

Genuinely Unwilling: An Update

The Failure of Israel's Investigative and Judicial System to Comply with the Requirements of International Law, with particular regard to the Crimes Committed during the Offensive on the Gaza Strip

(27 December 2008 – 18 January 2009)



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Table of Contents

1. Introduction	5
1.1. The scope of the present study.....	8
1.2. Recommendations.....	9
2. The Requirements of International Law	11
2.1. The Obligation to Investigate and Prosecute	11
2.1.1. The Role of the International Community and Third States	12
2.1.2. An obligation applicable at all times.....	13
2.2. Benefit of Conducting Investigations and Prosecutions	14
2.3. International Crimes and Military Justice	15
2.3.1. Military Tribunals/Investigations.....	16
2.4. International Standards Relating to an ‘Effective Investigation’	19
2.4.1. An ‘Effective’ Investigation	19
2.4.2. Independent Investigation.....	22
2.4.3. Prompt and Timely Remedy.....	24
2.4.4. Public Scrutiny	25
3. Analysis of Israel’s Investigative and Judicial Mechanisms.....	26
3.1. Background Context	26
3.2. Israeli Legal and Judicial Mechanisms	29
3.2.1. The Military Justice Law	29
3.2.2. The Role of the Military Advocate General.....	30
3.2.3. The Role of the High Court of Justice	34
3.3. Investigative Mechanisms	40
3.3.1. The Scope of Investigations	40
3.3.2. Purpose Underlying Israeli Investigations	41
3.3.3. Operational Debriefings.....	43
3.3.4. MPCID Investigations.....	48
3.4. Case Study: Proceedings Surrounding the Al-Daraj Case (Assassination of Saleh Shehadeh).....	51
3.4.1. Background Information.....	51

3.4.2.	Time Line	52
3.4.3.	Summary	55
4.	Measures Taken by the Israeli Authorities in the Aftermath of the 27 December 2008 – 18 January 2009 Offensive	55
4.1.	Operational Debriefings	57
4.1.1.	Claims involving incidents in which a large number of civilians not directly participating in hostilities were harmed	57
4.1.2.	Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation	58
4.1.3.	Incidents involving shooting at medical facilities, buildings, vehicles and crews	59
4.1.4.	Destruction of private property and infrastructure by ground forces	59
4.1.5.	The use of weaponry containing white phosphorous	59
4.1.6.	Summary	60
4.1.7.	Additional Operational Debriefings	61
4.2.	MPCID Investigations.....	61
4.3.	Limited Scale of Israeli Measures.....	62
4.4.	Analysis of Specific Cases Detailed in Israel’s July 2010 Report	63
4.4.1.	Abu Hajjaj.....	63
4.4.2.	Al-Maqadma Mosque.....	64
4.4.3.	Al-Dayem.....	65
4.4.4.	UNRWA Head Quarters.....	66
4.4.5.	Al-Fakhoura School.....	68
5.	Civil Proceedings	71
5.1.	Submitting a Complaint.....	71
5.2.	Filing a Case	71
5.3.	Settlement of the case	72
5.4.	Factors Restricting/Denying Access to Justice.....	73
5.4.1.	Court Insurance.....	73
5.4.2.	Witnesses Denied Permission to Travel to Court.....	73
6.	Conclusion.....	75

1. Introduction

At approximately 11:25 am on Saturday, 27 December 2008 Israeli forces began to attack the Gaza Strip. The offensive, codenamed 'Operation Cast Lead,' lasted for 23 days. In total, 1,419 Palestinians were killed. 1,182 of the dead – the overwhelming majority – were civilians, the 'protected persons' of international humanitarian law. A further 5,300 individuals were injured, and public and private property throughout the Gaza Strip was extensively and systematically targeted and destroyed.¹

Numerous investigations and reports by national and international human rights organisations provided compelling evidence indicating the widespread and systematic violation of international law.² The most high profile report was produced by the UN Fact Finding Mission on the Gaza Conflict ('UN Fact Finding Mission') led by Justice Richard Goldstone,³ and submitted to the UN Human Rights Council in September 2009, from where it was referred to the UN General Assembly.⁴

On 5 November 2009, the General Assembly voted to endorse the Report of the UN Fact Finding Mission. The adopted Resolution called upon Israel and the Palestinians to:

“... take all appropriate steps, within a period of three months, to undertake investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice”.⁵

In order to monitor both sides compliance with this request, the General Assembly requested the Secretary-General “to report to the General Assembly, within a period of three months, on the implementation of the present resolution, with a view to considering further action, if necessary, by the relevant United Nations organs and bodies, including the Security Council.”⁶ In February 2010, the Secretary-General transmitted the reports submitted by the Israeli and

¹ Figures presented herein are based on PCHR's documentation, as detailed in, *inter alia*, PCHR, *Targeted Civilians*, 2009.

² These events will not be recounted herein. For further details please see further, PCHR, *Targeted Civilians*, 2009; Report of the Independent Fact Finding Committee on Gaza, *No Safe Place*, Presented to the League of Arab States 30 April 2009; Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Drone Launched Missiles*, 2009; Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, MDE 15/015/2009, 2009; Human Rights Watch, *Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza*, 2009.

³ Report of the United Nations Fact Finding Mission on the Gaza Conflict (the Goldstone Report), U.N. Doc. A/HRC/12/46, §§1194-1199.

⁴ UN Human Rights Council Resolution, 21 October 2009, U.N. Doc. A/HRC/Res/S-12/1.

⁵ UN General Assembly Resolution, 5 November 2009, U.N. Doc. A/Res/64/10. This Resolution endorsed the previous Resolution of the Human Rights Council.

⁶ UN General Assembly Resolution, 5 November 2009, U.N. Doc. A/Res/64/10.

Palestinian authorities to the General Assembly, without providing any further analysis or conclusions; all parties were granted a further five months to conduct domestic investigations.⁷

Concurrently, the Human Rights Council mandated a “committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by the Government of Israel and the Palestinian side”.⁸ This Committee is due to submit its final report to the 15th Session of the Human Rights Council in September 2010.

This focus on national-level investigations and prosecutions is reflective of the obligation which customary international law places on all States to “investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.”⁹

However, while emphasis is placed on national courts and domestic mechanisms as a first step, the Goldstone Report also envisaged recourse to mechanisms of international criminal justice in the event that domestic investigations do not prove effective.¹⁰ Indeed, history has shown that, with respect to the commission of international crimes,¹¹ States are unlikely to conduct genuine investigations and prosecutions. As was the case during ‘Operation Cast Lead’, most serious violations of international law are committed consequent to government approved policy and military strategy; States have proven consistently unwilling to investigate and prosecute their own government officials or military commanders, thus censuring governmental or military policies. This is particularly true when it comes to alleged violations of international law committed in the course of ongoing armed conflicts and military operations, as is the case with respect to the Israeli-Palestinian conflict, which involves the long-standing belligerent occupation of Palestinian territory.

The international legal order has clearly evolved in the recognition that States will often prove genuinely unwilling or unable to prosecute those suspected of committing serious violations of international law; international legal mechanisms have been developed to ensure that, even in such situations, the rule of law can be enforced, and those responsible held to account. It is this

⁷ UN General Assembly Resolution, 26 February 2010, U.N. Doc. A/Res/64/254. The General Assembly debate on this issue, scheduled for 26 July 2010 has been postponed pending translation of the relevant reports; further information is not available at this time. For a chronology of the resolutions and decisions at the UN and EU level around the Goldstone Report, please see PCHR web section “in focus” at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6872&Itemid=298.

⁸ UN Human Rights Council Resolution, 14 April 2010, U.N. Doc. A/HRC/Res/13/9.

⁹ Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005.

¹⁰ Report of the United Nations Fact Finding Mission on the Gaza Conflict (the Goldstone Report), U.N. Doc. A/HRC/12/46,§1969(c).

¹¹ Under the Rome Statute the International Criminal Court has jurisdiction over the following international crimes: genocide, crimes against humanity, war crimes, and aggression.

reality that has given rise to the establishment of international tribunals, such as the International Criminal Court, and the development of the universality principle.¹²

Indeed, as noted by the UN, “[a]n international criminal court has been called the missing link in the international legal system. [...] Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and other egregious violations of human rights often go unpunished.”¹³ The necessity of such a court is then explained simply:

“Nations agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia. Or national institutions may have collapsed, as in the case of Rwanda.”¹⁴

The necessity of recourse to mechanisms of international justice is equally recognised in other treaties, such as the Geneva Conventions of 1949, and the Convention Against Torture.¹⁵ For example, Article 146 of the Fourth Geneva Convention states that: “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”

The Palestinian Centre for Human Rights (PCHR) longstanding experience has resulted in the conclusion that Israel is genuinely unwilling to fulfil its international legal obligations, and to investigate – and if appropriate prosecute – *all* those suspected of committing serious violations of international law. Not once in the history of the occupation has a senior military or government official been held to account. As explained in this study, not only is Israel unwilling, Israel’s judicial system is also unable to investigate senior government and military officials, and assessing criminal responsibility for violations such as those outlined, *inter alia*, in the Goldstone Report.

¹² Universal jurisdiction is a longstanding principle of international law; it holds that international crimes – such as grave breaches of the Geneva Conventions and other war crimes, crimes against humanity, and torture – are of such seriousness that they affect the international community as a whole. Consequently, national courts, acting as *de facto* agents of the international community, are granted jurisdiction, despite the lack of a direct *nexus* to the crime: they may investigate and prosecute all those suspected of committing international crimes. See further, PCHR, *The Principle and Practice of Universal Jurisdiction*, 2010.

¹³ UN, Rome Statute of the International Criminal Court, General Overview. Available at: <http://untreaty.un.org/cod/icc/general/overview.htm>

¹⁴ UN, Rome Statute of the International Criminal Court, General Overview. Available at: <http://untreaty.un.org/cod/icc/general/overview.htm>

¹⁵ See, Articles 5 and 7, UN Convention Against Torture.

In fact, as shown in this study, those scattered and exceptional (in numbers) military police investigations which do occur are strictly limited in their scope, and are characterized by fundamental flaws. They cannot be considered effective investigations in keeping with the requirements of international criminal law.

PCHR firmly believe that recourse to international criminal justice mechanisms is essential. It is for the international community to ensure that Palestinian victims' fundamental rights do not continue to be denied, and that those suspected of committing the most serious crimes of the international community do not continue to be granted impunity.

1.1. The scope of the present study

This study is intended to update '*Genuinely Unwilling: Israel's Investigations into Violations of International Law including Crimes Committed during the Offensive on the Gaza Strip, 27 December 2008 – 18 January 2009*' for the purposes of informing the work of the UN Secretary-General, and the Human Rights Council Committee of Experts. It analyses Israel's legal and judicial system in light of Israel's obligations under international law. Despite Israel's claims to the contrary, as published in, *inter alia*, *The Operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects*,¹⁶ *Gaza Operation Investigations: An Update*,¹⁷ and *Gaza Operation Investigations: Second Update*,¹⁸ this study shows that the Israeli system is incapable of conducting independent, credible investigations in conformity with international standards; as detailed below, the investigative processes begun following Operation Cast Lead reaffirm this conclusion, and are illustrative of a desire to frustrate and not further, the pursuit of justice. Israel's failure to conduct such investigations is in violation of its international legal obligations, and UN General Assembly Resolution A/Res/64/10.

Since 1995 PCHR has monitored, documented, and investigated violations of international law committed by Israel, the Occupying Power, and the Palestinian authorities. These efforts were intensified following the serious violations of international law committed during Operation Cast Lead, and included significant cooperation with numerous international bodies such as the UN Fact Finding Mission, the UN Board of Inquiry, and the Independent Fact Finding Mission of the Arab League. PCHR's investigations indicate that Israel committed widespread and systematic violations of international law, including grave breaches of the Geneva Conventions and crimes against humanity. Following the offensive, **PCHR submitted 1,046 civil complaints (or "damage applications") to the Compensation Officer in the Israeli Ministry of Defense, and approximately 490 criminal complaints** (on behalf of 1,046 affected individuals) requesting the opening of an investigation to the Israeli Military Prosecution. However, to date, only a handful of responses denoting the opening of an investigation, or simply acknowledging receipt

¹⁶ State of Israel, *The Operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects*, June 2009.

¹⁷ State of Israel, *Gaza Operation Investigations: An Update*, January 2010.

¹⁸ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010.

of the complaint, have been received;¹⁹ media sources have reported that other complaints filed by PCHR have been closed, but this has not been officially communicated.

This study concludes that over a year and a half after the military operation no effective domestic investigations have been conducted into the events of Operation Cast Lead, and that such investigations *cannot* be conducted within the Israeli national system.

PCHR emphasize that due to their nature, the alleged crimes as reported by the Goldstone Report – which are not simple violations of military law but amount to international crimes committed in a systematic and widespread manner, in accordance with official State policy – cannot be effectively dealt with by Israeli domestic justice mechanisms. As this study shows, such mechanisms invariably fail to achieve the standards of investigations that are “independent, credible and in conformity with international standards” as required by the UN General Assembly Resolution of 5 November 2009 which endorsed the Goldstone Report.²⁰

It is imperative that urgent recourse be had to mechanisms of international justice. This is the responsibility of the United Nations, in particular the UN Security Council, and the international community as a whole

1.2. Recommendations

In order to put an end to the grave impunity crisis that is afflicting the situation in the occupied Palestinian territory, the Palestinian Centre for Human Rights recommends that:

1. The Secretary-General and the UN General Assembly request that the UN Security Council, acting under Chapter VII of the UN Charter, refer the situation in Israel and the occupied Palestinian territory to the International Criminal Court (ICC);
2. In the absence of a referral by the UN Security Council, and following the declaration submitted on January 2009 by the Palestinian Authority under Article 12 of the ICC Statute²¹, the ICC Prosecutor initiate a *proprio motu* investigation into the alleged crimes as outlined in the Goldstone Report;

¹⁹ Concerning criminal complaints, to date PCHR have received only 13 ‘interlocutory’ responses from the Military Prosecution or from the Military Police Criminal Investigation Division.

²⁰ U.N. Doc A/Res/64/10.

²¹ On 22 January 2009, the Palestinian Authority lodged a declaration with the ICC Registrar accepting the Court’s jurisdiction under Article 12(3) of the ICC Statute. The Palestinian Authority recognized the jurisdiction of the Court “for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.”

3. Pursuant to their obligation under Article 146 of the Fourth Geneva Convention, individual States, as High Contracting Parties to the Geneva Conventions, fulfil their obligation to investigate and prosecute all alleged war crimes, including those outlined in the Goldstone Report, in accordance with the principle of universal jurisdiction;
4. As requested, *inter alia*, in General Assembly Resolution A/Res/64/10 of 5 November 2009, the Swiss Government, as the depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, should undertake as soon as possible the steps necessary to reconvene a conference of the High Contracting Parties with the aim of enforcing the Convention in the occupied Palestinian territory and ensuring its respect,;
5. The UN General Assembly establish an escrow fund to be used to pay adequate compensation to Palestinian victims who have suffered loss and damage as a result of unlawful acts attributable to Israel, and the Government of Israel pay the required amounts into this fund.²²

²² Report of the United Nations Fact Finding Mission on the Gaza Conflict ('the Goldstone Report'), U.N. Doc. A/HRC/12/46, §1971(b).

2. The Requirements of International Law

This section is intended to establish the overall legal framework, as a frame of reference for the context specific analysis of the Israeli investigative mechanisms which forms the operative part of this study. In this section the requirements of international law are detailed with respect to the obligation to investigate – and if appropriate prosecute – serious violations of international law (specifically international crimes), and the standards which any such investigations must adhere to in order to be considered effective (i.e. legitimate). The benefits of such prosecutions, as they relate to ensuring victims’ rights, and combating impunity – and thereby enforcing the rule of law – are also discussed.

2.1. The Obligation to Investigate and Prosecute

Customary international law recognizes the existence of a category of violations of international law that entail direct individual criminal responsibility, notwithstanding the possible (concurrent) responsibility of the State at the international level. ‘Crimes under international law’ (or international crimes) are of such seriousness, and involve the interest of the international community as a whole, that their commission gives rise to an obligation to investigate and prosecute which goes beyond the boundaries of the national or territorial State of commission.²³ As noted in the Report of the UN Fact Finding Mission: “Investigations and, if appropriate, prosecutions of those suspected of serious violations are necessary if respect for human rights and humanitarian law is to be ensured and to prevent the development of a climate of impunity. States have a duty under international law to investigate allegations of violations.”²⁴ For the purpose of this study, reference is made in particular to those crimes outlined in the Goldstone Report amounting to war crimes and crimes against humanity as codified in Articles 7 and 8 of the Statute of the International Criminal Court.

The obligation to investigate, and if appropriate prosecute, those suspected of committing international crimes arises directly from customary international law. With respect to serious violations of international humanitarian law (IHL) (i.e. Article 8 war crimes), customary law holds that all “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”²⁵ Equally, the *jus cogens* nature of crimes against humanity gives rise to an

²³ For further information on both international crimes and universal jurisdiction, see Palestinian Centre for Human Rights, *The Principle and Practice of Universal Jurisdiction: PCHR’s work in the occupied Palestinian territory*, 2010.

²⁴ Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/46, §1773.

²⁵ Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005. Based, *inter alia*, on the treaty obligation found in Article 146 of the Fourth Geneva Convention.

obligation to investigate and prosecute such crimes at the international level under customary international law.²⁶

On 16 December 2005, the General Assembly of the United Nations reaffirmed this obligation, explicitly applicable to both international human rights law and international humanitarian law.²⁷ Principle 3 of *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* states that:

“3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.”

It is apparent that the obligation to investigate and prosecute applies to all serious violations of international law, including, *inter alia*, those amounting to war crimes or crimes against humanity as contained in Articles 7 and 8 of the ICC Statute. The incidents listed in the Report of the UN Fact Finding Mission give rise to this obligation.

2.1.1. The Role of the International Community and Third States

The primary responsibility to investigate and prosecute international crimes lies with the national authorities of the State linked to the crime by one of the ‘traditional’ jurisdictional criteria (i.e. territoriality or nationality). However, should this State prove genuinely unwilling or unable to do so, as is often the case, mechanisms of international justice – such as the ICC or third States acting in accordance with the principle of universal jurisdiction – are empowered to

²⁶ See, M.C. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *Law and Contemporary Problems*, 1996. The ICTY confirmed the customary law status of crimes against humanity in: *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-t, Judgment (May 7, 1997), §937

²⁷ UN General Assembly, *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/Res/60/147, 16 Dec. 2005

exercise their jurisdiction. The logic underlying resort to mechanisms of international justice is straightforward:

“Crimes under international law are directed against the interests of the international community as a whole. It follows from this universal nature of international crimes that the international community is empowered to prosecute and punish these crimes, regardless of who committed them or against whom they were committed. Therefore, the international community may defend itself with criminal sanctions against attacks on its elementary values.”²⁸

In this regard it is relevant to note that the ICC Preamble affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished” and recalls “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

While the universality principle empowers the international community, or third States acting on its behalf, to investigate and prosecute international crimes, it must be noted that with respect to grave breaches of the Geneva Conventions, this is an *obligation*. All High Contracting Parties are “under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”²⁹

Universal jurisdiction is a jurisdiction of “last resort”, utilized when States with a more direct jurisdictional nexus to the crime prove unwilling or unable to investigate and prosecute.³⁰ As such, it is an essential safeguard, ensuring that those responsible for international crimes *can* be held to account, and thus constitutes a fundamental component in the fight against impunity.³¹

Israel’s proven unwillingness – as documented, *inter alia*, throughout the course of this study – and the inability of the Palestinian authorities means that recourse to mechanisms of international justice is essential with regard to all alleged serious violations of international law including, but not limited to, those, outlined in the Goldstone Report. In this context international justice mechanisms are the only possible means through which accountability can be pursued and impunity combated. The international community, and individual third States, must fulfill their obligation to investigate and prosecute these crimes.

2.1.2. An obligation applicable at all times

²⁸ Gerhard Werle, *Principles of International Criminal Law*, Second Edition, 2009, p. 64.

²⁹ Article 146, Fourth Geneva Convention.

³⁰ See, further the decision of the Spanish Tribunal Supremo in the *Guatemalan Generals* case, and PCHR, *The Principle and Practice of Universal Jurisdiction: PCHR’s work in the occupied Palestinian territory*, 2010.

³¹ Gerhard Werle, *Principles of International Criminal Law*, Second Edition, 2009, p. 68.

