regard to the specific incident described above and with regard to the other incidents that occurred during the two operations – even if the petitioners had provided substantiated claims in relation to specific incidents – is the amount of time that passed from the time of the occurrence

of the events requiring examination until the exercise of judicial review, i.e., the extensive delay that afflicts the petition. As stated above, the petitioner first contacted respondents 1 and 2 with a request to order a criminal investigation following Operation Rainbow in November 2005, about a year and a half after the end of the operation. The request to investigate the events of Operation Days of Repentance was first filed by the petitioner only in January 2007, over two years after the end of that operation. The petition itself was filed about sixteen months after the petitioner received a response from respondent 2 denying the request, and almost three years after the events.

According to case law, acceptance of an argument of delay against an administrative petition requires the presence of two cumulative elements – one, the existence of a subjective delay, i.e., does the actual conduct of the petitioner indicate an implied waiver on its part of its right to apply to the courts; and two, the existence of an objective delay, i.e., did a change occur in the actual situation on the ground, and did the delay in filing the petition harm the interests of other parties. In this case, there was, indeed, both a subjective and an objective delay, when the petitioners asked the respondents to open a criminal investigation for events that occurred in the course of Operation Rainbow, about a year and a half after the end of the Operation. The petition itself was also filed a long time – over a year – after receipt of the respondents' reply, and that delay was not explained by the petitioners. Moreover, the petitioners first contacted the respondents with a request to prosecute those responsible for Operation Rainbow in November 2005 – several months after implementation of the disengagement plan, during which the IDF left the Gaza Strip.

The petitioners argue, and there appears to be substance to the argument, that as a rule, the claim of delay should not be allowed when what is at stake is the rule of law and the violation of human rights. This is particularly true where the respondents had an obligation to investigate, even absent the request of the petitioners, and irrespective of any necessary connection to the filing of the petition. In principle, we accept this approach, and it is anchored in the case law of this Court. Indeed, the accepted law in our judgments is that the Court will not dismiss a petition because of a delay, if that entails a grave violation of the rule of law and of an important public interest (HCJ 7053/96 *Amcor Ltd. v. Minister of the Interior* [12], at p. 202; HCJ 170/87 *Asulin v. Mayor of Kiryat Gat* [13], at p. 684). Above and beyond what is necessary, we will say that when such concerns, and even less grave ones,

arise, we must not wait for applications by human rights organizations, journalists or other elements in order to initiate an investigation of the event, in a manner that would enable, should it be necessary, the conduct of an effective criminal process. Thus, we have already stated in a series of judgments that in cases in which there is a suspicion of criminal conduct, an investigation should be initiated soon after the event, to allow for the gathering of evidence (see, for example, HCJ 8517/07 *Bassam Aramin v. Attorney General* [14]).

In the case before us, however, we are not dealing with delay in its regular guise as a threshold argument but, rather, a delay that negates the ability to address the petition. The lengthy period of time that passed from the end of the combat operations which are the subject of the petition to the time of the actual filing of the petition affects the possibility of giving the petitioners the relief requested therein, even if their petition had merit. The more time that passes from the beginning of the fighting in a military arena, the greater the difficulty in gathering evidence, taking testimony and producing factual findings that might constitute a sufficient evidentiary and factual foundation for a disciplinary or criminal proceeding. The arena of the event changes, some of the witnesses are no longer available for questioning and accessibility to the area may change, as actually occurred in the circumstances of the matter before us. It may be said that the request for the remedy of a criminal investigation, or instituting criminal proceedings, always raises the subject of the interest of enforcing the law in its strongest sense but, on the other hand, it is a request with an "expiration date". When time passes from an event that is the subject of a request of this type, there is no longer any point to the request, although other non-criminal remedies may be relevant in appropriate circumstances. In this case, as a year and a half passed between the Operations and the petitioners' request to respondent 2 that he initiate a criminal investigation immediately, and certainly as almost three years have passed between the time the events took place and the filing of the petition before us, the relief of opening a criminal investigation is no longer applicable in any case. This is further justified by the absence of a factual basis that might have served as the foundation for a criminal investigation. This matter adds to the sense that the petition is not about an operative remedy but, rather, declarative relief and nothing more. In another matter, this Court stated as follows with regard to declarative relief:

'…such a declaration, which states the

> obvious, is completely superfluous. Do the respondents claim that they are exempt from the burden of the law? Do the respondents believe that a declaration by the courts, to the effect that the law must be upheld, will add validity or weight to the law? The court does not issue such declarations for which there is no need, and which have no benefit or dignity' (HCJ 1901/94 *MK Uzi Landau v. Jerusalem Municipality* [15], at p. 412).

To summarize this issue in general, it may be said that to the balance between the three different elements of the delay in its legal meaning, among which are the extent of harm to the interests of individuals who relied on a given situation and the extent of harm to the values of the rule of law (AdminAppA 7142/01 *Haifa Local Planning and Building Committee v. Society for the Protection of Nature* [16], at p. 679) must be added the ability to grant the requested remedy which, in effect, is also a general public interest that this Court not grant relief that cannot be realized. Therefore, in certain cases, a delay on the part of the petitioners becomes a reason to deny the petition, even when substantive issues are involved. This is because it will only be possible to deal with cases of this type, involving these issues, in a partial and incomplete manner, due to the amount of time that has passed and the changes in circumstances.

The Existence of a Judicial Decision in the Matter

16. Finally, the State claims that the issue of demolishing houses in the course of military operations has already been adjudicated in *Abu Atara v. Commander of IDF Forces* [1], and in *Adalah v. GOC Southern Command* [2], and the denial of those petitions shows that the State's position, whereby, as a rule, the demolition of houses in the framework of military action in the Gaza Strip does not constitute a "war crime", has already been accepted by the Court. This claim does not reflect the content of the aforementioned judgments. In *Adalah v. GOC Southern Command* [2], the petition was denied due to the respondents notifying the Court that the State intended to refrain from demolishing the houses at issue. In view of that notice, we found that the petition had become moot and that under those circumstances, "a decision on arguments in principle by the petitioners is not currently required" (para. 5 of the judgment). A similar decision was also

rendered in *Abu Atara v. Commander of IDF Forces* [1]. In that matter, the State declared that if a decision were to be made in the future on the demolition of additional structures, that decision would not be implemented without granting the right to a hearing to all parties liable to be harmed by it, with three exceptions – immediate operational needs, danger to the lives of the soldiers or sabotage of the operation. In its judgment, the Court emphasized that –

> 'We would assume that the respondents are aware of the gravity of the responsibility placed on their shoulders and that they are making every effort to reduce, as far as possible, the extent of the harm done to the general civilian population and the extent of its suffering.'

In view of the above, it is clear that the judgments mentioned by the State in this context did not establish any case law; rather, they related to the issue in accordance with the situation and the factual representation at that time, and with the principles presented by the State in its declaration to the Court. In the present case, the petitioners are not making a general claim regarding the authority of the military commander to demolish houses for security reasons. They argue that this authority was exercised unlawfully, in a manner that justifies an investigation. In the aforementioned judgments, therefore, general immunity was not given to the demolition, *per se*, of houses, but the Court recognized the fact that when a house serves as a base for firing at the State of Israel and terrorist activities are being conducted within it, or it is being used as shelter for a terrorist squad, its demolition, even without the right to a hearing, may constitute a legal and justified act. When a house serves as the residence of innocent civilians, under certain circumstances its demolition is prohibited, even during combat. Everything depends on the circumstances of each and every matter, taking into consideration the conditions, the needs and the situation at the scene.