The obligation to investigate serious violations of international human rights law and international humanitarian law applies at all times, regardless of the existence of an armed conflict. In *Ergi v. Turkey* the European Court of Human Rights stated that “neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted”.³² Equally, in General Comment 29, the Committee on Civil and Political Rights explicitly clarified that even in the event of a legitimate derogation during a State of Emergency, “the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.”³³ Evidently, the obligation inherent in international humanitarian law becomes applicable specifically in the event of an armed conflict.

2.2. Benefit of Conducting Investigations and Prosecutions

The essential purpose underlying investigation and prosecution is a desire to ensure the effective implementation of the law.³⁴ It is a self-evident truth that if the law is to be respected it must be enforced. As detailed above, the effective administration of (international) criminal justice – of which genuine investigations and prosecutions are an essential component – is the appropriate and practical means whereby the rule of law and victims’ rights are reestablished and their validity confirmed. . However, it must be emphasized that accountability also serves another broader purpose and can act as a deterrent to future crimes.

In the *Myrna Mack Chang Case* the Inter-American Court of Human Rights explained this broader motivation: “it is essential for the States to effectively investigate [...] and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life.”³⁵ Similarly, in *Bati v. Turkey*, the European Court of Human Rights stated that without effective investigation the “general legal prohibition [...] would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the right within their control with virtual impunity”.³⁶

Experience in the occupied Palestinian territory and Israel has proven the reality of the Court’s statement. The history of the occupation has been characterized by two consistent components: continuous and escalating violations of international law, and total impunity for these crimes.

³² *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §85.

³³ Committee on Civil and Political Rights, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11,31 August 2001, §14.

³⁴ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §105.

³⁵ *Myrna Mack Change Case*, Inter-American Court of Human Rights, Judgment of 25 November 2003, Ser.C (No. 101) 2003,§156.

³⁶ *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §134.

PCHR believe these two components to be intrinsically related. Impunity has led to an increasingly brazen disregard for even the most fundamental principles of international law, such as the principles of proportionality and distinction. This conclusion has been evidenced dramatically in recent years, *inter alia*, by: the adoption of the *Dahiya* doctrine, first in Lebanon and then in the Gaza Strip;³⁷ the collective punishment of Gaza's 1.5 million inhabitants through the imposition of a comprehensive and illegal closure; the continued construction of settlements and the annexation of land in the West Bank, including occupied East Jerusalem; and the manner in which Israeli forces attacked the Gaza Freedom Flotilla on 31 May 2010.³⁸

These experiences in occupied Palestine reflect those of other regions in the world. Following a situation in Venezuela, the Inter-American Court of Human Rights stated simply:

“At the date of the instant Judgment, after more than thirteen years, neither those responsible for the homicides, disappearances and grave wounds suffered by the victims nor those who ordered burial of the deceased in common graves have been identified and punished. This has led to a situation of grave impunity regarding the respective facts, a situation which constitutes an infringement of the aforementioned duty of the State. It is injurious to the victims, their next of kin and society as a whole, and fosters chronic recidivism of the human rights violations involved.”³⁹

In this context, the desire to combat impunity – achieved, *inter alia*, by conducting effective investigations and prosecutions – must be linked to the obligations to respect and to guarantee individuals' rights. By combating impunity, States are effectively fulfilling the obligation to establish a context wherein rights and protections can be ensured. Conversely, by failing to combat impunity, States are in violation of this obligation, and in effect are creating an environment which encourages continued violations of international law.

2.3. International Crimes and Military Justice

Before proceeding, a distinction must be made between international crimes, and other crimes traditionally falling under the competence of military justice. In domestic systems soldiers engaged in military operations are typically subject to the military law of their own country and

³⁷ See further, Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/46, §§1194-1199.

³⁸ See, PCHR, *PCHR Condemns Israeli Attack on Gaza Freedom Flotilla*, 31 May 2010, available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6709:pchr-condemns-israeli-attack-on-gaza-freedom-flotilla-&catid=36:pchrpressreleases&Itemid=194; and PCHR, *NGOs gathered in Kampala Call for End to Impunity Crisis Following Israeli Attack on Aid Convoy*, 2 June 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6711:ngos-gathered-in-kampala-call-for-end-to-impunity-crisis-following-israeli-attack-on-aid-convoy-&catid=36:pchrpressreleases&Itemid=194.

³⁹ Caracazo Case, Inter-American Court of Human Rights, (Ser. C) No. 95 (2002), Judgment of August 29, 2002, §117.

their acts are adjudicated by military courts (courts martial). In administering military justice, military courts apply in the first place the national military codes or laws as adopted by the country. However, in case of acts which occurred during armed conflicts, customary principles of international humanitarian law, as recognised *inter alia* by the Four Geneva Conventions, are to be applied. Traditionally, military law is primarily concerned with the maintenance of military discipline, with the goal of ensuring the effective functioning of the armed forces; crimes of concern to military justice thus typically include dereliction of duty, drug usage, drunk and disorderly, looting, disobedience, and so on. Indeed, it is significant to note that the only post-Operation Cast Lead conviction was related to the theft of a credit card of a Palestinian civilian by an Israeli soldier (looting).

International crimes on the other hand, as war crimes or crimes against humanity, are the most serious crimes of concern of the international community as a whole and they entail individual criminal responsibility directly under international law. Such crimes, because of their gravity, have been placed under the jurisdiction of international courts and tribunals and are also subjected to the universality principle, meaning that third State can investigate (and if appropriate prosecute) those suspected of the commission of war crimes or crimes against humanity, even in the absence of any territorial or national link to the crime. It is the gravity of the crime itself that forms the basis for jurisdiction.

Clearly, while some matters may be matters for the military justice system alone,⁴⁰ this is not the case with respect to the alleged serious violations of international humanitarian law and human rights law amounting to international crimes, as those reported by the UN Fact Finding Mission on the Gaza conflict. Customary international law requires that such violations, entailing individual criminal responsibility directly at the international level, must be subject to full judicial scrutiny, and investigated in accordance with the requirements of international law and international human rights law.

2.3.1. Military Tribunals/Investigations

Given Israel's extensive use of military investigations, it is important that the requirements relating to the independence and impartiality of military tribunals and investigations be addressed. This is an area of particular concern and sensitivity as "military jurisdiction is often used as a means of escaping the control of the civilian authorities."⁴¹ As noted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

⁴⁰ Namely traditional military crimes, such as disciplinary measures, disobedience, dereliction of duty, and so on.

⁴¹ International Commission of Jurists, *Military Jurisdiction and International Law*, Military courts and gross human rights violations vol. 1, 28 (2004).

“As an empirical matter, subjecting allegations of human rights abuses to military jurisdiction often leads to impunity. In such situations, investigation and prosecution by bodies independent of the military is necessary.”⁴²

The UN Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions explicitly require that “[t]hose potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.”⁴³ This requirement acknowledges the dangers inherent when those with a relationship to the accused, or an interest in the outcome, are involved in the investigation. International crimes may implicate all levels of the military establishment, and so members of the military may have a pressing interest in their suppression. This reality was recognised in *Incal v. Turkey*, where in finding that the court in question was not independent or impartial, the Court held that it “follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the case.”⁴⁴

The impossibility of this situation with respect to the interests of justice was also recognised by the Inter-American Court of Human Rights in the *Durand and Ugarte* case, where the Court held that “the military men who were members of the tribunals were, at the same time, members of the armed forces in active duty [...] Thus, they were unable to issue an independent and impartial judgment.”⁴⁵

This finding builds on a key concern relating to military judges/investigators, namely that they remain military officials subject to hierarchical obedience. In 1969, the UN Special Rapporteur on Equality in the Administration of Justice noted that “one might wonder whether the aforementioned personnel can be tried and prosecuted in complete freedom, bearing in mind that they are dependent on their commanding officer as far as the determination of efficiency, promotion, allocation of tasks and the right to go on leave are concerned.”⁴⁶ In *Findlay v. the United Kingdom* – a case which led to significant changes in the UK’s military justice system – the European Court of Human Rights echoed these concerns, and ultimately found them incompatible with the interests of justice: “aspects of these judges’ status make it questionable. Firstly, they are servicemen who still belong to the army, which in turn takes its orders from the executive. Secondly, they remain subject to military discipline and assessment reports are compiled on them by the army for that purpose (see paragraphs 28 and 29 above). Decisions pertaining to their appointment are to a great extent taken by the administrative authorities and

⁴² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 33-38, UNDoc. E/CN.4/2006/53m (March 8, 2006). § 37.

⁴³ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989)

⁴⁴ *Incal v. Turkey*, European Court of Human Rights, Application No. 22678/93, 9 June 1998, §72.

⁴⁵ *Durand and Ugarte Case*, Inter-American Court of Human Rights, 16 August 2000, (Ser. C), No. 68 (2000), §126.

⁴⁶ U.N. Doc. E/CN.4/Sub.2/296, 10 June 1969, §195. Spanish Original.

the army (see paragraph 29 above). Lastly, their term of office as National Security Court judges is only four years and can be renewed."⁴⁷

Ultimately, military investigations and tribunals must be subject to strict scrutiny and civilian oversight, given the evident problems as discussed briefly herein. The Human Rights Committee has consistently stated that States must take measures to ensure that military forces are subject to civilian authority;⁴⁸ namely, that investigations and prosecutions must be subject to the effective oversight of the civilian judicial system. Commenting on the situation in Venezuela, the Committee stated: "The State Party should establish an independent body empowered to receive and investigate all reports of excessive use of force and other abuses of authority by police and other security forces, to be followed, where appropriate, by prosecution of those who appear to be responsible for them."⁴⁹

Reinforcing the finding of the Canadian Supreme Court (above), the European Court of Human Rights has stressed that, as regards military courts, "even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused [...] In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified."⁵⁰

Given Israeli forces reliance on disciplinary proceedings it is important that these procedures be briefly addressed herein. It is apparent that Israeli forces regard disciplinary proceedings as an appropriate legal response to the commission of serious violations of international humanitarian law, including grave breaches of the Geneva Conventions. For example, following Operation Cast Lead, the Israeli MAG has ordered disciplinary proceedings in response to the shelling of UNRWA headquarters,⁵¹ the use of a human shield,⁵² and the direct attack on civilians and civilian objects.⁵³ However, such disciplinary proceedings in no way reflect the gravity of the crime, and cannot be considered consistent with Israel's obligation under customary IHL to investigate, and if appropriate prosecute, those suspected of committing war crimes.⁵⁴

⁴⁷ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §68.

⁴⁸ See, *inter alia*, Concluding Observations – Lesotho, U.N. Doc. CCPR/C/79/Add.106, §14; Concluding Observations – El Salvador, U.N. Doc. CCPR/C/79/Add.34 §8.

⁴⁹ Concluding Observations – Venezuela, U.N. Doc. CCPR/CO/71/VEN, 26 April 2001.

⁵⁰ *Incal v. Turkey*, European Court of Human Rights, Application No. 22678/93, 9 June 1998, §71.

⁵¹ State of Israel, *Gaza Operation Investigations: An Update*, January 2010 §108.

⁵² See the case of Majdi Abed-Rabo, as reported in: IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

⁵³ See the case of the attack on Al-Maqadma mosque, as reported in: IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

⁵⁴ Rule 158, ICRC, *Study on Customary International Humanitarian Law*, 2005.

2.4. International Standards Relating to an ‘Effective Investigation’

When analyzing the manner in which investigations into international crimes are conducted, the standards enshrined in international criminal law and international human rights law are directly relevant. While customary IHL regulates *when* such investigations are to be conducted,⁵⁵ it does not regulate *how* this is to happen. In this regard, and in keeping with the *lex specialis* doctrine advanced by the ICJ,⁵⁶ it is apparent that the detailed standards of international human rights law should apply. As noted, “[i]nvestigatory obligations have also been developed in treaty law, soft law and jurisprudence in human rights law and are now more detailed than in international humanitarian law.”⁵⁷ Significantly, the European Court of Human Rights, the Inter-American Court of Human Rights, and other human rights bodies have applied the investigative standards of human rights law to situations of armed conflict.⁵⁸

The jurisprudence of the European Court of Human Rights has consistently identified four components essential to conducting a genuine investigation.⁵⁹ A ‘genuine’ investigation must be: effective, independent, prompt, and involve an element of public scrutiny.⁶⁰ These components are reflective of the findings of other international human rights bodies, and the requirements of international criminal law. As a result of their fundamental importance and relevance to the current discussion, each of these requirements will be analyzed individually.

2.4.1. An ‘Effective’ Investigation

It is apparent that the duty to investigate “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”⁶¹ In this regard, international law requires that an “investigation must be “effective” in practice as well as in law, and not be unjustifiably

⁵⁵ Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005.

⁵⁶ See, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C. J. 136 (July 9) §106; and *Armed Activities on the Territory of the Congo*, (DRC v. Uganda), 2005 I.C.J. (December 19), §216.

⁵⁷ Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, International Review of the Red Cross, Volume 90, Number 871, September 2008, p. 540.

⁵⁸ *Isayeva, Yusupova and Bazayeva v. Russia*, E.Ct.H.R. Application Nos. 57947/00, 57948/00, 57949/00, 24 February 2005, §208-213; *Myrna Mack-Chang v. Guatemala*, Inter-America Court of Human Rights (Ser. C) No. 101 (2003), 25 November 2003; Human Rights Committee, Concluding Observations: Colombia, U.N. Doc. CCPR/C/79/Add.76, 5 May 1997, §32.

⁵⁹ Such requirements are also evidenced in, *inter alia*, the jurisprudence of the Inter-American Court of Human Rights, and the Human Rights Committee.

⁶⁰ See, for example, *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001; *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003; *Nachova and Others v. Bulgaria*, European Court of Human Rights, Application Nos. 43577/98, 43579/98, 6 July 2005.

⁶¹ *Chumbivilcas v. Peru*, Inter-American Commission on Human Rights, Case 10.559, 1 March 1996.

hindered by the acts or omissions of the authorities of the respondent State.”⁶² It is presented that the Israeli system is orchestrated towards precisely this ‘hindering’ of justice, and that within the Israeli system, justice and accountability, particularly for those ‘most responsible’, is impossible.

The requirement that an investigation be ‘effective’ is intrinsically related to the necessity of preventing ‘sham’ proceedings. It is explicitly required therefore that, for an investigation to be considered effective, it must be capable of leading “to the identification and punishment of those responsible.”⁶³ Indeed, this must be considered as one of the primary purposes of any investigation; the truth must be established, and those responsible held to account.

Significantly, this obligation is recognized as “not an obligation of result, but of means.”⁶⁴ It is the process, the mechanics of the investigation, which must be tightly regulated and conducted in accordance with international standards. In many ways this is a self-evident obligation: in order to ensure a credible result the process itself must be credible.

International law, as developed through the jurisprudence of international human rights bodies and courts, such as the European Court of Human Rights, thus places specific obligations on the process of investigation. For example, the “authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury, and an objective analysis of clinical findings, including the cause of death.”⁶⁵ In *Nachova and Others v. Bulgaria*, the Grand Chamber of the European Court further emphasized that the “investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements”.⁶⁶ International criminal law establishes similar requirements; in analyzing whether an investigation can be considered genuine, of relevance to the ICC OTP is, *inter alia*, requirements relating to the investigative steps undertaken, the use of available evidence, including the emphasis placed on evidence (i.e. were situations characterized in a misleading way), and the use of witnesses and victims.⁶⁷

The above requirements are example guidelines relevant to the specific cases examined through the Courts; they do not constitute an exhaustive list. Ultimately, all appropriate measures must

⁶² *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §134.

⁶³ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107.

⁶⁴ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, §69.

⁶⁵ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, §69.

⁶⁶ *Nachova and Others v. Bulgaria*, European Court of Human Rights, Application Nos. 43577/98, 43579/98, 6 July 2005, §113.

⁶⁷ Informal Expert Paper, *The Principle of Complementarity in Practice*, International Criminal Court Office of the Prosecutor, 2003.

be taken: “any deficiency in the investigation which undermines its ability to establish the cause [...] will risk falling foul of this standard [to conduct an effective investigation].”⁶⁸

2.4.1.1. *Scope of the investigation*

With respect to any analysis of Israel’s existing investigations, including those into the events surrounding Operation Cast Lead, it is imperative to note that existing international jurisprudence requires that the whole operation be analyzed, and not just the immediate specifics of any one incident. This was the approach adopted by the European Court of Human Rights in *Ergi v. Turkey*, the Court concluded that no effective investigation had been conducted, as, *inter alia*, the scope of the domestic investigation did not include examining the operation as a whole: “Nor was any detailed consideration given by either the district gendarmerie commander or the public prosecutor to verifying whether the security forces had conducted the operation in a proper manner. [...] it would appear that no inquiry was conducted into whether the plan and its implementation had been inadequate in the circumstances of the case”.⁶⁹ Similarly, in *McCann and Others v. the United Kingdom*, the Court found that the overall planning of the operation constituted a violation of the right to life, as opposed to the specific actions of the individual soldiers during the armed confrontation.⁷⁰

This obligation was expanded upon with respect to the right to life in *Isayeva, Yusupova, and Bazayeva v. Russia*, where the Court held that “it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action”.⁷¹

This obligation is also a requirement of international criminal law, as illustrated by, *inter alia*, the Statute and work of the ICC, and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. For example, an Expert Paper prepared for the ICC Office of the Prosecutor which discusses indicators of an ineffective domestic investigation raises the issue of the hierarchical level: how high up the scale of authority did investigations and prosecutions reach.⁷²

⁶⁸ *Isayeva, Yusupova, and Bazayeva v. Russia*, European Court of Human Rights, Applications Nos. 57947/00, 57948/00, 57949/00, 6 July 2005, §211.

⁶⁹ *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §84.

⁷⁰ See, *McCann and Others v. the United Kingdom*, European Court of Human Rights, Application No. 18984/91, 27 September 1995.

⁷¹ *Isayeva, Yusupova, and Bazayeva v. Russia*, European Court of Human Rights, Applications Nos. 57947/00, 57948/00, 57949/00, 6 July 2005, §171.

⁷² Informal Expert Paper, *The Principle of Complementarity in Practice*, International Criminal Court Office of the Prosecutor, 2003.

The scope of any investigation is one of the key issues of concern with respect to Israel's actions. Further, and as discussed, *inter alia*, in the reports of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967⁷³, the legitimacy of the operation itself, and the way it was planned raises serious concerns with respect to international law compliance; as planned the operation included attacking densely civilian populated areas making it impossible to distinguish between civilian and military targets.⁷⁴

2.4.2. Independent Investigation

Judicial independence and impartiality are a condition *sine qua non* with respect to the effective administration of justice, as discussed above in the section on military tribunals/investigations.⁷⁵ However, it is equally important that those conducting any investigation also be independent and impartial. In terms of the meaning associated with independence and impartiality, the European Court of Human Rights has held that independence is based on, *inter alia*, "the existence of guarantees against outside pressures and the questions whether the body presents an appearance of independence".⁷⁶ Regarding impartiality, "[f]irst, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect".⁷⁷ The Court also held that independence and objective impartiality are closely linked.⁷⁸

The Canadian Supreme Court held that an individual who wishes to challenge the independence of a tribunal – in this instance a military tribunal – "need not prove an actual lack of independence. Instead the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would *perceive* the tribunal as independent."⁷⁹

As stated by the European Court of Human Rights, "to be regarded as effective, the general rule is that the persons responsible for the injuries and those conducting the investigations should be independent of anyone implicated in the events. [...] This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in practice."⁸⁰ This finding is similar to the requirements associated with the ICC, which note, as

⁷³ See further, Report of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, U.N. Doc. A/HRC/10/20, 17 March 2009; Report of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, U.N. Doc. A/HRC/13/53, 15 January 2010.

⁷⁴ See PCHR Report, Targeted Civilians, 2009.

⁷⁵ See above, Section 2.3.

⁷⁶ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §73.

⁷⁷ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §73.

⁷⁸ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §73.

⁷⁹ *R. v. Genereux*, 1. S.C.R. 259, [1992]. Available at: <http://csc.lexum.umontreal.ca/en/1992/1992scr1-259/1992scr1-259.html>. Emphasis added.

⁸⁰ *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §135.

indicators of unwillingness: the degree of independence of judiciary, of prosecutors of investigating agencies, process of appointment and dismissal, nature of the governing body, patterns of political interference in investigation and prosecution, and patterns of trials reaching pre-ordained outcomes.⁸¹ Further indicators include:

Commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication. This constitutes circumstantial evidence for an inference of non-genuineness. This can include:

- political objectives of state authority, dominant political party; and
- coincidence or dissonance in objectives and crime (political gains, territorial goals, subjugation of group).
- rapport between authorities and suspected perpetrators (this applies only in situations where the investigative, prosecutorial or judicial authorities are not independent of other authorities):
- official statements (condemning or praising actions);
- awards or sanctions, promotion or demotion;
- financial support; and
- deployment or withdrawal of law enforcement, inhibiting or supporting investigation.⁸²

The independence and impartiality requirements are worth highlighting with respect to the Israeli investigative system and will be expanded on below. The European Court of Human Rights has repeatedly found investigations which do not exhibit the required independence/impartiality to be violations of the State's obligations. For example, in *Ergi v. Turkey*, the Court highlighted the public prosecutor's dependence on a *gendarmie* report which was ultimately judged to be inaccurate: "the Court is struck by the heavy reliance placed by Mustafa Yuce, the public prosecutor who had the obligation to carry out an investigation into Havva Ergi's death, on the conclusion of the *gendarmie* incident report that it was the PKK which had shot the applicant's sister".⁸³ The Court thus concluded that "the authorities failed to carry out an effective investigation into the circumstances".⁸⁴

Similarly, in *Isayeva v. Russia*, the court condemned the government's decision to close an investigation, based on the conclusion of a military expert's opinion that the operational command corps' actions had been legitimate and proportionate; a finding subsequently found to be inconsistent with the evidence.⁸⁵ Significantly, the Court also held that the "absence of any realistic possibility for the applicant to challenge the conclusions of the report and, ultimately, those of the investigation, cannot be said to be in conformity with the principles enumerated

⁸¹ Informal Expert Paper, *The Principle of Complementarity in Practice*, International Criminal Court Office of the Prosecutor, 2003.

⁸² Informal Expert Paper, *The Principle of Complementarity in Practice*, International Criminal Court Office of the Prosecutor, 2003.

⁸³ *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §83.

⁸⁴ *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §85.

⁸⁵ *Isayeva v. Russia*, European Court of Human Rights, Application No. 57950/00, 6 July 2005, §§223-224.

above concerning whether the force used was justified in the circumstances and the identification and punishment of those responsible.”⁸⁶ As will be discussed below, the circumstances of these cases exhibit tangible similarities with respect to Israel’s investigative system. See, for example, the heavy reliance placed on soldier’s testimony, as discussed in Section 4.4.

The dangers of judicial non-independence and impartiality are evident with respect to the effective administration of justice, and the conducting of ‘genuine’ investigations and prosecutions. However, broader dangers must also be emphasized. As pointed out by the Inter-American Court of Human Rights, judicial complicity in Guatemala “by tolerating or directly participating in the impunity that provided material coverage for the very basic violations of human rights, the bodies of the justice system became ineffective in one of their fundamental functions of protection of the individual vis-à-vis the State, and they lost all credibility as guarantors of legality in force. They allowed impunity to become one of the most important mechanisms to generate and maintain the climate of terror.”⁸⁷

2.4.3. Prompt and Timely Remedy

The obligation to investigate is a core component of a State’s duty to guarantee individual rights and protections; as stated by the Human Rights Commission, such investigations must be conducted promptly.⁸⁸ The European Court of Human Rights has consistently held that: “[i]t is beyond doubt that a requirement of promptness and reasonable expedition is implicit in the context. A prompt response by the authorities in investigating allegations [...] may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”⁸⁹

It is presented that the unjustifiable prolongation of investigations may be considered as constituting an attempt to shield perpetrators from justice. For example, the ICC OTP notes as indicators of unwillingness: delay in various stages of the proceedings (both investigative and prosecutorial), for example in comparison with normal delays in that national system for cases of similar complexity; where there is delay, is there justification for that delay; and, where there is unjustified delay, is it inconsistent with an intent to bring the person concerned to justice.⁹⁰ In *Del Caracazo* the Inter-American Court of Human Rights stated that investigations which persist for a long-period of time, without those responsible for gross human rights violations being

⁸⁶ *Isayeva v. Russia*, European Court of Human Rights, Application No. 57950/00, 6 July 2005, §223.

⁸⁷ *Myrna Mack Change Case*, Inter-American Court of Human Rights, Judgment of 25 November 2003, Ser.C (No. 101) 2003, §155.

⁸⁸ Human Rights Commission, Resolution 2001/62, 25 April 2001, §6.

⁸⁹ *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §136.

⁹⁰ Informal Expert Paper, *The Principle of Complementarity in Practice*, International Criminal Court Office of the Prosecutor, 2003.

identified or punished, constitute “a situation of serious impunity and [...] a breach of the State’s duty”.⁹¹

Given the importance of, *inter alia*, collecting evidence and interviewing witnesses as soon after the commission of the alleged crime as possible, unjustifiably prolonged investigations cannot be considered to constitute an effective remedy. It should be noted that in *Isayeva, Yusupova and Bazayeva v. Russia*, the European Court of Human Rights condemned a delay of approximately six months before an investigation was opened: “[t]here was thus a considerable delay – at least until May 2000 – before a criminal investigation was opened into credible allegations of a very serious crime. No explanation was put forward to explain this delay.”⁹²

2.4.4. Public Scrutiny

The final component of a genuine investigation relates to the degree of public scrutiny involved. The motivation for this requirement is the same as that of a prompt and timely remedy, namely the maintenance of public confidence. The European Court of Human Rights has consistently held that “[f]or the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”.⁹³ It must be noted that this requirement does not hold that the public must have access to ‘secret’ documents which may legitimately be deemed to affect national security, but rather that there be public scrutiny of the process itself, including the opportunity to challenge any findings.

⁹¹ *Del Caracazo v. Venezuela*, Inter-American Court of Human Rights, 29 August 2002, ¶117, quoted in International Commission of Jurists, *Military Jurisdiction and International Law*, Military courts and gross human rights violations vol. 1, 55 (2004).

⁹² *Isayeva, Yusupova, and Bazayeva v. Russia*, European Court of Human Rights, Applications Nos. 57947/00, 57948/00, 57949/00, 6 July 2005, §218.

⁹³ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, §213.

3. Analysis of Israel's Investigative and Judicial Mechanisms

This section will analyse Israel's judicial and investigative mechanisms in light of the international standards detailed in the preceding section. In addressing investigations into serious violations of international law, it is necessarily the overall system that is of interest; individual issues arising in the aftermath of Israel's 27 December 2008- 18 January 2009 offensive on the Gaza Strip occur within this overall context, and will be addressed subsequently.⁹⁴

This section is intended to provide clarity regarding the Israeli system, and to address and refute specific claims made by the Israeli authorities. PCHR's experience has led to the conclusion that the Israeli system itself exhibits fundamental flaws rendering the effective pursuit of justice an impossibility with respect to the alleged serious violations of international humanitarian law and human rights law committed against Palestinians.

Israel has consistently claimed that:

"Under Israel's Basic Law for the Military, the IDF is subordinate and accountable to the civilian Government. Like any other governmental authority, it is subject to the rule of law, including the applicable rules of international law. The Israeli system of justice holds the Government, including the IDF, to its legal obligations."⁹⁵

However, as will be demonstrated, although Israel does possess a functioning legal system, when it comes to: *inter alia*, Palestinian victims, the actions of the military/ security establishment, and the prosecution of officials for crimes committed against Palestinians, this system is fundamentally biased, rendering the impartial and effective pursuit of justice impossible. This claim is underlined by the fact that no senior figures – military or civilian – have ever been prosecuted for crimes committed against Palestinian civilians.

Before analysing select components of Israel's legal and judicial system in detail, it is important to establish the overall context, in particular the State's attitude as regards the investigation and prosecution of alleged crimes committed against Palestinians.

3.1. Background Context

The State of Israel actively seeks to avoid scrutiny of its military and security apparatuses; in this regard it is assisted by the HCJ. The net result – as detailed below – is a climate of pervasive impunity, one 'legitimised' by the judicial system.

⁹⁴ See Section 4, *infra*.

⁹⁵ State of Israel, Gaza Operation Investigations: An Update, January 2010, §9.

The State's views are best illustrated by reference to submissions made to the Israeli High Court of Justice (HCJ). In a submission to the HCJ concerning the Al-Daraj attack,⁹⁶ the State of Israel cited a previous HCJ decision which rejected a petition requesting a criminal investigation. As originally held by the HCJ: "the unique characteristics of active operations sometimes constitute considerations negating the presence of a public interest in the instigation of criminal proceedings, *even if criminal liability is present*."⁹⁷ The Court acknowledged what is widely regarded as a fundamental tenet of law, namely that in seeking prosecutions, "there is a clear public interest in deterring offenders from similar acts in the future".⁹⁸ However, the Court then tellingly introduced an explicit exceptionalist caveat concluding that "in cases of negligence committed during active operations, there is, at the present, almost no need for such deterrence."⁹⁹ This statement must be read in light of the Inter-American Court of Human Rights' finding in the *Myrna Mack Chang Case*:

"by tolerating or directly participating in the impunity that provided material coverage for the very basic violations of human rights, the bodies of the justice system became ineffective in one of their fundamental functions of protection of the individual vis-à-vis the State, and they lost all credibility as guarantors of legality in force. They allowed impunity to become one of the most important mechanisms to generate and maintain the climate of terror."¹⁰⁰

Even at first glance the logic underlying the HCJ's assessment is inexplicable, raising concrete questions regarding the Court's independence and impartiality. The ramifications of this HCJ-endorsed policy of not opening criminal investigations are evident; in effect it renders the requirements and obligations of international law irrelevant. Highlighting the erosive effect such decisions have on respect for the rule of law is the State's submission in the *Al-Daraj* case. Here the State built on this previously established premise, arguing that the Court's reasons for not authorizing criminal investigations in negligence cases "during active operations" should apply more forcefully to "combat operations" where "the possible ramifications of a criminal investigation for the chain of command and the willingness of commanders to perform their functions are extremely dramatic. Taking these policy considerations into account, it is clear that

⁹⁶ The State Response related to a petition filed by PCHR and others, requesting that an investigation be opened into the Al-Daraj assassination of July 2002. For further information on this case, please see 3.4, *infra*.

⁹⁷ HCJ 4550/94 *Anonymous v Attorney-General et al.*, *Piskei Din* 49(5) 859, cited by the State Attorney's Office in HCJ 8794/03, *Yoav Hess et al. v Judge Advocate General et. al*; Response on Behalf of the State Attorney's Office, quoted in Human Rights Watch, *Promoting Impunity*, July 21 2005. Emphasis added.

⁹⁸ HCJ 4550/94 *Anonymous v Attorney-General et al.*, *Piskei Din* 49(5) 859, cited by the State Attorney's Office in HCJ 8794/03, *Yoav Hess et al. v Judge Advocate General et. al*; Response on Behalf of the State Attorney's Office, quoted in Human Rights Watch, *Promoting Impunity*, July 21 2005.

⁹⁹ HCJ 4550/94 *Anonymous v Attorney-General et al.*, *Piskei Din* 49(5) 859, cited by the State Attorney's Office in HCJ 8794/03, *Yoav Hess et al. v Judge Advocate General et. al*; Response on Behalf of the State Attorney's Office, quoted in Human Rights Watch, *Promoting Impunity*, July 21 2005.

¹⁰⁰ *Myrna Mack Chang Case*, Inter-American Court of Human Rights, Judgment of 25 November 2003, Ser.C (No. 101) 2003,§155.

the cases in which a criminal investigation will be instigated with regard to combat operations shall be exceptional and unusual.”¹⁰¹

This argument indicates that the ‘possible ramifications on the chain of command’ relate to criminal responsibility and that the ‘policy considerations’ referred to amount to nothing more than a desire to shield the accused from justice; a conclusion reinforced by the reality of investigation and prosecution. When combined with a pre-formed policy of severely limiting the circumstances under which criminal investigations can be opened, it is apparent that the State of Israel – effectively endorsed by the HCJ – is seeking to establish and perpetuate a climate of pervasive impunity.

This conclusion is further illustrated by the fact that – since the beginning of the second *Intifada* – the Military Advocate General (MAG) has pursued an explicit policy of not opening criminal investigations into the killing and injury of Palestinian civilians. The State, through the Attorney General (AG), has argued that criminal responsibility will only apply to “intentional” acts.¹⁰² This claim is clearly inconsistent with the requirements of international criminal law, whereby individual responsibility may be attributed on the basis of intentional, reckless, or even, when expressly provided, negligent acts.¹⁰³ For example, in *Blaskic*, the International Criminal Tribunal for the former Yugoslavia confirmed that, “the mens rea constituting all the violations of Article 2 [grave breaches of the Geneva Conventions] includes both guilty *intent* and *recklessness* which may be likened to serious criminal *negligence*.”¹⁰⁴ Equally, the prohibition on indiscriminate attacks concerns both “direct and indirect intent”,¹⁰⁵ while the authoritative Commentary to Additional Protocol I states, regarding the relatively high-threshold concept of ‘wilfully’, that “this encompasses the concepts of “wrongful intent” or “recklessness””.¹⁰⁶ As noted by Adalah, this practice is also inconsistent with Israeli domestic law, according to which criminal responsibility may be found for intentional, reckless or negligent acts.¹⁰⁷

Furthermore, the State of Israel and the Israeli armed forces have consistently argued that ‘combat operations’ – a catchall phrase utilised to cover virtually all incidents involving Palestinians – possess ‘unique characteristics’ and serve an important national interest. Essentially, this argument holds that investigating military personnel would place an unjustifiable burden on morale and the chain of command, and would prevent personnel from

¹⁰¹ HCJ 8794/03, *Yoav Hess et al. v. Judge Advocate General et. al*; Response on Behalf of the State Attorney’s Office, quoted in Human Rights Watch, *Promoting Impunity*, 2005. Emphasis added.

¹⁰² See, HCJ 3292/07, *Adalah, Al Haq and PCHR et al. v. Attorney General* (case pending).

¹⁰³ See G. Werle and F. Jessberger, *Principles of International Criminal Law*, Cambridge University Press, 2005, p. 115; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, ICRC, 2003.

¹⁰⁴ Prosecutor v. *Blaskic*, Case No. IT-95-14-T, 3 March 2000, §152. Emphasis added.

¹⁰⁵ Prosecutor v. *Martić*, Case No. IT-95-11-A, 8 October 2008, §72.

¹⁰⁶ ICRC, Commentary to Additional Protocol I, §3474.

¹⁰⁷ Quoting, S.Z. Feller, *Elements of Criminal Law*, Vol. A, 1984, p.516; see also sections 20(A)(1),(2) and 20(B) of the Penal Code, 1977; See, Adalah, *Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza*, January 2010.

taking risks required for successful combat operations.¹⁰⁸ With respect to the 'combat operations' caveat it is worth highlighting that as far back as 1996, Israeli forces refused to investigate the killing of 47 Palestinian civilians and 13 members of the Palestinian security forces during clashes which occurred during a demonstration linked to the opening of a highly controversial tunnel near the Al-Aqsa mosque in Jerusalem, on the basis that the events were designated as "combat incidents".¹⁰⁹ This policy was criticised in the Report of the Sharm Al-Sheik Fact Finding Committee, lead by George Mitchell.¹¹⁰

3.2. Israeli Legal and Judicial Mechanisms

3.2.1. The Military Justice Law

The Israeli military justice system is based on the Military Justice Law 5715-1955 and subsequent amendments. This law regulates, *inter alia*, the role of the Israeli armed forces' chief legal officer (the MAG, also referred to as the Judge Advocate General, or JAG), the composition and powers of courts martial and appeals courts, and the mechanisms of investigation. Offences under the military justice law include looting (article 74), illegal use of arms (article 85), negligence (article 125), and obstructing a military police officer (article 126).

The Military Justice Law also confers significant powers on Israeli Defence Force District Chiefs (the commanding officers of the relevant command or corps, such as the Southern Command, or the General Staff) allowing them to intervene in, and influence the legal process. District Chiefs are entitled to: file an appeal against a judgment handed down in a court of first instance,¹¹¹ to consent to a military court's final judgment as a confirming authority,¹¹² and significantly, to order the quashing of a charge sheet.¹¹³ This relationship raises serious issues with respect to the independence and impartiality of the military legal system and the separation of powers principle.¹¹⁴ Simply put, such influence is not conducive to either independence or impartiality; rather, it has the potential to fundamentally undermine it.

¹⁰⁸ See, Human Rights Watch, Promoting Impunity, July 21 2005, chapter III.

¹⁰⁹ Letter to B'Tselem, Maj. Avital Margalit, Head of Assistance Branch, Office of the IDF Spokesperson, 22 October 1996, quoted in B'Tselem, *Illusions of Restraint: Human Rights Violations During the Events in the Occupied Territories, 29 September to 2 December*, December 2000, p. 19

¹¹⁰ *Report of the Sharm Al-Sheikh Fact Finding Committee*, 30 April, 2001

¹¹¹ Section 424(b) of the Military Justice Law.

¹¹² Section 44(1)(b) and (c) of the Military Justice Law.

¹¹³ Section 308(a) of the Military Justice Law.

¹¹⁴ See, Finkelstein & Tomer, The Israeli military legal system - overview of the current situation and a glimpse into the future, *Air Force Law Review*, (2002).

3.2.2. The Role of the Military Advocate General

Within the Israeli military system, the MAG serves a twofold function: acting as legal advisor to the military,¹¹⁵ and enforcing penal laws intended to 'represent the rule of law and the public interest'.¹¹⁶ In this respect the MAG performs a similar role to that of the AG in the civilian sphere; the MAG's authority to indict extends only to members of the armed forces.

As regards independence and impartiality, however, the MAG remains subordinate – in terms of command – to the Chief of Staff. While the Chief of Staff does not have the authority to instruct the MAG regarding arraignments, as noted by the HCJ: the military hierarchy within which the MAG operates cannot be ignored.¹¹⁷

In response to Israel's publication of a report relating to Operation Cast Lead, B'Tselem has expanded upon this evident conflict:

"No system can investigate itself. The report emphasizes the independence of the military justice system in interpreting the law. However in all other matters, it is an integral part of the military. As such, it depends on the military system for budgets, personnel complements, and promotions. For example, the last two JAGs were personally given the rank of major general by the Chief of General Staff. All the decision-makers involved in the handling of complaints are subject to this system.

Furthermore, regarding the investigation of complaints that were filed against the army's conduct during the operation, the independence of the JAG's Office is even more in doubt. The Office was involved, for example, in drafting the open-fire regulations for Operation Cast Lead, in deciding what constituted a legitimate target, and in approving the use of certain weapons. Therefore, if it is found that these determinations contravene international humanitarian law, members of the JAG's Office are liable to be investigated and prosecuted themselves. Clearly, then, they cannot be put in charge of these investigations."¹¹⁸

The recognized nature of this conflict of interest is also illustrated by a letter sent to the AG by a number of Israeli human rights organisations. The letter, sent on 20 January 2009 in the immediate aftermath of the offensive, requested "independent and effective" investigations. Significantly, the letter was sent to the AG and not the MAG (referred to as the Judge Advocate General, JAG) "because, inter alia, the involvement of JAG personnel and the JAG himself during stages of decision-making does not allow for the

¹¹⁵ Military Justice Law §178(1).

¹¹⁶ Military Justice Law §178(2), (4).

¹¹⁷ HCJ 425/89, Zofan v. the MAG, 43(4) P.D. 718, 725

¹¹⁸ B'Tselem, Israel's report to the UN misstates the truth, 4 February 2010. Available at: http://www.btselem.org/English/Gaza_Strip/20100204_Israels_Report_to_UN.asp

JAG's appointment as an investigating figure."¹¹⁹ The letter cites the report of the Winograd Commission of Inquiry into the Lebanon Campaign of 2006 as further proof of this incapacity.

The military hierarchy, and its fundamental characteristics, are further illustrated by the HCJ:

"The military is a typical hierarchical organization ... and is generally considered to have special characteristics ... as distinct from civilian organizations. Discipline and coercion are among the notable characteristics of the military, as are [...] mutual co-dependence and solidarity in the ranks--especially on the battlefield, but not only; obedience of command; [...] the relations of trust between commanders and their subordinates and among the soldiers themselves; [...] they are an absolutely essential precondition of the existence of a military worthy of the name".¹²⁰

This reality illustrates that the MAG cannot be considered independent or impartial.¹²¹ For example, with respect to a similar situation, in finding that a military tribunal was *not* impartial or independent, the European Court of Human Rights held that: "aspects of these judges' status make it questionable. Firstly, they are servicemen who still belong to the army, which in turn takes its orders from the executive. Secondly, they remain subject to military discipline and assessment reports are compiled on them by the army for that purpose".¹²² Equally, the Inter-American Court of Human rights in the *Durand and Ugarte* case held that: "[t]he military men who were members of the tribunals were, at the same time, members of the armed forces in active duty [...] Thus, they were unable to issue an independent and impartial judgment."¹²³

This conclusion must also be made with respect to the Israeli MAG: he/she is unable to issue an independent and impartial decision particularly with respect to the commission of international crimes by the military.