Before Concluding

17. For the reasons we have elucidated, we do not find that the petition has established cause for our intervention in the decision not to conduct a criminal investigation, as requested by the petitioners. The delay in filing the petition, its generality and its reliance on partial information highlight the

fact that the legal tool is the least suitable tool for achieving the goals of the petitioners in this matter, whatever they may be. Regarding the substantive issue, the war on terrorism is a difficult one, which poses difficult dilemmas for the combat forces and the defense leadership with regard to avoiding harm to civilians when murderous actions come from among them. The grave, blood-soaked events that preceded the operations illustrate the difficulty involved in making decisions about combat actions and their outcomes. It certainly cannot be said that launching two operations and all the actions that were taken during those operations establish a *prima facie* suspicion of criminal offenses, as indicated by the arguments in the petition. Moreover, as we have explained above, the decision by the Attorney General or by the MAG with regard to pressing charges is made in light of an isolated incident, and that is also how judicial review on decisions of this type is exercised. Indeed –

> 'If the petitioners leave this Court with empty hands, it is only because they took the wrong path, and therefore did not reach their objective. There are those who say that this Court is the last refuge of the citizen in his dispute with the government. But as opposed to these, there are those who apply to this Court in order to settle such an argument, as the first step on the path, even before turning to the government itself. And there are also those who come to the Court not in order to settle the argument, knowing that the case is not at all amenable to judicial decision and, accordingly, there is also no basis for assuming that the Court will grant them relief' (*MK Uzi Landau v. Jerusalem Municipality* [15], at p. 418).

The sweeping petition and the serious claims made therein do not lay a proper factual or legal foundation for a practical and concrete deliberation. The petition mixes legal claims and claims that belong, perhaps, to a publicist-public discourse, and not in a legal proceeding. It appears on its face to be an attempt to utilize the Court in a debate which seemingly should not be planted in that field.

18. In this context, it should be noted that, for its own reasons, the petitioner also saw fit to refer extensively in its arguments to the principle of universal jurisdiction. This principle is not relevant to the proceedings that are held before this Court, nor does it have any relevance to the present proceeding. Claims of that type, in accordance with the manner of their formulation, are in the nature of a veiled "threat" against the respondents and even the Court, and it would have been better had the petitioner not chosen to bring that argument before us.

19. The reality in which we live is dynamic and changing and it seems that the day is still far off when the fighting will end completely. Unfortunately, the armed conflict between the State of Israel and the Palestinian terrorist organizations claims many victims from among the civilian population on both sides, and there is no end in sight. In combat situations, just as in calmer times, the security forces are obligated to refrain, as far as possible, from harming innocent people who are caught up in the fighting through no fault of their own, under both Israeli and international law, and under basic principles of humanity. However, tragically, during the fighting and due to the manner of the fighting conducted by the terrorist organizations, innocent people may be hurt, even when the IDF acts properly. Contending with such tragedies does not necessarily – nor should it always – lead to a criminal trial. We feel that we must emphasize yet again – and the State has not disputed this – that when there is a suspected deviation from the proper norms of behavior, even if there is no reason for a criminal trial, the investigating authorities must conduct an examination of the incident with the appropriate tools for that purpose, in order to establish deterrence that could prevent harmful behavior in the future, to instill an educational message into the fighting forces as to the importance of respecting the legal and moral criteria, and to demonstrate the importance of maintaining the rule of law.

Conclusion

In view of all the above, the petition is denied. Due to the importance of the matter with which the petition deals, however, we have not seen fit to grant an order for costs.

Justice E. Rubinstein

1. I concur in all that was said by my colleague the President, from beginning to end, and even though any addition would only detract, I would like to add some brief words of my own.