Nonetheless, however, it is the MAG who makes the decision whether or not to open a criminal investigation into the conduct of military personnel, including those violations committed in the context of Operation Cast Lead.¹²⁴ With this in mind, PCHR reiterate that one of the MAG's core functions is to act as legal advisor to the military. For example, the MAG and the AG, were heavily involved in the planning and execution of Operation 'Cast Lead', providing the legal

¹¹⁹ Letter submitted by ACRI, B'Tselem, GISHA, PCATI, Binkom, Hamoked, Yesh Din, and Physicians for Human Rights – Israel. Available at: http://www.btselem.org/Download/20090120_ACRI_to_Mazuz_on_Castlead_Investigations_Eng.pdf

¹²⁰ HCJ 3959/99, Movement for Quality Government in Israel v. the Sentencing Commission, 53(3) P.D. 721, 745. Emphasis added.

¹²¹ For further analysis regarding independence and impartiality please refer to Section 2.3 and 2.4, *supra*.

¹²² Findlay v. the United Kingdom, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §68.

¹²³ Durand and Ugarte Case, Inter-American Court of Human Rights, 16 August 2000, (Ser. C), No. 68 (2000), §126. Emphasis added.

¹²⁴ See, Human Rights Watch, *Promoting Impunity*, 2005, p. 43.

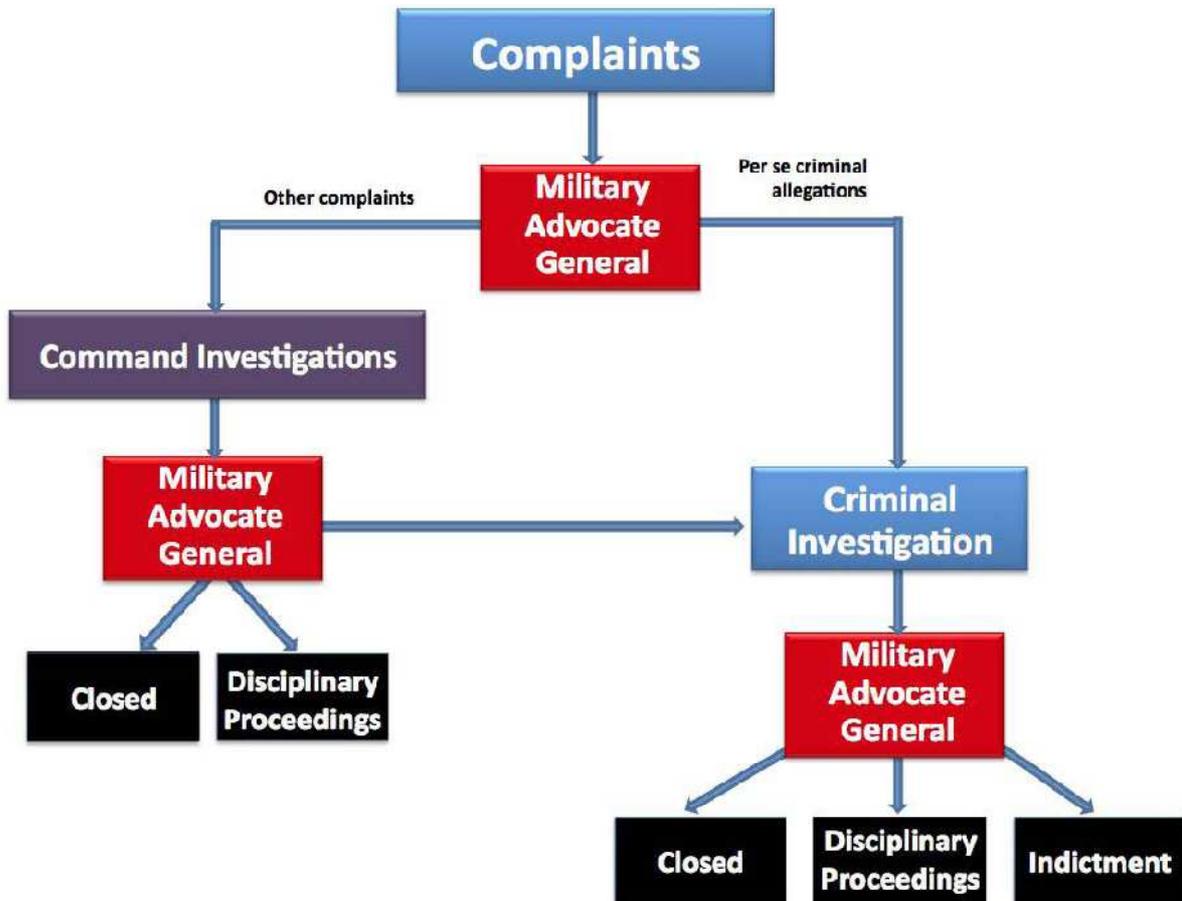
framework regulating the attacks on Gaza.¹²⁵ As noted in Israel's *The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects*:

“Leading up to and during the recent operations in Gaza, the IDF Military Advocate General’s Corps provided legal advice on the Law of Armed Conflict to commanders at the General Staff, Regional Command and Divisional levels. The lawyers examined the legality of planned targets, participated in the operational planning process, helped direct humanitarian efforts, and took part in situation assessments, exercises and simulations. Legal advisors also assisted in drafting operational orders and procedures and in preparing legal annexes to such orders.”¹²⁶

The central decision-making role of the MAG can be illustrated through a diagram presented by the State of Israel in *Gaza Operation Investigations: An Update*:

¹²⁵ “IDF military lawyers were involved in advising commanders on international law aspects of the Gaza operation. [...] In principal legal aspects the MAG is subject to the guidance and supervision of Israel’s Attorney-General and regularly consults with the Attorney General.” IDF, *The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects*, July 2009, §217; See also Yotam Feldman and Uri Blau, “How IDF legal experts legitimized strikes involving Gaza civilians,” *Haaretz*, 23 January 2009, available at: <http://www.haaretz.com/hasen/spages/1057648.html>.

¹²⁶ IDF, *The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects*, July 2009, §216.



As can be seen from this diagram, it is the MAG who is the principal decision-making organ; at all stages the decision to open or close an investigation rests with the MAG himself. In effect this system operates as a loop, with the MAG responsible for each strategic decision. This system is open to manipulation, in that the MAG can allow investigations to proceed – to provide an illusion of investigative rigour – only to subsequently close them; PCHR believe that a number of procedures opened in the context of Operation Cast Lead fulfilled this exact purpose. In many cases, procedures appear to have been undertaken to show Israel’s “significant results”.¹²⁷ However, these procedures reached standardised conclusions, which had been consistently iterated before any investigative procedure began, namely that: “[t]hroughout the fighting in Gaza, the IDF operated in accordance with international law.”¹²⁸ The findings of some of these procedures which appear to have been preordained, and the stark contrast with available evidence, are discussed further below.

The role of the MAG clearly conflicts with the obligation to conduct effective – and thus necessarily independent – investigations. As noted by the European Court of Human Rights,

¹²⁷ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §10.

¹²⁸ IDF, *Conclusions of Investigations into Central Claims and Issues in Operation Cast Lead*, 22 April 2009. Available at: <http://dover.idf.il/IDF/English/Press+Releases/09/4/2201.htm>.

“to be regarded as effective, the general rule is that the persons responsible for the injuries and those conducting the investigations *should be independent of anyone implicated in the events*. [...] This means not only that *there should be no hierarchical or institutional connection but also that the investigators should be independent in practice*.”¹²⁹ This is clearly not the case if the person who advised that a specific attack was legal, is then responsible for the decision to open a criminal investigation into the legality of that same attack, with potential implications for their own criminal liability. This conflict is illustrated by the words of the MAG himself, who in replying to a letter by B’Tselem stated – before any investigations had been conducted – stated that: “while we regret, of course, any harm to civilians, we emphasize again that the *responsibility for that lies solely at the doorstep of the Hamas organization*, following its use of the civilian population for its despicable purposes.”¹³⁰

The decisions of the MAG may be reviewed by the AG, and ultimately the Supreme Court. In Israel’s official reports concerning Operation Cast Lead investigations this is utilised to obfuscate the above-stated reality and to create an illusion of tight civilian supervision. However, in response to this claim B’Tselem replied:

“it is important that the facts be presented precisely. For example, the report states that the attorney general is empowered to examine all the decisions of the Judge Advocate General (JAG), but does not mention that this intervention is rare and occurs only in extremely exceptional circumstances. The report also states that the Supreme Court is empowered to cancel decisions of the JAG [...] The report does not mention that the Supreme Court justices have time and again reiterated their hesitance to interfere in the JAG’s discretion.”¹³¹

PCHR’s experience confirms this conclusion. Requests submitted to the AG, and subsequently the HCJ, requesting the opening of an investigation have been dismissed. See, for example, the timeline to the *Al-Daraj* case, presented below.

Simply stated, the MAG’s central decision-making role, in advising the military and then investigating those acts, in addition to the hierarchical and independence constraints, renders the effective pursuit of justice impossible.

3.2.3. The Role of the High Court of Justice

The Supreme Court of Israel, sitting as the High Court of Justice, ostensibly provides civilian supervision of both the military and the military justice system. However, primarily as a result of the extensive margin of appreciation awarded by the HCJ to the military establishment and

¹²⁹ Bati v. Turkey, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §135. Emphasis added.

¹³⁰ Quoted in, B’Tselem, *Guidelines for Israel’s Investigation into Operation Cast Lead*, 27 December 2008 – 18 January 2009, February 2009, p. 21. Emphasis added.

¹³¹ B’Tselem, Israel’s report to the UN misstates the truth, 4 February 2010. Available at: [http://www.btselem.org/English/Gaza Strip/20100204 Israel’s Report to UN.asp](http://www.btselem.org/English/Gaza%20Strip/20100204%20Israel%27s%20Report%20to%20UN.asp)

the 'government-minded' approach of the Court, this supervision exists in law but not in fact. As noted by Adalah, for example, "[t]o date the court has not criticized the MAG's heavy reliance on military operational probes conducted by the army itself, or the state's policy of opening criminal investigations only in cases of [intentional] killings."¹³² Equally, and as detailed in the introduction to this section,¹³³ the HCJ has endorsed the view that "the unique characteristics of active operations sometimes constitute considerations negating the presence of a public interest in the instigation of criminal proceedings, *even if criminal liability is present*."¹³⁴

Professor David Kretzmer has simply summed up the relationship between the HCJ and the State with respect to Palestine-related issues, noting that the 'rights-minded approach' of the HCJ – evident in decisions relating to Israel itself – is "generally conspicuous by its absence in decisions relating to the Occupied Territories. The jurisprudence of these decisions is blatantly government-minded"¹³⁵ For example, in the *Kaswame (1)* case, three Palestinian leaders had been deported from the West Bank without the hearing required by Israeli domestic law. Justice Landau concluded:

"they are not worthy of any remedy from this court, *which serves as one of the authorities of the state*."¹³⁶

3.2.3.1. *Enemy Aliens*

This approach of the HCJ is illustrated by its adoption of the 'enemy aliens' doctrine, which, as argued by the AG, assumes that every Palestinian will support, directly or indirectly, operations undertaken against the security of the State of Israel, and consequently that all Palestinians should be considered enemy aliens. As held by the HCJ:

"An armed conflict has been taking place between Israel and the Palestinians for many years. This conflict has reaped a heavy price on both sides, and we have seen the massive scale of the harm caused to Israel and its inhabitants. *The Palestinian public plays an active part in the armed conflict. Among the Palestinian public there is enmity to Israel and Israelis. Large parts of the Palestinian public – including also persons who are members of the organs of the Palestinian Authority – support the armed struggle against Israel and actively participate in it [...]* It follows

¹³² Adalah, Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza, January 2010.

¹³³ See Section 3.1, *supra*.

¹³⁴ HCJ 4550/94 *Anonymous v Attorney-General et al.*, *Piskei Din* 49(5) 859, cited by the State Attorney's Office in HCJ 8794/03, *Yoav Hess et al. v Judge Advocate General et. al*; Response on Behalf of the State Attorney's Office, quoted in Human Rights Watch, *Promoting Impunity*, July 21 2005. Emphasis added.

¹³⁵ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 188, 2002.

¹³⁶ *Kaswame v. Minister of Defense (1980)*, 35 (3) PD 113, §122. **Emphasis Added.**

from this that the residents of the territories — Judaea, Samaria and the Gaza Strip — are enemy aliens.”¹³⁷

The Court further held that:

“This natural and simple rule, that a foreign national who presents a risk to national security will not be allowed to enter the state, leads almost automatically to the conclusion that in times of war hostile nationals will not be allowed to enter the state, since they are presumed to endanger national security and public security.”¹³⁸

On 31 July 2008, in a separate petition, the AG reaffirmed this position:

“The State of Israel is in a state of war with the Palestinians: a people facing another people; a collective facing another collective. Alongside the Palestinians there are other states, enemy states, some of which seek to destroy the State of Israel; in others Islamic terrorism prevails. In a war between peoples and states, there is an assumption that each human being owes loyalty to the collective to which he belongs.”¹³⁹

Clearly, this HCJ-endorsed position – which holds that all Palestinians are presumed to endanger the State of Israel’s national and public security – raises clear and pressing concerns relating to the effective administration of justice. For example, the straightforward presumption that all Palestinians pose a direct threat to Israel comes into direct conflict with the presumption of innocence, a fundamental tenet of international law;¹⁴⁰ equally, this presumption explains the heavy reliance which both the MAG and the courts place on soldier testimony, even in the face of conflicting evidence submitted by Palestinian victims and their representatives.¹⁴¹ It is also evident that, in perpetuating such a doctrine, the Israeli courts can in no way be considered impartial; as noted by Prof. Kretzmer, the courts have forsaken a rights-minded approach to the law in favour of a government minded one.¹⁴²

The acceptance and perpetuation of this ideology goes some way towards explaining the actions of the courts, as will be illustrated through a number of cases presented below.

In September 2007, the Israeli Security Council designated the Gaza Strip a “hostile entity”, and began to impose a number of measures of collective punishment, intended to force internal political change: “Additional sanctions will be imposed on the Hamas regime in order to restrict

¹³⁷ HCJ 7052/03, *Adalah v. The Interior Minister* (decision delivered in 14 May 2006), para. 12 (emphasis added).

¹³⁸ *Ibid.*, para. 78 (emphasis added).

¹³⁹ See the state’s response, on file with Adalah, in HCJ 466/07, *Gal’on et al. v. The Interior Minister* (case pending).

¹⁴⁰ Article 14(2) ICCPR.

¹⁴¹ See, for example, the Abu Hajjaj case discussed in Section 4.4.1, *infra*.

¹⁴² David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 188, 2002.

the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will be placed on the movement of people to and from the Gaza Strip.”¹⁴³ These measures, justified as “economic warfare”,¹⁴⁴ targeted the population of Gaza as a whole.

In the *Al-Baysouni* case, which challenged the legality of these fuel and electricity cuts, the HCJ approved punitive measures against the entire population of the Gaza Strip,¹⁴⁵ despite the State’s pressing legal obligations as an Occupying Power, and the State’s citation of political motivations to justify the measures:

“The imposition of these restrictions has two main objectives: Firstly, to defeat the military efforts of all terrorist organizations in the Strip by reducing the sum of all resources available to these organizations, specifically, fuel [...] Secondly, to exert pressure on the Hamas regime aimed at impelling it to limit the scope of its hostile activities against Israel from within the Gaza Strip.”¹⁴⁶

The acceptance of this argument endorsing the legality of “economic warfare”,¹⁴⁷ and the establishment of a so-called “minimum humanitarian standard” that has no basis in law, is indicative of the HCJ’s recent jurisprudence. Since 2006, the court has approved, *inter alia*: the closure of border crossings for humanitarian aid and vital commodities and goods;¹⁴⁸ denial of passage for seriously ill individuals in need of medical treatment that is not available in Gaza;¹⁴⁹ and cuts in fuel and electricity supplies.¹⁵⁰

The imposition of a closure-regime on the Gaza Strip, and the practice of collective punishment based on the doctrine of “hostile territory”, has resulted in a blanket ban prohibiting Palestinians from leaving the Gaza Strip, and entering Israel and/or the West Bank. Illustratively, in a petition filed by Physicians for Human Rights-Israel on behalf of patients in Gaza who were in need of urgent medical treatment unavailable in Gaza, the court rejected the request of these patients to enter Israel, deciding as follows:

“Neither we, nor the petitioners, stand in the Erez border crossing exposed to terrorist threats each time it is opened. Therefore, it would be unfair and disproportionate to expose IDF soldiers and citizens [to danger] by opening the

¹⁴³ Ministry of Foreign Affairs, “Israel’s Security Cabinet declares Gaza hostile territory,” 19 September 2009. Available at: <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

¹⁴⁴ See *Al-Basyouni* above, the state’s response of 7 November 2007, para. 25. On file with Adalah.

¹⁴⁵ HCJ 9132/07, *Jaber Al-Basyouni Ahmed v. The Prime Minister* (decision delivered 30 January 2008), available in English at: http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.htm.

¹⁴⁶ See the state’s response of 7 November 2007 in the *Al-Basyouni* case, para. 71, on file with Adalah.

¹⁴⁷ See *Al-Basyouni* above, the state’s response of 7 November 2007, para. 25. On file with Adalah.

¹⁴⁸ HCJ 5523/07, *Adalah, et al. v. The Prime Minister, et al.* (petition withdrawn in October 2007).

¹⁴⁹ HCJ 5429/07, *Physicians for Human Rights-Israel, et al. v. The Minister of Defense* (decision delivered on 28 June 2007).

¹⁵⁰ HCJ 9132/07, *Jaber Al-Basyouni Ahmed v. The Prime Minister* (decision delivered 30 January 2008), available in English at: http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.htm.

crossing more than is necessary, and such is the request in this case (subject to restrictions for security reasons in specific cases). Nevertheless, we *assume* that the respondents' attitude will be humane, in that they will consider exceptional cases of patients whose lives will be altered completely if no treatment is offered. And yet we are of the opinion that we need not deal with these matters in detail, but consider them when they arise in specific cases."¹⁵¹

The lack of effective civilian judicial oversight, and the government-minded nature of the HCJ, at least in decisions relating to Palestinians, may be regarded as the ultimate cumulative factor which fundamentally undermines the genuine pursuit of criminal accountability. In this regard, the excessive 'margin of appreciation/discretion' awarded to the AG and the MAG by the HCJ is illustrative.

3.2.3.2. *Margin of Appreciation*

In *John Doe*, the Israeli High Court of Justice ruled that the margin of discretion awarded to the AG regarding the decision to issue indictments is extremely wide, particularly with respect to decisions which are based on an examination of the evidence;¹⁵² a similar finding was reached with respect to the authority of the MAG in the *Suffan* case.¹⁵³ Evidently, this margin of appreciation will apply, in particular, to the decision to open or close an investigation, or to indict. Consequently, the scope of judicial review is extremely limited. As noted by the High Court of Justice:

"The decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence [...] normally falls within the 'margin of appreciation' that is afforded to the authorities and curtails – almost to nil – the scope of judicial intervention. *I was unable to find even one case in which this court intervened in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.*"¹⁵⁴

It must be emphasized – as discussed below – that both the AG and the MAG make decisions on the basis of evidence obtained by flawed investigations (i.e. operational debriefings or command investigations). The civilian judicial system is left with an extremely small – effectively non-existent – margin with which to review such decisions, negating the possibility of civilian oversight, and leaving a significant portion of the decision to open a criminal investigation in the hands of those implicated in the commission of an alleged crime.

¹⁵¹ HCJ 5429/07, *Physicians for Human Rights-Israel v. The Minister of Defense* (decision delivered on 28 June 2007). Emphasis added.

¹⁵² HCJ 5699/07, *Jane Doe (A) v. The Attorney General* (decision delivered on 26 February 2008)

¹⁵³ HCJ 425/89, *Suffan v. The Military Advocate General*, PD 43(4) 718, 727 (1989).

¹⁵⁴ HCJ 5699/07, *Jane Doe (A) v. The Attorney General* (decision delivered on 26 February 2008), para. 10 of Deputy Chief Justice Rivlin's ruling. Emphasis added.