2. The State of Israel is frequently engaged in a battle against cruel terrorism, which is part of the saga that takes on and sheds the form of a struggle against those who have tried to destroy it in every generation, including this one. This petition, which is 135 pages long, contains no legal reference to this struggle of the State of Israel against ignominious and nefarious people who do not deserve the name human beings, who do not hesitate to slaughter its citizens in buses, in cafes and at the Passover seder table, at bus stations and in any possible place, including in a serene family home on a Sabbath or holiday, and to launch missiles at Sederot and the villages around Gaza year after year, with the aim of hurting civilians and only civilians. I am not even talking about empathy – although the reader of the petition might believe that the matter involved intentional harm to people who were sitting "tranquil and unsuspecting …and had no dealings with any man" (Judges 18:7). What hides behind the learned legal cover with innumerable citations? And the question is whether its true purpose is not the delegitimization of the State of Israel, with the "threat" to which my colleague referred about the exercise of "universal jurisdiction". The truth is that we are not in a bubble surrounding only one party at which are aimed the arrows of the petition – the State of Israel and its soldiers – and no other party or parties whose hands are covered in blood, who do not act according the humanitarian laws and according to the rules of humanity in general. The sophisticated legal language cannot cover this up. This Court is not oblivious to the harm caused to civilians, as shown by its rulings over many years – and neither are the IDF and the defense establishment in general. This Court deals with this constantly, on an almost daily basis, including judicial review of decisions made by military entities in various contexts that are threaded throughout the judgments. The Court's decisions have also attracted internal criticism from various circles in Israel; but it will not alter its path, which takes into consideration domestic and international law, but which also recalls that the Court operates amongst its people.

3. Indeed, this Court has more than once granted petitions that were directed against the defense establishment (see, *inter alia*, *Abu Rahma v. Military Advocate General* [8]). On the other hand, I occasionally visit

prisons and meet security prisoners, among them murderers, who are given rights under all the laws and rules, including visits by the Red Cross and their families. Gilad Shalit was held for five years and four months by evil Hamas operatives without the Red Cross being allowed to visit him. In the case of Operation Cast Lead in 2009, this Court heard petitions immediately, while the battles were raging, on humanitarian and other issues connected with the war, which is unique and has no equal in other countries: that the highest court in a country would deal, in real time, while the actual events are occurring, with issues pertaining to the war that is being waged at that time. In addition, I can attest firsthand to innumerable discussions in various fora, among them the very highest, such as the government and the cabinet, during my term as attorney general, and before that as the government secretary, in which the legal entities reminded and warned about the duty of caution under the circumstances vis-à-vis innocent civilians, at the time when terrorists were using civilian neighborhoods and residents for their own criminal actions. This Court will remain on guard, and the military and civilian law enforcement authorities will fulfill their obligations with regard to specific complaints; with regard to their obligation to act in that context and in the context of "government offenses" in general, there is no need to elaborate (in addition to the words of my colleague the President here, extensive case law exists. See, e.g., HCJ 769/02 *Public Committee Against Torture v. Government of Israel* [17] (para. 40)).

4. My colleague analyzed the petition and the arguments therein, and addressed each one of them, exercising great restraint. I concur, as stated, in all of her words.

Justice H. Melcer

I concur in the judgment of the President, Justice D. Beinisch.

I would like to add that allegations similar to those made by the petitioners in this petition were made at the time to the prosecutor who was appointed to examine the NATO bombings in Yugoslavia, which were perpetrated in response to the harm done to the residents of Kosovo. The prosecutor there was assisted by a special committee, which advised her on the issue and determined as follows:

'… in the particular incidents reviewed by the

> committee with particular care (…) the committee has not assessed any particular incidents as justifying the commencement of an investigation by the OTP. NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.' (See: Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, §90. Can be viewed at: http://icty.org/sid/10052).

These words also hold true, *mutatis mutandis*, for the issues here, and thus this petition is also distinguished from what was before us in *Abu Rahma v. Military Advocate General* [8], in which this Court issued an absolute order (see: my opinion, *ad loc*.)

Held as per the opinion of President D. Beinisch.

12 Kislev, 5772.

8 December, 2011.