The Court has further stated that:

“The scope of intervention by this court in the decision of the Attorney General is, as a matter of principle, very narrow, and while his decisions regarding conducting criminal investigations and filing indictments are not immune from judicial review, the intervention of this court is ‘limited to those cases in which the Attorney General’s decision was made in an extremely unreasonable matter, such as where there was a clear deviation from considerations of public interest, a grave error or a lack of good faith’ (HCJ 1689/02, *Nimrodi v. The Attorney General*, PD 57[6] 49, 55 [2003]. See also HCJ 6271/96, *Be’eri v. The Attorney General*, PD 50[4] 425, 429 [1996], HCJ 3425/94, *Ganor v. The Attorney General*, PD 50[4] 1, 10 [1996]).”¹⁵⁵

The Court has intervened in certain exceptional cases, but this is the exception and not the rule. For example, in the *Abu Rahma* case referred to by the State of Israel in its January 2010 report,¹⁵⁶ the Court intervened only after irrefutable video evidence came to light, and was circulated widely in the public domain. It must be noted, however, that even in this case – which involved the shooting of a handcuffed and blindfolded detainee at close range using a rubber coated bullet, in a manner similar to a mock execution – the modified charges did not reflect the crime; the two individuals involved were charged with the illegal use of a firearm, and conduct unbecoming, which does not give rise to a criminal record. Clearly, this charge does not reflect the gravity of what is widely regarded as a war crime.¹⁵⁷

This excessive margin of appreciation results in a situation whereby although in law civilian oversight is a possibility, in reality it is an exception; essentially the MAG’s decision to open or close an investigation is regarded as authoritative. When combined with the Israeli military system’s independence and impartiality deficit, the absence of effective civilian judicial oversight and review fundamentally violates Palestinian victims’ right to an effective judicial remedy.

The effective investigation and prosecution of all those responsible for serious violations of international law is impossible under such circumstances. Indeed, the UN Fact Finding Mission on the Gaza Conflict noted that “the extent to which Palestinian rights to access a court of law and an effective remedy are limited or denied”¹⁵⁸ may amount to the crime against humanity of persecution.¹⁵⁹

¹⁵⁵ HCJ 10665/05, *Shtanger v. The Attorney General* (decision delivered on 16 July 2006). See also Amnon Rubenstein and Barak Medina, *The Constitutional Law in the State of Israel: Government Authorities and Citizenship*, Vol. 2, (Shoken, 2005), pp. 1020, 1024 (Hebrew).

¹⁵⁶ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §36.

¹⁵⁷ See, Orna Ben-Naftali and Noam Zamir, *Whose ‘Conduct Unbecoming’? The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator*, *Journal of International Criminal Justice*, 2009.

¹⁵⁸ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1334.

¹⁵⁹ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1335.

3.3. Investigative Mechanisms

Israel's Military Justice Law establishes four investigative mechanisms: disciplinary proceedings; operational debriefings (also referred to by Israeli forces as command investigations, military probes, operational probes, etc.); special operational debriefings performed by a senior officer at the request of the Chief of Staff (slightly modified operational debriefings); and Military Police investigations carried out by the Military Police Criminal Investigation Division (MPCID). This section will deal primarily with operational debriefings and those investigations conducted by the MPCID; special operational debriefings follow essentially the same pattern as operational debriefings, and the same analysis therefore remains applicable.

Before analysing these mechanisms in detail, it is beneficial to first raise issues common to all Israeli investigations (of alleged crimes relating to Palestinian victims) namely the scope of these investigations, and the background – but overarching – purpose which PCHR believe they serve.

3.3.1. The Scope of Investigations

Both operational debriefings and MPCID investigations focus solely on specific cases. As noted by B'Tselem, the “assumption underlying them [the investigations] is that the soldiers acted within a legal framework, and that the only thing left to examine is whether they deviated from the orders given them.”¹⁶⁰ This assumption is clearly fatally flawed, and inconsistent with the obligation to effectively investigate and prosecute.¹⁶¹

Many of the violations of international law committed in the context of Operation Cast Lead – and during armed conflict in general – occurred as a result of command level policy-based decisions many of which, such as the choice of targets or the weapons to be used, were made before hostilities began. Necessarily, these decisions must also be effectively investigated. Given that actions undertaken were the result of official State policy, and that domestic processes fail to address policy-level decisions, PCHR does not believe that they can be investigated and prosecuted within Israel. As noted in the Report of the UN Fact Finding Mission, the Israeli offensive was “premised on a deliberate policy of disproportionate force aimed not at the enemy but at the “supporting infrastructure.” In practice, this appears to have meant the civilian population.”¹⁶² The legality of this policy cannot be adequately investigated within the Israeli domestic system, *inter alia*, on the basis its implications with respect to the individual criminal responsibility of senior political and military officials.

¹⁶⁰ B'Tselem, Israel's report to the UN misstates the truth, 4 February 2010. Available at: [http://www.btselem.org/English/Gaza Strip/20100204 Israels Report to UN.asp](http://www.btselem.org/English/Gaza%20Strip/20100204%20Israel%20Report%20to%20UN.asp)

¹⁶¹ See discussion above, in particular Section. 2.4.1.1.

¹⁶² Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1886.

The attack on Arafat City Police Compound on 27 December 2008, which resulted in the deaths of approximately 50 police officers, is a case in point. The Israeli government and armed forces explicitly classified all policemen as combatants, and held them to be legitimate targets for attack. PCHR, however, believe that “ Hamas’ political and civil wings are civilian: individuals belonging to these organisations are legally entitled to the protections associated with this status, provided they do not take an active part in hostilities.”¹⁶³ This conclusion was supported by the UN Fact-Finding Mission, which held that “the policemen killed cannot be considered to have been combatants by virtue of their membership in the police”¹⁶⁴ and that “they did not lose their civilian immunity from direct attacks as civilians”.¹⁶⁵

Clearly, in this instance, it is the overall decision that must be analysed, as the root of the issue rests with Israel’s illegitimate classification of policemen as combatants. However, as stated by B’Tselem “the military investigations currently underway do not question the legality of the decisions.”¹⁶⁶ They cannot be considered effective. Adalah confirm this conclusion:

“To date, Israel has refused to investigate the wider context of the policies, strategies, procedures, regulations and objectives of the military operation, or the continuing illegal closure of the Gaza Strip, contrary to the Goldstone Mission’s explicit recommendations.”¹⁶⁷

PCHR reiterate that the MAG was intrinsically involved in the planning of Operation Cast Lead, and the decision to classify police as combatants; that the MAG is then responsible for the decision to open a criminal investigation clearly violates the obligations associated with genuine, independent and impartial investigations.

3.3.2. Purpose Underlying Israeli Investigations

PCHR’s experience indicates that the Israeli investigative system is utilised to provide an illusion of respect for the rule of law and compliance with international obligations. In reality, this system is elaborately manipulated in order to ensure that those responsible for serious violations of international law will never be held to account.

¹⁶³ PCHR, PCHR Contest Distortion of Gaza Strip Death Toll, 26 March 2009; available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=1081:pchr-contests-distortion-of-gaza-strip-death-toll&catid=36:pchrpressreleases&Itemid=194.

¹⁶⁴ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §433.

¹⁶⁵ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §434.

¹⁶⁶ B’Tselem, Israel’s report to the UN misstates the truth, 4 February 2010. Available at: http://www.btselem.org/English/Gaza_Strip/20100204_Israels_Report_to_UN.asp

¹⁶⁷ Adalah, Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza, January 2010.

For example, the reports on Operation Cast Lead investigations issued by the government of Israel highlight the establishment of the Judge Advocates Office for Operational Affairs in 2007, and the resources, and so on, allocated to the MPCID.¹⁶⁸ The Office for Operational Affairs handles, *inter alia*, complaints regarding soldiers who mistreat Palestinians. As stated by B'Tselem, however, the "report does not mention that the unit lacks sufficient personnel and is highly overloaded by the massive number of files it has received, nor that it takes months and even years for decisions to be made on many of the files. As a result, even if a decision is ultimately made to open a Military Police investigation, the investigation is ineffective and is unlikely to expose the truth."¹⁶⁹ Equally, while Israel claims that the MPCID is staffed by "hundreds of trained investigators, including reservists, who are posted in different regional and specialized units",¹⁷⁰ it fails to mention that: the MPCID has no base in the oPt; investigations routinely do not visit the site of an incident; most investigators do not speak Arabic; and, the MPCID does not have a criminal forensic lab at its disposal.

Finally, it must be noted that in the rare event that a soldier is punished, these punishments rarely fit the seriousness of the crime. In addition to the political unwillingness to pursue accountability, lesser charges are also often brought against suspects as a result of, *inter alia*, deficiencies in the investigation, or consequent to a plea bargain. For example, between September 2000 and the end of 2007,¹⁷¹ "seventy three of the 95 defendants who confessed to the charges against them – whether as part of a plea bargain or not – did so after the indictments against them were amended such that they were charged with lesser offenses than they originally had been charged."¹⁷² As further emphasized by Yesh Din, "it should also be noted that the criminal charges of which soldiers and officers were convicted resulted in many cases from amended and lenient indictments".¹⁷³

In practice, this means that instead of being convicted of the grave breach of the Geneva Conventions of wilful killing (amounting to a war crime), a soldier may instead be convicted of the 'illegal use of arms',¹⁷⁴ a charge which carries a maximum sentence of three years imprisonment.¹⁷⁵ As noted by the UN Fact Finding Mission on the Gaza Conflict, "convictions are for offenses that do not reflect the degree of gravity of the action."¹⁷⁶

¹⁶⁸ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §21.

¹⁶⁹ B'Tselem, Israel's report to the UN misstates the truth, 4 February 2010. Available at: http://www.btselem.org/English/Gaza_Strip/20100204_Israels_Report_to_UN.asp

¹⁷⁰ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §21.

¹⁷¹ i.e. the Second Intifada.

¹⁷² Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, (2008), p. 34.

¹⁷³ Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, (2008), p. 37.

¹⁷⁴ See, for example, the case of Muein Abu Lawi, documented in Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, (2008), p. 51; and other examples contained in the report.

¹⁷⁵ Section 85, Military Justice Law.

¹⁷⁶ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1828.

3.3.3. Operational Debriefings

Since the beginning of the second *Intifada*, operational debriefings have been used as the primary mechanism of analysis with respect to alleged violations committed in the course of military operations against the Palestinian population: in the majority of cases which Israel actually subjects to analysis, they constitute the only 'investigative' step: only in exceptional cases do operational debriefings form the basis on which the decision to open a subsequent MPCID investigation is made.¹⁷⁷

Although Israel refers to such military debriefings as 'investigations' PCHR note that these procedures can by no means be considered genuine investigations; not only do they not meet the international legal requirements associated with an effective investigation, under the Military Justice Law they are simply not investigations: an operational debriefing is a procedure intended to analyse an incident from an internal military perspective, so that lessons may be learned, conclusions drawn, and so on, for the purpose of enhancing the performance of the Israeli military.

Article 539(A)(a) of the Military Justice Law defines an operational debriefing as:

"a procedure held in the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or military operation or with connection to them."¹⁷⁸

As confirmed by the State of Israel, an operational debriefing "normally focuses on examining the performance of the forces and identifying aspects of an operation to preserve and to improve, but may also focus on specific problems that occurred. By undertaking this review, the IDF seeks to reduce further operational errors".¹⁷⁹

Consequently, operational debriefings are not intended to identify criminal behaviour or criminal responsibility. According to attorney Michael Sfar, who has long-standing experience working before the HCJ, where he has been involved in representing Palestinian victims, "the purpose [of an operational debriefing] is exactly to see the situation through the eyes of the soldiers. The aim is not to uncover the truth or to find out what happened, but rather to see how the soldiers perceive and interpret the events."¹⁸⁰ This fundamental distinction between an operational debriefing and a criminal investigation was elaborated upon by the HCJ in *Al-Nebari*:

¹⁷⁷ According to the information available to PCHR with regard to the 'investigations related to Cast Lead Operation, only 13 investigations have been referred to the Israeli Military Police following an operational debriefing.

¹⁷⁸ Article 539(A)(a), Military Justice Law 5715-1955.

¹⁷⁹ State of Israel, *Gaza Operation Investigations: An Update*, January 2009, §54.

¹⁸⁰ Quoted in, Human Rights Watch, *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing*, 2005, p.40.

“The factual examination is the main role of the investigatory bodies – the Military Police, the Inspecting Officer, and the Investigatory Judge – and its purpose is to reveal the truth in order to do justice and bring those responsible to justice. Conversely, the factual examination that is undertaken within the framework of an operational probe, while it is an essential and extremely important step in conducting the probe, is not its purpose; rather it comes to serve the main purpose of the operational probe, *which is to draw conclusions and lessons in order to prevent future failures and errors* [...] *There is, therefore, a substantial difference between an operational probe and a criminal investigation, both at the level of purpose and at the operational level.*”¹⁸¹

These ‘procedures’ are conducted by military personnel, as distinct from members of the military police; typically investigators are involved in the direct chain of command under investigation. This point must be emphasized: those conducting the investigation may have been directly involved in the incident and may bear the criminal consequences (according, for instance, to the principle of command responsibility as codified by Article 28 of the ICC Statute). Israeli forces justify this practice by arguing that such personnel are better placed to evaluate the propriety of military action than individuals without combat experience. However, while this may be appropriate with respect to evaluating lessons learned, it is evidently completely inconsistent with the demands of an effective investigation,¹⁸² which must be capable of leading “to the identification and punishment of those responsible.”¹⁸³ Equally, it must be reiterated that “to be regarded as effective, the general rule is that the persons responsible for the injuries and those conducting the investigations should be independent of anyone implicated in the events. [...] This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in practice.”¹⁸⁴

This conclusion is shared by B’Tselem who have noted that operational debriefings are conducted by members of the military “who have no professional training in conducting such investigations, and who are not independent of the person whose acts they are supposed to investigate.”¹⁸⁵ This reality also contravenes the standards of Israeli domestic law as a result of the inherent conflict of interest faced by those conducting the investigation. The HCJ itself has held that: “The test of a situation where a conflict of interest exists is an objective one. It is enough for the individual to be in a situation that raises real concerns that there is a conflict of interest, and there is no need for an actual conflict of interest to be proved.”¹⁸⁶

¹⁸¹ HCJ 2366/05, Al-Nebari v. The Chief of Staff of the Israeli Army (decision delivered on 29 June 2008), para. 6-10 of Justice Arbel’s ruling. Emphasis added.

¹⁸² See Section 2.4, *supra*.

¹⁸³ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107.

¹⁸⁴ *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §135.

¹⁸⁵ B’Tselem, Israel’s report to the UN misstates the truth, 4 February 2010. Available at: http://www.btselem.org/English/Gaza_Strip/20100204_Israels_Report_to_UN.asp

¹⁸⁶ HCJ 5575/94, Mehadrin Ltd. v. The Government of Israel, PD 49(3) 133, 142 (1995). See also, HCJ 531/79, The Likud Party in the Petakh Tikva City Council v. The Petakh Tikva City Council, PD 34(2) 566, 571 (1980).

During operational debriefings no external witnesses are interviewed, a fundamental flaw given that this precludes a cross-examination of the facts, and assumes that those suspected of crimes will not act in their own self-interest. Additionally, operational debriefings are not conducted in accordance with any standardised guidelines, other than those basic requirements established by the Military Justice Law. In 2002, Col. Daniel Reisner, then deputy Judge Advocate General, remarked “[e]very commander determines whether he’s reached the truth... There is no textbook on investigations... We see a great variety.”¹⁸⁷

The Military Justice Law and the General Security Services Law also stipulate that all materials related to an operational debriefing, including what is said in the course of a probe, the protocols of its hearings, its findings, conclusions and recommendations, are confidential and shall not be used as evidence in court.¹⁸⁸ Ostensibly utilised in order not to deter soldiers from reporting full and true reports in debriefings, Section 539 of the Military Justice Law explicitly stipulates that a debriefing will be subject to confidentiality and that investigatory bodies will not have access to it.

This means that there is no possibility to examine any questions raised in the debriefing, or to evaluate the degree of seriousness and professionalism with which they were conducted. For example, in *Al-Nebari*, Adalah submitted a petition requesting access to the *summary* of the operational debriefing. This request was rejected. This secrecy is clearly inconsistent with the requirement that “there must be a sufficient element of public scrutiny of the investigation or *its results* to secure accountability in practice as well as in theory.”¹⁸⁹

Israel has claimed that,

“Some of Israel’s critics have misunderstood the nature of these dual investigative tracks and incorrectly assumed that all complaints first must proceed through the command investigation [operational debriefing] stage, thereby delaying criminal proceedings for months. This premise – a central premise of the Human Rights Council Fact-Finding Report – is wrong. ... The Military Advocate General and the military prosecution have full authority to

¹⁸⁷ Tracy Wilkinson, “Israeli Army Probes Slaying of Palestinian Grandmother,” Los Angeles Times, December 29, 2002. Emphasis added.

¹⁸⁸ Article 539A of the Military Justice Law – 1955 states that, “Anything that is said during the course of a military probe, in a protocol of a probe, or any other materials prepared during a probe, as well as its summaries, findings and conclusions, shall not be accepted as evidence in court, except for in a trial for providing false information or concealing an important piece of information in a probe.” Article 17(a) of the General Security Services Law – 2002 states that, “Anything that is said during an internal probe or in a report prepared following an internal probe, including protocols, findings, conclusions or recommendations [...] shall not be accepted as evidence in court, except for in a disciplinary procedure or a criminal trial for providing false information or knowingly concealing an important piece of information in a probe.”

¹⁸⁹ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, §71.

initiate, and do initiate, direct criminal investigations of those complaints alleging conduct that is clearly criminal in nature.”¹⁹⁰

As already noted, only in exceptional cases does an operational debriefing result in a MPCID investigation, and since the beginning of the second *Intifada* the use of operational debriefings to address incidents arising from military operations has become the rule. This was confirmed in a February 2002 letter to the IDF commander in Gaza, when Maj. Gen. Finkelstein (then MAG) noted, "Today fact checking is done by operational debriefing, and only highly irregular cases are passed on to my examination, to decide about an MP [Military Police] investigation."¹⁹¹

Col. (res.) Ilan Katz (Deputy MAG until March 2003) has noted that:

“...when commanders conduct an operational debriefing they destroy the scene of the crime, and months later it is difficult to find traces of evidence on the ground. You cannot even check the gun from which the shots were fired because by the time the [MPCID] investigation begins many more shots have been fired by the same gun, or in some cases the gun changes hands and it is very hard to trace it.”¹⁹²

It should be noted, that this delay, and the implications on any future procedure, will inevitably affect the type (and severity) of charges that can be brought, further compounding the pursuit of accountability. PCHR believe that when opened, operational debriefings are used by commanders in order to shield themselves, or those under their command, from further investigation and prosecution. This conclusion is confirmed by Col. (res.) Katz:

“Even if at the end of the operational debriefing the decision is made by the MAG to order the opening of an MPCID investigation, usually at that point investigation is nearly impossible. [...] the way it [operational debriefings] is exploited by commanders in order to prevent MPCID investigations is not reasonable.”¹⁹³

This means that even if prosecutions are brought there is often not the evidence with which to serve an indictment. For example, in *Military Prosecutor v. Sec.-Lt. NK*, an officer was convicted of the illegal use of a weapon – reduced from negligent manslaughter – as the Courts-Martial determined that the lack of findings from the site of the incident, the lack of a pathological

¹⁹⁰ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §53.

¹⁹¹ Uri Blau, "Not to Investigate Palestinian Deaths," *Kol Ha'ir*, March 1, 2002, available at <http://oznik.com/news/020301.html> (accessed 26 July 2009)

¹⁹² Quoted in, Report of the UN Fact Finding Mission on the Gaza Conflict, §1614.

¹⁹³ Amir Rappaport, "The MPCID does not know how to do its job". *Maariv*, January 1, 2005

report, and other evidence render it impossible to attribute the cause of the death of the deceased to the officer.¹⁹⁴

Israel has claimed that, “countries such as the United Kingdom, the United States, Australia, and Canada have processes to screen for Law of Armed Conflict and other complaints that warrant criminal investigation, including the use of preliminary military reviews (comparable to command investigations [operational debriefings]), to assist in that determination.”¹⁹⁵ However, military experts from each of these countries have refuted this claim, and stated that each of the instances documented in the Report of the UN Fact Finding Mission on the Gaza Conflict would have resulted in an immediate criminal investigation.¹⁹⁶

It is on the basis of this inherently flawed debriefing that the decision to open a military police investigation – or not – is invariably made. As noted by the Israeli armed forces in *Gaza Operation Investigations: An Update*, operational debriefings “serve as a means of compiling an evidentiary record for the MAG, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation.”¹⁹⁷ Israel has systematically failed to address the flaws inherent in this form of decision making, in particular the evident inconsistency with the requirement that investigations must be capable of leading “to the identification and punishment of those responsible”,¹⁹⁸ that they be independent and impartial, and the fact that operational debriefings simply are not investigations.

There are evident and tangible similarities between the conduct found by the European Court of Human Rights (*inter alia*, in *Isayeva*,¹⁹⁹ and *Ergi*²⁰⁰) to be a violation of the State’s obligations,²⁰¹ and the Israeli investigative system, particularly the reliance placed on operational debriefings.

It must be stressed that under international criminal law genuine investigations of war crimes are criminal investigations that are conducted with the “intent to bring the person concerned to justice.”²⁰² Non-prosecutorial mechanisms, such as operational debriefings, cannot be considered genuine and effective investigations; PCHR believe that they are employed to provide an illusion of investigative rigour, while continuing to prevent the effective pursuit of justice. Ultimately, and as concluded by the UN Fact Finding Mission on the Gaza Conflict, “a tool designed for the review of performance and to learn lessons can hardly be an effective and

¹⁹⁴ North/223/06, Military Prosecutor v. Sec.-Lt. NK. Quoted in, Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, 2008, p.29.

¹⁹⁵ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §73.

¹⁹⁶ Open Society Justice Initiative, *Comparative Analysis of Preliminary Investigation Systems in Respect of Alleged Violations of International Human Rights And/Or Humanitarian Law*, 2010.

¹⁹⁷ The State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §60.

¹⁹⁸ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107.

¹⁹⁹ *Isayeva v. Russia*, European Court of Human Rights, Application No. 57950/00, 6 July 2005, §§223-224.

²⁰⁰ *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §85.

²⁰¹ See Section 2.4, *supra*.

²⁰² See Articles 17 and 53(1)(b) of the Statute of the ICC.

impartial investigation mechanism [...] It [operation debriefing] does not comply with internationally recognized principles of impartiality and promptness in investigations.”²⁰³

3.3.4. MPCID Investigations

In Israel, investigations into alleged crimes committed by military personnel are typically conducted by the MPCID, who investigate violations of military laws and the conduct of military personnel. As shown by the relevant statistics, only in a very small percentage of cases (approximately 10%) do these investigations result in an actual indictment giving rise to a criminal proceeding within the military justice system. These military investigations cannot be considered effective. PCHR believe that they form part of an overall system whose purpose is to shield the suspects from justice.

Before analysing the structural deficiencies of MPCID investigations, it is important to note – as a further indicator of unwillingness – that, as a result of official policy, such investigations rarely occur. The principal reason for the lack of investigations appears to be a genuine unwillingness on the part of the State. As noted previously, at the beginning of the second *intifada* the MAG changed its policy regarding the opening of MPCID investigations. Whereas before 2000, MPCID investigations were opened into each instance in which a Palestinian civilian not participating in hostilities was killed, the new policy holds that investigations will only be opened in those cases in which soldiers “severely violate the open-fire regulations and cause bodily injury or loss of life.”²⁰⁴

Clearly, this policy is overly nebulous: as stated by B’Tselem, the “declaration that only cases of “severe violations” warrant the opening of an investigation is vague and susceptible to various interpretations.”²⁰⁵ In practice, the preferred interpretation would seem to be not to open an investigation, as indicated by the previous cited example not to open a criminal investigation into the shelling of the UNRWA headquarters, despite finding that this violated the rules of engagement.²⁰⁶ This unwillingness to investigate is the result of State-policy:

“the possible ramifications of a criminal investigation for the chain of command and the willingness of commanders to perform their functions are extremely dramatic. Taking these policy considerations into account, it is clear that the *cases in which a criminal investigation will be instigated with regard to combat operations shall be exceptional and unusual.*”²⁰⁷

²⁰³ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §121.

²⁰⁴ B’Tselem, *Accountability: Military Police Investigations during the al-Aqsa Intifada*, available at: http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp

B’Tselem, *Accountability: Military Police Investigations during the al-Aqsa Intifada*, available at: http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp²⁰⁵

²⁰⁶ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §108.

²⁰⁷ HCJ 8794/03, *Yoav Hess et al. v. Judge Advocate General et. al*; Response on Behalf of the State Attorney's Office, quoted in Human Rights Watch, *Promoting Impunity*, 2005. Emphasis added.

In the limited number of instances wherein complaints are acted upon, operational debriefings invariably form the first – and often the only – evaluation process. Significantly, should a case proceed to a MPCID investigation, heavy reliance is placed on the – flawed – operational debriefing. As noted by the State of Israel, “the Military Prosecution [within an MPCID investigation] generally relies on the complaint itself (including any complaints submitted by the complainants or witnesses) together with the report and record of the command investigation [operational debriefing].”²⁰⁸

The State’s unwillingness is graphically illustrated by the relevant statistics. For example, according to PCHR’s documentation, between 2000 and 2008, at least 3,493 Palestinian civilians were killed by Israeli forces, and 11,275 injured. However, during this period, only 287 MPCID investigations were opened into cases of suspected illegal shooting by security forces.²⁰⁹ Put bluntly, investigations were opened into approximately 8% of those instances which resulted in death, and only 1.9% of those which resulted in death or injury.

In total, between October 2000 and the end of 2007, a total of 1,246 MPCID investigations were opened into cases relating to Palestinians. Of these, only 118, or 10%, resulted in indictments.²¹⁰ The already dramatic death and injury figures listed above exclude other incidents which necessitate investigation such as allegations of torture, detainee abuse, house demolition, the destruction of property, the use of human shields, the use of high explosives in built up/ urban areas, and so on.

It is important to stress that the low number of investigations and the shockingly low number of indictments is a matter of choice and resource allocation. For example, between 2003 and 2006 more indictments were filed on average each year against Israeli soldiers accused of other criminal offenses than investigations were opened into offenses related to Palestinians between 2000 and 2007. This is graphically illustrated by means of a table.²¹¹

	Palestinian Related Cases		Non-Palestinian Related Cases
Year	Investigative Files Opened	Indictments	Indictments
2003	145	15	1,239
2004	189	12	1,726

²⁰⁸ State of Israel, *Gaza Operation Investigations: An Update*, January 2009, §64.

²⁰⁹ B’Tselem, *Accountability: Military Police Investigations during the al-Aqsa Intifada*, available at: http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp

²¹⁰ Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, 2008, p. 8. This report notes 78 indictments, however, Yesh Din, *Investigation of criminal offenses by IDF soldiers against Palestinians and their property*, December 2007 p.2, notes 118 indictments.

²¹¹ Figures taken from, Yesh Din, *Investigation of criminal offenses by IDF soldiers against Palestinians and their property*, December 2007 p.4; Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, 2008, p. 17.

2005	155	5	1,968
2006	152	8	1,057
Total	641	40	5,990

The disparity inherent in these figures is glaringly obvious. As reported by Yesh Din, "in 2006 alone the number of indictments against IDF soldiers on drug offences was *seven times higher than the total number of indictments* filed on soldiers' harming Palestinians and their property for nearly seven years since the beginning of the second intifada."²¹² In 2006, 702 indictments were filed for drug offences – which involve complex investigations – in comparison to a total of 118 indictments for offenses against Palestinians between 2000 and 2007.²¹³

The MPCID also suffer from significant deficiencies with respect to the quality of both personnel and investigations. Adalah have noted that MPCID investigations "are conducted by a body that is internal to the army itself, typically by officers who are inexperienced and unskilled."²¹⁴ This is highlighted by the fact that trainee investigators - working under the supervision of a more senior officer - conduct the investigation.²¹⁵ This reality, consistent with PCHR's own experience, is emphasized by reference to the scathing judgment of an Israeli military court in the case of St.-Sgt. AA who was charged with killing Sayed Abu Safra in the Gaza Strip:

"This is the place to emphasize that it is our opinion that the investigation of the incident was negligent and unprofessional. [...] The investigators made no effort to document an exact reconstruction of events and map the location of those present at the site; the reconstruction of the site was conducted only one year after the incident, at a time when the physical features of the area had changed and by the defendant alone; the damage to the fence and the safety railings was not documented and, worse yet, the questions about the exact location of the gathering and the relative positions of the location of the gathering and the location of the person observed by the lookout falling were not asked. [...] Add to that the disappearance of the tape of the confrontation between the defendant and the driver [...] and the loss of the pictures from the site of the incident, pictures which as opposed to the reconstruction done a year later, were taken in close timing with the incident."²¹⁶

²¹² Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, 2008, p. 5. Emphasis added.

²¹³ Yesh Din, *Investigation of criminal offenses by IDF soldiers against Palestinian civilians and their property: Figures for 2000 – 2007*, 2007, p. 5.s

²¹⁴ Adalah, *Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza*, January 2010.

²¹⁵ Human Rights Watch, *Prompting Impunity*, 2005, p. 47.

²¹⁶ South /231/04 Military Prosecutor v. St.-Sgt. AA, quoted in Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, 2008, p. 28.

The inability and unwillingness of the MPCID to conduct investigations is illustrated by the words of a veteran investigator:

"Investigators deal with several cases at once, and cases dealing with the death of civilians take the lowest priority. However, one cannot clearly say that things are white-washed over. The objective circumstances are very problematic ones. Despite the fact that on the professional level these are murder investigations in every way, but in actuality, we treat the investigations of the murder of Palestinians like regular criminal investigations... . If we were talking about an incident where Israelis were shot by IDF soldiers, or a soldier shot by another soldier, the level of investigation would be entirely different. This is the reality."²¹⁷

Specific regulations governing the conduct of investigations are not publicly available.

PCHR conclude that MPCID investigations cannot be considered a legitimate component of a genuine investigation conducted in accordance with the demands of international law. PCHR reiterate that MPCID investigations focus only on isolated incidents and the conduct of individual soldiers and are incapable of addressing the criminal responsibility of those 'most responsible'. As a further indicator of Israel's overall unwillingness, PCHR emphasize that since the beginning of the second *Intifada* investigations are only opened for a restricted category of offenses, namely those involving a direct blatant criminal intent on the part of the soldier to commit the crime.

3.4. Case Study: Proceedings Surrounding the Al-Daraj Case (Assassination of Saleh Shehadeh)

3.4.1. Background Information

At approximately 11:55 pm on 22 July 2002, an Israeli Air Force F-16 fighter jet dropped a 985 kilogramme (one-tonne) bomb on a three storey apartment building. The apartment building was located in the densely populated Al-Daraj district, a residential neighbourhood of Gaza City. Israel stated that this attack was a 'targeted assassination' directed at Saleh Shehadeh, the alleged leader of the *Izz ad-Din Qassam Brigades*, Hamas' military wing. At the time of the attack, Shehadeh was on the upper floor of the building.

²¹⁷ Unnamed 'veteran reservist investigator' quoted in Alex Fishman and Guy Leshem, "Poorly Investigated, Forgotten and Buried", Yedioth Ahronoth, 23 January 2004, p. B10. In Human Rights Watch, *Promoting Impunity*, 2005, p. 49

The bomb, which was a direct hit, completely destroyed the targeted building. Additionally – as a result of the blast impact – eight other adjoining and nearby apartment buildings were completely destroyed, nine were partially destroyed, and a further 21 sustained considerable damage. Excluding Shehadeh and his guard, 14 civilians were killed, and approximately 150 civilians were injured.

Israeli officials have acknowledged that they decided to drop the bomb on the Shehadeh house in the knowledge that his wife was present, intentionally killing her as well.²¹⁸ The State of Israel has claimed that Israeli forces believed that Shehadeh, his wife, and another Hamas activist were alone in the house at the time of the attack, and that the adjacent building was uninhabited. However, it is believed that the decision to attack apparently also took into account the possibility that, along with Shehadeh, approximately 10 civilians would be killed.²¹⁹

This attack was planned in advance, targeted a densely populated residential area, and was conducted at a time when it could reasonably be expected that there would be an extremely high number of civilians present. PCHR believes that this attack, *inter alia*, constitutes a grave breach of the Geneva Conventions with respect to the prohibition on: “wilful killing”, and “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly”,²²⁰ and a war crime according to Articles 8(2)(b)(i), (ii), and (iv) of the Statute of the International Criminal Court.²²¹

3.4.2. Time Line

3.4.2.1. 2002: Complaint to MAG

In 2002, a criminal complaint was submitted to the Israeli MAG by PCHR and other organizations, requesting the opening of a criminal investigation into the incident. The MAG and the AG found no basis for opening a criminal investigation, ‘because the killing of the civilians had not been intentional and had occurred due to a gap in the available intelligence information. Specifically, according to the information in the possession of the military, Shehadeh, his wife and another Hamas activist had been alone in the house, and the adjacent building was uninhabited at the time of the attack.’²²²

²¹⁸ *Matar v. Dichter*, 05 Civ 10270 (WHP), Initial Complaint, Dec. 07, 2005, §41.

²¹⁹ *Matar v. Dichter*, 05 Civ 10270 (WHP), Initial Complaint, Dec. 07, 2005, §42.

²²⁰ Article 147, Fourth Geneva Convention.

²²¹ See, further, *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 5 December 2003, §57.

²²² See, Expert Witness Opinion concerning *Raed Mohammed Ibrahim Mattar, et al. v. Dan Halutz, Commander of the Israeli Air Force, et al. (the “Al Daraj” case)*, p.1. On file with PCHR.

3.4.2.2. 30 September 2003: Petition to HCJ Challenging Decision not to open Criminal Investigation

On 30 September 2003, a petition was filed before the Israeli Supreme Court, sitting as the High Court of Justice, challenging the decision of the MAG and the AG not to open a criminal investigation.

3.4.2.3. 23 January 2008: 'Committee of Examination' Appointed

On 23 January 2008, five and a half years after the attack, a 'Committee of Examination' was established to examine the *Al-Daraj* case. This Committee – distinct from a statutory 'Committee of Inquiry' – was established "on the basis of the inherent powers of the government to appoint a committee to examine matters that fall within the scope of its responsibilities."²²³ Unlike statutory investigatory bodies, "such a committee does not have a status determined by law, and is usually used as a tool to assist in examinations into the internal matters of the appointing authority."²²⁴

Committee of examinations are the weakest of three kinds of investigatory bodies that can be established under Israeli law; they are unable to, *inter alia*, compel witnesses to attend investigations, and to seize evidence. As noted by the Israeli HCJ, in *Ometz Association v. The Prime Minister*: "The committee of examination lacks the statutory power to compel witnesses and bring evidence, and its conclusions and recommendations have no recognized statutory status."²²⁵ Furthermore, the criminal sanctions that apply for obstructing a criminal investigation, for example, providing false information,²²⁶ carrying out a deliberate act in order to cause a criminal investigation to fail or to prevent it from taking place, including preventing a witness from being brought to give evidence and concealing evidence,²²⁷ and persuading potential witnesses to withhold information or to lie in a criminal investigation,²²⁸ do not apply to witnesses who appear before a committee of examination.

3.4.2.4. Composition of the 'Committee of Examination'

The three members of the Committee were appointed by the Prime Minister. This gives rise to a clear conflict of interest: the Prime Minister is head of the executive authority, the body responsible for the act in question.

All of the members of the committee have served for many years in very senior positions within the Israeli military or General Security Services (GSS). One of them, Mr. Yitzhak Eitan, served as

²²³ HCJ [The Supreme Court sitting as the High Court of Justice] 8794/03, *Hess v. The Military Advocate General* (decision delivered on 23 December 2008. Hereinafter: "The ruling in the *Shehadeh* case"), §11.

²²⁴ HCJ 6001/97, *Amitai v. The Prime Minister* (decision delivered on 22 October 1997).

²²⁵ HCJ 6728/06, *Ometz Association v. The Prime Minister* (decision delivered on 30 November 2006), §§28-29 of Justice Procaccia's ruling.

²²⁶ Article 2 of the Criminal Procedure (Testimony) Ordinance and Article 243 of the Penal Code – 1977.

²²⁷ Article 244 of the Penal Code – 1977.

²²⁸ Article 245 of the Penal Code – 1977.

the Head of the Central Command in the years 2000-2002, a period during which a large number of assassinations by Israel were carried out in the West Bank, an area that was under his military responsibility. In these circumstances, the appointment of these members to the committee responsible, among other things, for examining whether there was a need for criminal investigations to be opened against those involved in the decision-making and/or the execution of the assassination of Shehadeh, creates a clear conflict of interest. Nevertheless, in its ruling on the *Al-Daraj* case, the Israeli Supreme Court rejected the petitioners' arguments regarding the flaws in the appointment and composition of the committee of examination, describing them as, "definitely not a flaw that would justify the intervention of the court in the wide discretion that is granted to the government in such matters."²²⁹

This finding conflicts with Israeli law which clearly stipulates that: "The test of a situation where a conflict of interest exists is an objective one. It is enough for the individual to be in a situation that raises real concerns that there is a conflict of interest, and there is no need for an actual conflict of interest to be proved."²³⁰

As of the time of writing, the Committee, which has recently changed composition, has still not reached any conclusions.

3.4.2.5. *23 December 2008: HCJ Dismiss Petition Challenging Decision Not to open Criminal Investigation*

On 23 December 2008, a three-justice panel of the Israeli Supreme Court, led by Chief Justice Dorit Beinisch, dismissed the *Al-Daraj* case. The Supreme Court based its decision for the dismissal, *inter alia*, on the fact that a Committee of Examination (as outlined above) had been appointed by the Prime Minister to draw lessons and conclusions on the operational level, and if, from its review this committee finds that there is a fear that a criminal felony or disciplinary infraction was committed, it should inform the AG or the MAG, accordingly.

Significantly, the Court also explicitly stated that: "Article 539A of the Military Justice Law – 1955 or Article 17 of the General Security Services Law – 2002 shall apply as appropriate" to the committee of examination.²³¹ These articles regulate operational debriefings, as discussed in detail in a previous section. In short, the Court stated that all material associated with the Committee of Examination, including its findings, will remain confidential. Significantly, and as noted previously, this means that these findings cannot be challenged.

²²⁹ The ruling in the *Shehadeh* case, §11.

²³⁰ HCJ 5575/94, *Mehadrin Ltd. v. The Government of Israel*, PD 49(3) 133, 142 (1995). See also, HCJ 531/79, *The Likud Party in the Petakh Tikva City Council v. The Petakh Tikva City Council*, PD 34(2) 566, 571 (1980).

²³¹ The ruling in the *Shehadeh* case, §10.

3.4.3. Summary

The Shehadeh assassination occurred on 22 July 2002. Today, eight years later, it is apparent that no criminal investigation has been conducted. Indeed, on 23 December 2008 – almost six years after the attack in question – the Israeli HCJ dismissed a petition requesting that a criminal investigation be opened. The sole investigatory mechanism has been an inherently flawed ‘committee of examination’, a procedure that cannot constitute an effective criminal investigation, *inter alia*, on the basis of its status, powers, and composition.²³²

The Shehadeh assassination constitutes, *inter alia*, a grave breach of the Geneva Conventions, violating the prohibitions on wilful killing and the extensive destruction of property not justified by military necessity. Such cases demand immediate and effective investigation, and the prosecution of all those responsible. It is worth highlighting that on 11 December 2005, in a separate case challenging Israel’s policy of target assassinations, the HCJ held as regards proportionality, and thus the legality of an attack, that:

“The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (*see* HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbour or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (*compare* DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples.”²³³

It is widely believed that – in defining this ‘extreme example’ of a disproportionate, and thus illegal, attack – the HCJ was making a thinly veiled reference to the Shehadeh assassination. However, despite such intimation, the fact remains that over eight years after the attack – despite significant legal efforts exerted on behalf of the victims – the State of Israel has not pursued accountability, and that this policy has been endorsed by the HCJ.

4. Measures Taken by the Israeli Authorities in the Aftermath of the 27 December 2008 – 18 January 2009 Offensive

²³² See further, requirements associated with an effective criminal investigation, Section 2.4. *supra*.

²³³ *The Public Committee against Torture in Israel v. The Government of Israel*, HCJ 769/02, 11 December 2005, §46.

This section will detail the known measures taken by the Israeli authorities in the aftermath of Operation Cast Lead; further detailed information on specific cases taken by PCHR will be detailed in a subsequent section. PCHR emphasize that this section is intended to assist the international debate regarding domestic remedies. PCHR does not consider measures taken to be in compliance with Israel's obligations under international law, as consistently demonstrated throughout this report.

At the outset it is important to note that all measures taken in the aftermath of Operation Cast Lead have conformed to the pattern established over the course of the occupation. As such, the analysis of the Israeli investigative system presented previously is pertinently relevant. It must be stressed that even the limited number of criminal investigations opened to-date suffer from inherent flaws which render the effective pursuit of justice – and the upholding of victims' legitimate rights – an impossibility. This fact is emphasized by the illustrative examples contained in the section dealing with Israel's update of July 2010, and the investigative findings reported therein.

The unwillingness to conduct effective investigations is underlined by the words of numerous political and legal leaders. On 12 October 2009, Prime Minister Netanyahu publicly vowed that Israeli soldiers and leaders will not stand trial for crimes committed during the Israeli offensive.²³⁴ On 25 January 2009, in the immediate aftermath of the offensive, then Prime Minister Olmert stated in a cabinet communiqué:

“Last Thursday, I appointed Justice Minister Prof. Daniel Friedmann to chair an inter-ministerial team to coordinate the State of Israel's activity to provide a legal defense for those who took part in the military operation. The State of Israel will fully back those who acted on its behalf. Minister Friedmann - along with senior civil-service jurists, international and military law experts - will formulate answers to possible questions regarding IDF operations, which the self-righteous are liable to raise concerning the character of the Israeli fighting and its results. The soldiers and commanders who were sent on missions in Gaza must know that they are safe from various tribunals and that the State of Israel will assist them on this issue and defend them just as they bodily defended us during Operation Cast Lead.”²³⁵

Equally, Colonel Lionel Liebman, head of Israeli forces' international law department stated that “[c]ommanders during the fighting shouldn't be losing sleep because of the investigations”,²³⁶ while in response to a letter by Israeli human rights organisations requesting independent and effective investigations, the AG flatly stated – on 24 February 2009 – that Israeli forces acted “in

²³⁴ See, Joseph Federman, “Netanyahu: No war crimes trials for Israelis”, *The Washington Times*, 12 October 2009, available at: <http://www.washingtontimes.com/news/2009/oct/12/netanyahu-no-war-crimes-trials-israelis/> (accessed 11 July 2010); see also “Netanyahu vows never to let Israelis be tried for war crimes”, *Haaretz*, 12 October 2009, available at: <http://www.haaretz.com/hasen/spages/1120498.html> (accessed 11 July 2010).

²³⁵ Israel Ministry of Foreign Affairs, Cabinet Communique, 25 January 2009. Available at: http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cabinet_communique_25-Jan-2009.htm

²³⁶ Quoted in, Tomer Zarchin, *IDF: War crime charges over Gaza offensive are 'legal terror'*, *Ha'aretz*, 19 February 2009.

line with the principles of the rules of war and international law”, and that “the listing of contentions regarding the general pattern of action employed by the IDF, as set forth in your letter, cannot constitute a basis for the launching of a criminal investigation.”²³⁷

4.1. Operational Debriefings

Consistent with previously stated practice, the Israeli authorities have opened a number of regular and ‘special’ operational debriefings. On 25 January 2009, the Israeli Chief of Staff ordered five special operational debriefings to conduct an overview of certain categories of cases. Five Colonels, “not directly involved in the incidents investigated or in the direct chain of command”²³⁸ were appointed. Israel has reported that these probes focused on five categories of violations, encompassing 30 individual incidents.

As the deficiencies of operational debriefings have already been analysed, this section will merely detail the known measures taken by Israeli authorities. Equally, as the purpose of this report is to review domestic remedies, details of specific cases will not be presented herein, except in certain cases; it is difficult to reply to further Israeli decisions, as little or no details are known. For further analysis of the specific cases please refer to PCHR’s previous publications, such as *Targeted Civilians*, and the analysis contained in *The Principle and Practice of Universal Jurisdiction: PCHR’s work in the occupied Palestinian territory*, or to the work of international organisations such as Amnesty International, or Human Rights Watch.²³⁹

PCHR emphasize that the findings of these debriefings are confidential, and cannot be reviewed; it must also be stressed that under international criminal law genuine investigations of war crimes are criminal investigations that are conducted with the “intent to bring the person concerned to justice.”²⁴⁰ Non-prosecutorial mechanisms such as these cannot be considered to be genuine and effective investigations.

4.1.1. Claims involving incidents in which a large number of civilians not directly participating in hostilities were harmed

Israel has reported that it addressed seven individual incidents, though no information as to which cases were analysed has been presented. As of January 2010, the date of Israel’s last

²³⁷

Available at:

http://www.btselem.org/Download/20090224_States_Attorney_Office_to_ACRI_on_Castlead_Investigations_Eng.pdf

²³⁸ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §96.

²³⁹ Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Drone Launched Missiles*, 2009; Amnesty International, *Operation ‘Cast Lead’: 22 Days of Death and Destruction*, MDE 15/015/2009, 2009; Human Rights Watch, *Reign of Fire: Israel’s Unlawful Use of White Phosphorous in Gaza*, 2009.

²⁴⁰ See Articles 17 and 53(1)(b) of the Statute of the ICC.

report, four of these cases had been closed, and a review of the remaining three was still underway.²⁴¹

4.1.2. Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation

Israel has reported that it addressed 13 individual incidents, all have been closed. The “Military Advocate General found no basis to order criminal investigation of the thirteen incidents under review.”²⁴² Disciplinary proceedings were apparently undertaken with respect to two incidents, one of which was the 15 January 2009 attack on UNRWA headquarters, which involved the extensive use of both high explosive and white phosphorous artillery. The operational debriefing found that artillery shells were fired “in violation of the rules of engagement prohibiting use of such artillery near populated areas.”²⁴³ The State of Israel reported that the Commander of the Southern Command disciplined a Brigadier General and a Colonel.²⁴⁴ However, contrary to this claim, and following publication of Israel’s report, the IDF denied that the two officers in question were disciplined.²⁴⁵

The findings of the operational debriefing in this case conflicted sharply with evidence collected by PCHR and, *inter alia*, the findings of the UN Board of Inquiry. Specifically, the Secretary-General’s summary of the Board’s report held that: “there was a breach of the inviolability of United Nations premises and a failure to accord the property and assets of the Organization immunity from any interference. It noted that such inviolability and immunity cannot be overridden by demands of military expediency. The Board found that the Government of Israel is therefore responsible for the injuries suffered and the very substantial damage done to UNRWA property and assets caused by its actions.”²⁴⁶ PCHR note that attacking a UN premises is listed as a war crime under Article 8(2)(b)(iii) of the Statute of the ICC.

The Board further “concluded that, given all the circumstances, the firing by the IDF of artillery with high explosive and projectiles containing white phosphorous into, over or in such close proximity to the UNRWA Headquarters as to cause injuries to persons and very substantial damage to property was grossly negligent, amounting to recklessness.”²⁴⁷ PCHR believe that this indiscriminate attack amounted to the direct targeting of civilians.²⁴⁸

²⁴¹ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §103-104.

²⁴² State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §96.

²⁴³ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §108.

²⁴⁴ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §108.

²⁴⁵ Anshel Pfeffer, *IDF denies disciplining top officers over white phosphorous use in Gaza war*, Ha’aretz, 1 February 2010.

²⁴⁶ Secretary-General’s Summary, United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, 5 May 2009, §54.

²⁴⁷ Secretary-General’s Summary, United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, 5 May 2009, §56.

²⁴⁸ See further, PCHR, *The Principle and Practice of Universal Jurisdiction: PCHR’s work in the occupied Palestinian territory*, 2010, pp. 75-76.

PCHR emphasize that disciplinary proceedings are wholly inappropriate with respect to the commission of grave breaches of the Geneva Conventions.

4.1.3. Incidents involving shooting at medical facilities, buildings, vehicles and crews

Israel reported that 10 separate incidents were analysed. The “Military Advocate General found no basis to order criminal investigations of the 10 incidents under review.”²⁴⁹

4.1.4. Destruction of private property and infrastructure by ground forces

This debriefing dealt with the overall issues, the State of Israel has reported that operational debriefings were subsequently ordered into specific incidents.²⁵⁰ PCHR note that this does not address the policy of systematic destruction of property – which constitutes a grave breach of the Geneva Conventions – as raised, *inter alia*, in the Report of the UN Fact Finding Mission on the Gaza Conflict.²⁵¹

4.1.5. The use of weaponry containing white phosphorous

The State of Israel has reported that “[w]ith respect to exploding munitions containing white phosphorous, the Military Advocate General concluded that the use of this weapon in the operation was consistent with Israel’s obligations under international law.” The operational debriefing was thus the end of the process. PCHR note that this claim is wholly inconsistent with the evidence.²⁵²

The State of Israel reported similar findings with respect to the use of white phosphorous smoke projectiles, stating that:

“the Military Advocate General found that international law does not prohibit use of smoke projectiles containing phosphorous. Specifically, such projectiles are not “incendiary weapons”, within the meaning of the Protocol on Prohibitions or

²⁴⁹ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §112.

²⁵⁰ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §115.

²⁵¹ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §961 and §1891;

²⁵² See further, the Abu Halima case, in PCHR, *The Principle and Practice of Universal Jurisdiction: PCHR’s work in the occupied Palestinian territory*, 2010, pp. 69-70; Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §788-801

Restrictions on the Use of Incendiary Weapons, because they are not primarily designed to set fire or to burn. The Military Advocate General further determined that during the Gaza Operation, the IDF used such smoke projectiles for military purposes only, for instance to camouflage IDF armor forces from Hamas's anti-tank units by creating smoke screens."²⁵³

Again, this claim is wholly inconsistent with the evidence. It fails to address, *inter alia*, those situations where white phosphorous smoke projectiles were used in areas where no fighting was occurring, such as the attack on the UNRWA headquarters,²⁵⁴ and Beit Lahia school,²⁵⁵ and the availability of other – equally effective – alternatives.²⁵⁶ PCHR remind that IHL explicitly specifies that: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."²⁵⁷ Equally, the Commentary to Additional Protocol I states that Article 51(4)(i) – which concerns indiscriminate attacks – was "intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in the circumstances would involve an indiscriminate attack."²⁵⁸

4.1.6. Summary

In an indication of the context in which these 'special operational debriefings' are conducted, it is significant to note that the IDF concluded that:

"[t]hroughout the fighting in Gaza, the IDF operated in accordance with international law. The IDF maintained a high professional and moral level while facing an enemy that aimed to terrorize Israeli civilians whilst taking cover amidst uninvolved civilians in the Gaza strip and using them as human shields. Notwithstanding, the investigations revealed a very small number of incidents in which intelligence or operational errors took place during the fighting. These unfortunate incidents were unavoidable and occur in all combat situations, in particular of the type which Hamas forced on the IDF, by choosing to fight from within the civilian population."²⁵⁹

²⁵³ State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §119.

²⁵⁴ *Inter alia*, Secretary-General's Summary, United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, 5 May 2009, §4; and Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §591.

²⁵⁵ *Inter alia*, Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza*, 2009, p. 48.

²⁵⁶ *Inter alia*, Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §901; Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza*, 2009, p. 17.

²⁵⁷ Article 35, Additional Protocol I.

²⁵⁸ ICRC, Commentary to Additional Protocol I, §1962.

²⁵⁹ IDF, *Conclusions of Investigations into Central Claims and Issues in Operation Cast Lead*, 22 April 2009. Available at: <http://dover.idf.il/IDF/English/Press+Releases/09/4/2201.htm>.

It must also be emphasized that military experts from the UK, US, Canada and Australia, reported that criminal investigations would be opened immediately, and as a first step, following allegations of crimes similar to those reported by the UN Fact Finding Mission.

4.1.7. Additional Operational Debriefings

In addition to the above-mentioned operational debriefings, the MAG recommended an additional special operational debriefing to assess allegations arising from the Report of the UN Fact Finding Mission on the Gaza Conflict. On 10 November 2009, another Colonel was appointed to address three incidents: the attack on the Al-Samouni residence, the attack on Al-Maqadma mosque, and the treatment of detainees.

The State of Israel has also reported that it opened approximately 103 operational debriefings into incidents arising from the offensive on the Gaza Strip.²⁶⁰ As of July 2010, the date of Israel's last report, it appears that the majority of operational debriefings have been completed, of which 13 were referred to the MPCID. For the remainder, the State of Israel reported that the MAG concluded that "the investigations did not establish any violations of the Law of Armed Conflict or IDF procedures."²⁶¹ All those incidents subject to review have not been disclosed.

4.2. MPCID Investigations

The State of Israel has reported that it has opened 47 MPCID investigations into issues arising from Operation Cast Lead, and to this end "[s]pecial investigative teams of the MPCID were appointed solely for the purpose of investigating complaints from the Gaza Operation."²⁶²

From previous Israeli reports, it is known that of the 36 investigations begun by January 2010 19 involved the alleged shooting of civilians, of which 12 went straight to MPCID while seven arose from operational debriefings. The remaining 17 involved the use of human shields, mistreatment of detainees and civilians, and pillage or theft. PCHR emphasize that Israel does not communicate details of its investigations to the complainants, for example, Israeli media sources and the reports of the State of Israel have reported that a number of cases have been closed, this information has not been officially communicated to PCHR.

One of these investigations has led to the indictment and conviction of a soldier for the theft of a credit card,²⁶³ the soldier in question served seven and a half months in prison. According to a

²⁶⁰ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §35.

²⁶¹ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §12.

²⁶² State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §132.

²⁶³ *Military Prosecutor v. Sergeant A.K.*, S/153/09, 11 August 2009.

press statement issued on the 6 July 2010,²⁶⁴ a Battalion Commander has been indicted for the using a Palestinian civilian (Majdi Abed-Rabbo) as a human shield. The MAG indicted the Battalion Commander “because he deviated from authorized and appropriate IDF behaviour”. It was claimed that the civilian voluntarily entered the house. However, from the available press statement, and a subsequent report by Israel, it appears that this resulted only in the disciplining of the officer.²⁶⁵ A staff sergeant was also charged with manslaughter for shooting at a group of civilians carrying white flags. The soldier has been charged with shooting and killing a man, however, all evidence collected indicated that two women had been killed at the scene; raising serious questions regarding the charge, and the possibility of success in the Courts. This case is discussed further in a subsequent section.

On 13 February 2009, dozens of officers participated at a military course in northern Israel where they discussed their experiences in Gaza. A number of the statements indicated the commission of, *inter alia*, grave breaches of the Geneva Conventions. The MAG ordered MPCID to investigate, and this investigation was closed after 11 day on the basis that the statements were allegedly “based on hearsay and not supported by specific knowledge.”²⁶⁶ No explanation of the process was given, and no witnesses from Gaza were interviewed.

In January 2010, Israel reported that seven investigations have been closed, but details have not been communicated.

4.3. Limited Scale of Israeli Measures

PCHR note that in addition to the flaws inherent in both operational debriefings and MPCID procedures, the scope of the cases analysed is patently inadequate. 1,419 Palestinians were killed over the course of the 23 day offensive, of whom 1,167 (82%) were civilians. At least 5,300 Palestinians were also injured. In addition to the physical death and injury toll, *inter alia*, at least 6,855 *dunums* of agricultural land were razed; 2,114 houses (2,864 housing units) were completely destroyed and 3,242 houses (5,014 housing units) rendered uninhabitable; 178 economic establishments were completely destroyed and 108 partially destroyed; 15 hospitals were damaged, and 43 primary health care facilities damaged or destroyed.

It is apparent from the sheer scale of the death and destruction, and the civilian nature of the overwhelming majority of the targets, that extensive effective investigation is required.

²⁶⁴ IDF, *IDF Military Advocate General Takes Disciplinary Action, Indicts Soldiers Following Investigation into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

²⁶⁵ “The disciplinary process was carried out before GOC Northern Command, Maj. Gen. Gadi Eisenkot, who convicted and warned the officer.” Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>; State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §46.

²⁶⁶ IDF Press Release, *Military Police Investigation Concerning Statements Made at the Rabin Center: Based on Hearsay*, 30 March 2009.

In addition to documentation related work, PCHR also represent a number of the victims of the Israeli offensive, and are pursuing legal remedies on their behalf. In total PCHR has submitted 450 criminal complaints to the Israeli Military Prosecutor, on behalf of 1,046 affected individuals, and 1,046 complaints to the compensation officer, on behalf of 1,046 individuals.²⁶⁷ As of 15 July 2010, PCHR have only received 13 ‘interlocutory’ responses from the military police or the military prosecution relating to criminal complaints, and 23 ‘interlocutory’ responses from the Compensation Office of the Ministry of Defence, relating to civil complaints. PCHR lawyers accompanied 45 witnesses, which had been summoned to Erez crossing ostensibly for interview with the military police, in relation to 7 cases. No further information has been received.

PCHR emphasize that the vast majority of complaints, both criminal and civil, have not been analysed by the Israeli authorities. As noted previously, to-date PCHR claims have only resulted in one successful prosecution, for the theft of a credit card.

4.4. Analysis of Specific Cases Detailed in Israel’s July 2010 Report

4.4.1. Abu Hajjaj

The case of the Abu Hajjaj family involves the targeting of a group of civilians carrying white flags on the 4 January 2009, in the Johr Ad-Dik area of the Gaza Strip. The attack resulted in the killing of two women: Majeda Abu Hajjaj (35), and Raya Abu Hajjaj (65).

Israeli forces have claimed that their investigation:

“...found gaps between the testimonies given by the soldiers and those given by Palestinians. This fact made it impossible to make a criminal connection between the described incident according to Palestinian testimonies and to that described by the soldiers.

The soldiers testified that on January 5th, 2009 it was a man that was shot and killed in the same location described by Palestinian witnesses.”²⁶⁸

As a result, it was reported that an Israeli marksman was charged with the manslaughter of an unidentified man.²⁶⁹

²⁶⁷ PCHR does not believe that Israeli mechanisms – for the reasons outlined in this report – are an appropriate response to submitted serious allegations of violations of international law, and international crimes. However, as an organisation acting on behalf of, and in the best interests of victims and clients, PCHR must pursue all possible legal remedies.

²⁶⁸ IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

Both the findings and the charge raise serious questions as regards the effectiveness of the investigation and the intention behind the indictment.

No male was shot during this incident. At no point in the complaint was it mentioned that a man was injured or killed, and there is absolutely no evidence to indicate that this occurred. As noted by Salah Abu Hajjaj, who was among the targeted group: “My mother was shot and injured. The bullet went through her arm and into her chest. After 15 meters my mother fell down. Majeda, was also shot. She died immediately.” Salah’s mother and sister were the only two individuals killed in the incident.

Two specific issues arise from the MAG’s conclusions. First, is the heavy – in this instance apparently exclusive – reliance on the testimony of the suspect. As stated, there is no evidence to corroborate this version of events, which it must be presumed were given in an attempt to mitigate the effects of self-incrimination. Equally, it is apparent that investigators did not place any reliance on the complainants’ sworn affidavits, or request further evidence. Second, given that there is no evidence whatsoever to indicate that a male was killed, one must question the purpose of bringing forward an indictment on this charge. As regards the charge itself, it must be noted that the intentional killing of a civilian constitutes the crime of wilful killing, a grave breach of the Geneva Conventions; a charge of manslaughter clearly does not reflect the gravity of the crime.

4.4.2. Al-Maqadma Mosque

On 3 January 2009, Israeli forces targeted the Al-Maqadma mosque on the outskirts of Jabalia camp. A single air-to-ground anti-personnel missile struck near the doorway of the mosque, killing 15 civilians and injuring a further 40. The missile contained a payload of small cube shaped fragments designed to enhance the lethality of the weapon.

The inconsistencies in Israel’s original analysis of the incident have been detailed elsewhere and will not be discussed in detail here. Suffice to highlight that the original procedure failed to find that the vicinity of the mosque was hit.²⁷⁰ The Report of the UN Fact Finding Mission on the Gaza Conflict noted the “unsatisfactory and demonstrably false position of the Israeli Government.”²⁷¹

After discovering that the mosque was in fact hit, on 6 July 2010 Israel claimed the “aerial strike targeted a terror operative involved in the firing of rockets towards Israel who was standing

²⁶⁹ IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

²⁷⁰ IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

²⁷¹ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §839.

outside the mosque.”²⁷² Subsequently, on 19 July, Israel claimed that the missile strike was actually “directed at two terrorist operatives standing near the entrance of the mosque.”²⁷³ Sworn affidavits, and investigations conducted by PCHR, indicate that there were no hostilities or military activity in the vicinity at the time of the attack. This was not contested by Israel in its two recent statements. PCHR’s evidence indicates that all of the dead were civilians, and the name of the alleged ‘terror operative(s)’ has not been disclosed.

The attack occurred at approximately 17:20 pm, shortly after sunset prayers; it could reasonably be assumed that the mosque and its immediate vicinity would be full of civilian worshippers. Israel has claimed that “[i]njuries caused to civilians inside were unintentional and caused by shrapnel that penetrated the mosque.”²⁷⁴ However, both the timing of the attack, and the nature of the anti-personnel missile used, contest the credibility of this claim.

PCHR believe that this attack constitutes a grave breach of the Geneva Conventions, in respect of the crimes of wilful killing and wilfully causing great suffering; a finding shared by the UN Fact Finding Mission.²⁷⁵ Even if the attack did target a combatant – a claim contested by PCHR – it remains a grave breach of the Geneva Conventions as it was clearly indiscriminate, and of such a nature as to amount to the direct targeting of civilians.²⁷⁶

Apart from the blatant inadequacies of the investigation, which cannot be considered to be in conformity with the requirements of international law, it is noted that the officer who authorised the attack was merely disciplined, and rebuked by the Chief of the General Staff, despite the fact that Israel has noted that before the strike the officer in question learned that the building was a mosque, but failed to call off the attack.²⁷⁷ Such ‘disciplinary’ actions in no way reflect the gravity of the international crime committed.

4.4.3. Al-Dayem

On 5 January, at approximately 8:20 am, Israeli forces fired two tank shells containing flechette darts in the direction of a condolence ceremony. 5 civilians were killed, and a further 17 civilians injured.

Israel has reported that the tank commander “visually identified a squad of terrorist operatives in open terrain, loading a “Grad” rocket”.²⁷⁸ It was further reported that the “tank crew

²⁷² IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

²⁷³ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §68.

²⁷⁴ IDF, *IDF Military Advocate General Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead*, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

²⁷⁵ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §842.

²⁷⁶ See, *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 5 December 2003, §57.

²⁷⁷ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §73.

²⁷⁸ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §115.

observed the area surrounding the terrorist squad and did not identify any civilians in the vicinity."²⁷⁹

As with the case of Abu Hajjaj, this version of events conflicts all available evidence. First, it must be noted that the condolence tent was situated on a sidewalk approximately 10 metres wide, along a road approximately 22m wide in total. This gives a high degree of continuous visibility, over what is a residential area, as can be seen from an analysis of the site; although there is a high degree of visibility, it is not "open terrain" as was claimed.

As is to be expected at an event of this type, a significant number of individuals were present in the tents and on the street, as proven by the high number of casualties. It defies belief that the tank commander did not see this large gathering of civilians. Further, it is emphasized that tank fired flechette shells are a line-of-sight weapon; the individual firing the weapon fires directly at a target.

Israel's claim that the attack targeted a group of combatants is further contested by the fact that the dead and injured were all civilians.

This incident was clearly an indiscriminate attack of such a nature as to amount to the direct targeting of civilians.²⁸⁰ As such, it constitutes the grave breach of wilful killing, and wilfully causing great suffering. It may also constitute the straightforward direct targeting of civilians.

4.4.4. UNRWA Head Quarters

At approximately 7:30 am on 15 January 2009, Israeli shells began landing near UNRWA Head Quarters in the Tal Al-Hawa area of Gaza City, a densely populated residential area. The compound is clearly marked as a UN installation, and appeared on maps prepared by the IDF.²⁸¹

The first direct hit occurred at approximately 7:45 am. Scott Anderson, UNRWA Gaza Field Administration Officer and a retired US Army officer, stated that: "The pattern of shelling was that it started over the Gaza training college, in the western part of the UNRWA compound, and then the shelling moved to the west and walked its way over the whole compound. It was hitting the compound itself for around an hour."²⁸² 'Walking' artillery refers to firing shells along an arc at evenly spaced intervals.

²⁷⁹ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §115.

²⁸⁰ See, *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 5 December 2003, §57.

²⁸¹ UN Board of Inquiry, §46.

²⁸² Quoted in, Human Rights Watch, *Rain of Fire: Israel's Unlawful use of White Phosphorous in Gaza*, 2009, p.43.

During the attack Israeli forces used conventional artillery – 155mm high explosive shells – and airburst white phosphorous smoke munitions. At least three high explosive shells struck the compound directly, and “at least eight shell casings from M825A1 smoke projectiles, containing white phosphorous, together with a large number of burning white phosphorous-impregnated wedges”²⁸³ fell within the compound, specifically near the warehouse area.

Israeli forces have claimed that they were engaging Hamas anti-tank units, allegedly located near the northern side of the UNRWA compound. This claim has been consistently refuted.²⁸⁴ Even if combatants were engaging Israeli forces in the vicinity – a contested and unproven claim – walking artillery across the UNRWA compound is hardly an effective response, rather it amounts to an indiscriminate attack. Israel’s finding that “no criminal charges were appropriate because the shelling was aimed at military targets”²⁸⁵ is inconsistent with the requirements of IHL. Specifically, the prohibition on indiscriminate attack, and the requirement that all feasible precautions be taken in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects. As noted by the UN Fact Finding Mission:

“the claim that this result was neither intended nor anticipated has to be reviewed carefully. In the first place the Mission affirms the result to be reviewed is not fragments and wedges landing in the compound but ten shells landing and exploding inside the compound. It is difficult to accept that the consequences were not appreciated and foreseen by the Israeli armed forces.

577. Those in the Israeli army who deploy white phosphorous, or indeed any artillery shells, are expertly trained to factor in the relevant complexities of targeting, including wind force and the earth’s curvature. They have to know the area they are firing at, possible obstacles in hitting the target and the other environmental factors necessary to ensure an effective strike. It is also clear that, having determined that it was necessary to establish a safety distance, the presence of the UNWRA installations was a factor present in the minds of those carrying out the shelling.

578. The question then becomes how specialists expertly trained in the complex issue of artillery deployment and aware of the presence of an extremely sensitive site can strike that site ten times while apparently trying to avoid it.”²⁸⁶

²⁸³ UN Board of Inquiry, §50.

²⁸⁴ UN Board of Inquiry, §49; Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §591.

²⁸⁵ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §94.

²⁸⁶ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §576-578.

Israel's claim that "precautions were taken which proved effective in avoiding civilian casualties"²⁸⁷ is thus demonstrably false. The UNRWA compound contained large stores, including a substantial fuel depot. It was only as a result of luck, and the courageous actions of UN staff, that casualties were avoided.

This was clearly an indiscriminate attack, which may be found to amount to the direct targeting of a civilian object.²⁸⁸ As such, it is recognised as a war crime to which individual criminal responsibility attaches, *inter alia*, in Article 8(2)(b)(iv) of the Statute of the International Criminal Court. Clearly, disciplinary proceedings – which were subsequently denied by Israeli forces²⁸⁹ – are a wholly inadequate response.

It must also be noted that, with respect to the use of white phosphorous smoke projectiles, Israel claimed that, following this incident, it "immediately imposed revised restrictions on the use of smoke-screening near sensitive sites (including the requirement of a several hundred meters buffer zone). These restrictions were in place through the remainder of the Gaza Operation."²⁹⁰ This claim is inconsistent with the reality, as evidenced, for example, by the 17 January 2009 attack on an UNRWA school in Beit Lahiya. White phosphorous was again used in this attack, and caused the death of two children, and the injury of at least 13 civilians.

4.4.5. Al-Fakhoura School

On 6 January 2009, Israeli forces fired a number of mortars in close proximity to the UNRWA school in the al-Fakhoura area of Jabalia refugee camp. Four shells struck the street near the school, while a number of other shells landed nearby, including two which struck the home of the Deeb family. At least 24 civilians were killed, and at least 40 injured. 11 members of the Deeb family were killed.

Israel's conflicting claims regarding the incident have been dealt with in the Report of the UN Fact Finding Mission on the Gaza Conflict;²⁹¹ such inconsistencies raise considerable questions regarding the effectiveness of any investigations conducted, and resemble an attempt to legitimise an illegal attack.

Israel's latest versions of events has concluded that Israeli forces targeted and attack a Hamas mortar unit, operating approximately 80 metres from the school. Following investigations conducted by PCHR this claim is strongly contested, no combatants were among the dead, and PCHR note that one of the alleged "well-known members of the Hamas military machine" was

²⁸⁷ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §94.

²⁸⁸ See, *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 5 December 2003, §57.

²⁸⁹ Anshel Pfeffer, *IDF denies disciplining top officers over white phosphorous use in Gaza war*, Ha'aretz, 1 February 2010.

²⁹⁰ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §96.

²⁹¹ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §653-686.

a 13 year old boy, with no connection to any armed group. No charges have been brought against those responsible for the attack.

According to Israel's report, the "MAG also found that the commander was aware that the mortar attacks were being carried out from a populated area in the vicinity of an UNRWA school. For this reason, the commander took many precautions, including cross-verification of the source of fire by two independent means, using the most accurate weapon available, and making sure the school would not be hit by ensuring a safe buffer distance between the school and the targeted location."²⁹² This claim fails to address the fact that, according to sworn witness testimony, there were approximately 150 civilians in the street at the time of the attack, in addition to 1,368 civilians sheltering in the UNRWA school. This number of civilians must have been clearly visible to those involved in sighting the alleged Hamas mortar group. Further, one shell landed within 20 metres of the school, a distance that cannot be considered a "safe buffer distance" given the nature of the weapon used.

In this regard, given the inevitable consequences of launching mortar shells into a densely populated civilian area, in which approximately 150 civilians were present, the MAG's determination "that the anticipated collateral damage prior to initiating IDF mortar fire was not excessive when weighed against the expected military benefit"²⁹³ highlights serious issues, and raises questions regarding the MAG's motivation in evaluating alleged IHL violations. As stated by the UN Fact Finding Mission: "Even if the version of events presented now by Israel is to be believed, the Mission does not consider that the choice of deploying mortar weapons in a busy street with around 150 civilians in it (not to mention those within the school) can be justified. The Mission does not consider that in these circumstances it was a choice that any reasonable commander would have made."²⁹⁴

As regards the choice of weapons, and Israel's claim that "the IDF's choice of weapon was appropriate under the circumstances", the Fact Finding Mission's analysis remains pertinent:

"The Mission does not say that the Israeli armed forces had to accept the risk to themselves at all cost, but in addressing that risk it appears to the Mission that they had ample opportunity to make a choice of weapons that would have significantly limited the risk to civilians in the area. According to the position the Government has itself taken, Israeli forces had a full 50 minutes to respond to this threat – or at least they took a full 50 minutes to respond to it. Given the mobilization speeds of helicopters and fighter jets in the context of the military operations in Gaza, the Mission finds it difficult to believe that mortars were the most accurate weapons available at the time. The time in question is almost 1 hour. The decision is difficult to justify.

²⁹² State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §63.

²⁹³ State of Israel, *Gaza Operation Investigations: Second Update*, July 2010, §64.

²⁹⁴ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §700.

699. The choice of weapon – mortars – appears to have been a reckless one. Mortars are area weapons. They kill or maim whoever is within the impact zone after detonation and they are incapable of distinguishing between combatants and civilians. A decision to deploy them in a location filled with civilians is a decision that a commander knows will result in the death and injuries of some of those civilians.”²⁹⁵

This clearly indiscriminate attack amounts to the direct targeting of civilians. As such, it constitutes the grave breach of wilful killing, and wilfully causing great suffering.

²⁹⁵ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §698, 699.

5. Civil Proceedings

Previous discussion has centred on criminal proceedings, however, as noted, this process is completely dependent upon the Israeli authorities' decision to open an investigation; victims or their representatives can only submit a request asking that a criminal investigation be opened. Unlike other jurisdictions, such as the UK or Spain, there is no right to private petition.

This section discusses the procedures surrounding the submission of civil complaints and cases. It must be remembered that the right to reparation is an equally fundamental component of the right to an effective remedy,²⁹⁶ and is also a component of customary IHL: "A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused."²⁹⁷

PCHR note that, following Operation Cast Lead, the Centre submitted 1,046 compensation claims to the Compensation Officer at the Israeli Ministry of Defence (MoD). To-date, only 23 interlocutory responses have been received.

5.1. Submitting a Complaint

In the event of a violation for which reparation is sought, a complaint must be filed with the compensation officer at the Israeli MoD within 60 days of the incident. Should this time limit be missed, no civil remedy may be pursued. This initial complaint is made via a standardised form.

Following this submission, a response may be received from the MoD. Typically, these responses take two forms: the first, is an 'interlocutory' response, noting receipt of the complaint. In PCHR's experience, this is taken to be, in effect, a negative response, as invariably it denotes the end of all correspondence. In a small number of cases, the MoD may request witness testimony, or further information. Again, unless a full case is subsequently filed, this latter invariably marks the end of correspondence. In the majority of cases, as illustrated by experiences post Operation Cast Lead, no response is received.

It should be noted that these responses are posted to PCHR, despite the evident problems in delivering post to Gaza, and the availability of fax.

5.2. Filing a Case

A full case requesting compensation may be filed before the Israeli civil courts, subject to two requirements. First, a complaint to the compensation officer at the MoD *must* have been

²⁹⁶ Article 2(3), ICCPR.

²⁹⁷ Rule 150, ICRC, Study on Customary International Humanitarian Law, 2005.

submitted within 60 days of the incident. Second, the full case must be filed within two years of the incident.

In filing the case, all relevant information must be submitted, i.e. a summary of the incident, supporting evidence, witness and victim affidavits, and so on. For claims of less than 2.5 million NIS cases are heard before the courts of first instance, claims for 2.5 million NIS and above are heard in one of the five Central Courts.²⁹⁸ The outcome of these cases may be appealed to either the Central Court (less than 2.5 million NIS claims) and the Supreme Court (greater than 2.5 million NIS claims).

These cases relate solely to civil responsibility, and are brought against the MoD; the pursuit of criminal responsibility involves a distinct process, discussed below. Civil cases are evaluated in two stages. First, the court will assess whether civil responsibility applies with respect to the incident in question. If this is answered in the affirmative, the Court then assesses whether the claimants have a right to compensation, and if so, for what amount.

There are two significant issues to note with respect to a finding of civil responsibility, relating to the context of the event, and the actions of the soldiers involved. In 2004, a law was introduced holding that compensation would not be awarded with respect to 'combat operations', an excessively broad phrase, discussed previously. This law was challenged before the HCJ, which ruled against the blanket prohibition on compensation, holding that all incidents must be evaluated on a case by case basis. However, this apparent 'victory' has achieved little in practice. In PCHR's experience, the majority of cases are found by the Court – on a case by case basis – to constitute combat operations, for which no compensation can be sought. The second factor involves the application of civil responsibility, in practice this is only applied if individual soldiers 'stepped out of line', i.e. disobeyed direct orders, or contravened the rules of engagement. Other relevant factors, such as, *inter alia*, the legality of those orders, recklessness or negligence in pursuing a particular course of action, or the methods and means of warfare utilised, are not deemed relevant. This means that civil responsibility *may* only ever be found for an excessively narrow subset of cases.

5.3. Settlement of the case

If the Israel authorities feel that a compensation case has a significant chance of success, a 'Settlement Committee' comprised of, *inter alia*, representatives of the Ministry of Defense, and the Civil Prosecutor, may negotiate with lawyers for a settlement outside of court. Previously, lawyers acting for victims could initiate negotiations with this committee directly, however, in recent years only the civil prosecutor can refer cases.

Before the advent of the Palestinian National Authority, a significant number of compensation claims were successfully pursued by lawyers representing victims. However, in recent years,

²⁹⁸ These courts are located in Tel Aviv, Jerusalem, Haifa, Nazareth, and Be'er Sheva.

Israel has stopped paying compensation, and now chances of success in the courts are increasingly remote.

5.4. Factors Restricting/Denying Access to Justice

5.4.1. Court Insurance

In addition to requiring the payment of court fees (approximately 1,600 NIS per case), the Court requires the payment of a court insurance/guarantee, *before* any remedy can be pursued. This requirement is based on Article 519 of the Israeli Civil Code, whereby the Court is granted the right (not obligation) to request payment of a guarantee, before the case begins, in order to cover the other party's expenses (the MoD in this case) in the event that the case is lost. The logic underlying this requirement rests on the presumption that expenses may not be recovered from certain complainants after the fact. However, this requirement is applied in a discriminatory manner, i.e. only against Palestinians (including those from East Jerusalem, which Israel has illegally annexed, and over which it consequently exercises full domestic jurisdiction).

There is no set manner in which the amount required as court insurance is evaluated, it is at the discretion of the Court. From experience, it has been noted that for property cases insurance is typically set in line with the value of the property. Regarding personal injury or other claims, however, there seems to be no set precedent. For instance, in some cases the Court has set an insurance of 20,000 NIS for every death. As a general rule, court insurance is typically set at a minimum of 10,000 NIS but this is often much higher, reaching to over a 100,000 NIS in some cases.

What is clear is that this effectively arbitrary setting of court insurance, and its application only to Palestinian claimants, serves to limit, and ultimately deny, access to justice. Few victims can afford to pay the court insurance, and are therefore forced to drop their cases. PCHR is one of the few NGOs which raise money in order to pay these fees, as an NGO, however, resources are necessarily limited.

5.4.2. Witnesses Denied Permission to Travel to Court

A compensation case generally consists of two phases. In the first phase, general arguments are presented, mainly on the basis of the original case as it was filed. At the second hearing, further evidence and so on is presented, and witnesses are required to appear in Court. At this point affidavits have no weight and witnesses/victims must appear in person in order to, *inter alia*, undergo cross examination, and face questions from the Court.

At this point the Court issues an official notification, in writing, requesting the witnesses/victims' presence in Court on a certain date. At least two weeks prior to this date, PCHR submit a request to the Israeli authorities at Erez crossing, requesting permission for the

individual to travel, and including the official notification from the Court. Since July 2007,²⁹⁹ the response has been virtually immediate and negative. For the last three years, no individuals from Gaza have been allowed to travel to the Court.

When lawyers inform the Court that the individuals are unable to appear, consequent to a decision of the Israeli authorities, the case is either closed (and thus lost), or adjourned. In the event of an adjournment the same process is repeated at a later date.

To emphasize, since July 2007, not a single individual has been allowed to appear before the Court. The process of claiming compensation is extremely protracted, and is indicative of a desire to prevent the pursuit of justice. For example, PCHR have cases which were filed in 2004 but have still not been scheduled for Court.

²⁹⁹ When Hamas seized control of the Gaza Strip.

6. Conclusion

In September 2009, the UN Fact Finding Mission noted Israel's failure "to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law."³⁰⁰

Today, over one and a half years after the 27 December 2008 – 18 January 2009 offensive, Israel has still failed to open independent and impartial investigations. As this study has shown, this is in keeping with consistent and longstanding Israeli practice: it is the Israeli investigative and judicial system itself that renders effective investigations impossible. Under such circumstances, effective national proceedings *cannot* be conducted. Israel has consistently and without exception failed to fulfil its customary law obligation to "investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects."³⁰¹

In light of Israel's unwillingness, and the inability of the Palestinian authorities, there are no domestic mechanisms capable of upholding Palestinian victims' right to an effective judicial remedy, and of holding those responsible for international crimes to account. Indeed, as noted by the UN Fact Finding Mission "the extent to which Palestinian right to access a court of law and an effective remedy are limited or denied by Israeli laws"³⁰² may amount to the crime against humanity of persecution.³⁰³

It is imperative that recourse be had to mechanisms of international criminal justice. Such mechanisms should include a referral of the situation in the occupied Palestinian territory and Israel to the International Criminal Court by the UN Security Council, acting under Chapter VII of the UN Charter; in the absence of this referral, the ICC Prosecutor shall initiate a *proprio motu* investigation, consequent to the January 2009 Palestinian Authority declaration under Article 12(3) of the ICC Statute.

In addition, PCHR note that each State – as a High Contracting Party to the four Geneva Conventions of 1949 – is under a pressing legal obligation to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts."³⁰⁴ Universal jurisdiction is currently one of the only legal mechanisms capable of providing judicial redress and accountability with respect to Israeli-perpetrated crimes against the Palestinian civilians.

³⁰⁰ Report of the UN Fact Finding Mission on the Gaza Conflict, §1620.

³⁰¹ Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005.

³⁰² Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1334.

³⁰³ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §1502.

³⁰⁴ Article 146, Fourth Geneva Convention 1949.

If the rule of law is to be relevant, it must be enforced. As long as individuals and States are allowed to act with impunity they will continue to violate international law: innocent civilians will continue to suffer the horrific consequences.

This reality is evident in the history of the occupation. Without enforcement of the law, there is nothing to guarantee that what happened in the Gaza Strip between 27 December 2008 and 18 January 2009 will not happen again.